Perspectives on Federalism

In Search of Sub-National Constitutionalism

James A. Gardner*

Federalism as a consequence of local/cultural self-determination – Degree of autonomous human rights protection on a subnational level – Analysis in terms of two dimensions: subnational constitutionalism and contestatory federalism – Contrast between US and European models – Opposition between contestatory federalism and subsidiarity – Rise of international human rights protection diminishes importance of subnational human rights protection

Since the end of World War II, federalism has emerged as one of the most popular forms of government in the world, employed today in more than two dozen nations populated by one-third of the world's inhabitants.[1] One of the defining attributes of federalism is of course the autonomy it grants to sub-national units – states, provinces, cantons, *Länder*, and so on – and by far the most important way in which sub-national autonomy manifests itself is in the authority of sub-national units to govern themselves with some degree of independence from rules and policies established at the national level.

This spread of federalism has been accompanied by a proliferation of sub-national constitutions. Today, documents that can fairly be described as constitutions govern the affairs of some two hundred sub-national divisions of nations around the world.

The status and function of sub-national constitutions, however, remain ambiguous. Do sub-national constitutions, like their national counterparts, announce the presence of a politically autonomous, genuinely self-governing population?

* Vice Dean for Academic Affairs and Joseph W. Belluck and Laura L. Aswad Professor of Civil Justice, University at Buffalo Law School, State University of New York, Buffalo, NY 14260; jgard@buffalo.edu.

[1] Ronald L. Watts, 'States, Provinces, Länder, and Cantons: International Variety among Sub-national Constitutions', 31 *Rutgers L.J.* (2000) p. 941, 942.

European Constitutional Law Review, 4: 325–343, 2008

doi:10.1017/S1574019608003258

Do they embody binding and legally enforceable commitments distinct from those embodied in corresponding national constitutions? Are sub-national constitutions documents that can be appealed to as independent sources of power and protection? If so, by whom? Against whom? And for what purposes?

In this paper, I begin to explore these questions by examining the role of sub-national constitutions in the protection of human rights. On their face, many contemporary sub-national constitutions offer direct protection or familiar rights such as human dignity, equality, and family autonomy.[2] Nevertheless, the significance of such provisions is unclear. In many cases, for example, rights-protective provisions of sub-national constitutions seem merely to duplicate similar provisions contained in the national constitution, as well as protections offered by supranational legal norms and institutions. In other cases, sub-national units seem to lack the autonomy and independent power necessary to provide meaningful protection even of rights identified in their own constitutions. At the same time, however, where sufficient actual sub-national autonomy and power exist, sub-national units may be able to play a significant role in protecting the rights of their populations even though their constitutions lack specific, rights-protective provisions.

I argue here that sub-national constitutions are likely to play a real and substantial role in the protection of the human rights of sub-national populations in two circumstances. The first is when a sub-national constitution is given life by sub-national constitutionalism, a political ideology capable of infusing sub-national constitutions with the weight of sub-national aspirations for meaningful local autonomy and self-governance. The second is when a state's internal structure of federalism is contestatory, a variety of federalism that institutionalizes a competition between national and sub-national governments for the allegiance and loyalty of the people. Both of these circumstances are capable of making sub-national units significant players in intergovernmental negotiations concerning the rights of sub-national and even national populations and, in consequence, transforming their constitutions into meaningful bulwarks of protection against governmental tyranny.

In the balance of this paper, I describe the concepts of sub-national constitutionalism and contestatory federalism; review some aspects of European sub-national constitutions suggestive of the possible presence of these two phenomena; and conclude by examining several considerations that militate against the likelihood of a meaningful role for European sub-national constitutions in the protection of human rights. I conclude, in the end, that the evidence is mixed. Although some signs of sub-national constitutionalism and contestatory federalism may be

[2] *See*, e.g., Constitution of the Canton of Berne (Switzerland), Arts. 9, 10; Statute of Autonomy of Andalusia (Spain), Arts. 15-17.

found in the recent efflorescence of state and provincial constitutions, there are also reasons to be cautious about inferring from the mere presence of sub-national constitutions a corresponding spread of the autonomy and independent power necessary to give sub-national units a meaningful role in the complex governmental structures that protect human rights.

Sub-national constitutionalism

Sub-national constitutionalism is nothing more than the application of principles of constitutionalism to sub-national documents. Constitutionalism, as the political theorist Stephen Holmes has observed, provides liberalism's answer to the question: 'How can we assign the rulers enough power to control the ruled, while also preventing this accumulated power from being abused?'[3] Liberal constitutional theory typically contemplates at least three conditions that must be satisfied to give rise to a meaningful constitutionalism. First, a populace must come to self-consciousness as a polity; it must understand itself to be a politically distinct group entitled to exercise some significant degree of self-rule.[4] Second, this populace must possess sufficient actual autonomy to undertake the enterprise of meaningful self-governance; it must have the capacity, that is, to make meaningful choices about how to live. Finally, the polity in question must commit itself to self-restraint under the rule of law through adoption of a constitution. The first two conditions create a self-governing people or polity; the third expresses a commitment to self-governance under a constitutional regime of voluntary self-constraint.

A constitution adopted by a populace indifferent to constitutionalism might be little more than a piece of paper setting out some rules that at the moment happen to seem to the public useful or appealing – a statute enacted by a popular assembly rather than by a legislature. A constitution adopted in a spirit of constitutionalism, in contrast, can be (although it need not be) something considerably more. Because such a constitution is deliberately created by a society for the purpose of establishing with some degree of permanence the conditions under which it will govern itself, a constitution supported by a public commitment to constitutionalism is often understood to be a document expressing a society's deeply held desires about how it ought to live.[5] Because on this view a constitution is a kind of

[3] Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago, University of Chicago Press 1995), 270.

[4] This is the basic, Lockean idea of a group arriving at political self-consciousness of its distinctiveness by organizing to take itself out of the state of nature. *See* John Locke, *The Second Treatise of Government*, Thomas P. Peardon (ed.), (Indianapolis, Bobbs-Merrill 1952), §§ 4, 87, 89. Although most strongly associated with Locke, similar ideas may be found in roughly contemporary works by Sidney, Hutcheson, Burlamaqui, Grotius, and Pufendorf.

[5] *See* James A. Gardner, 'The Failed Discourse of State Constitutionalism', 90 *Mich. L. Rev.* (1992), p. 761, 814-817.

charter for living, it therefore necessarily reflects the beliefs of the people who make it about the nature of a good life, both for the self-governing community that the constitution directly governs, and for the individuals who inhabit it. It is to some degree an expression, in other words, of a polity's political and even its social identity.[6]

These principles are uncontroversial in the case of national constitutions. The more difficult question concerns their implication in the sub-national setting. For sub-national constitutionalism to arise, sub-national units must be conceived to have an independent role – a role of constitutional stature – in the collective self-governance of a nation. Yet this would mean, typically, that sub-national units are, in the words of the US Supreme Court, 'not mere political subdivisions of the [nation], and . . . are neither regional offices nor administrative agencies of the federal government.'[7] Instead, sub-national units would be perceived as having a degree of autonomy sufficient to make them efficacious representatives and agents of sub-national populations.

If it exists, this agency can by definition be brought to bear internally, in the constitutional self-governance of the sub-national unit. But there are also circumstances in which a sub-national unit's agency can be brought to bear externally, against the larger nation of which the sub-national unit is a part. In this enterprise, the key institutional arrangement is federalism.

Contestatory federalism

There are many different kinds of, and justifications for, federal arrangements of governmental power.[8] Here, however, I focus on what I shall call 'contestatory' federalism, a conception of divided power that justifies federalism as a method of protecting liberty through the institutionalization of a permanent contest for power between national and sub-national units of government. This is the justification most closely associated with the brand of federalism practiced in the United States, and most clearly articulated by James Madison in 1787.

'The accumulation of all powers . . . in the same hands', wrote Madison in *Federalist* No. 47, 'may justly be pronounced the very definition of tyranny'.[9] To protect liberty, on this view, power must be divided. Federalism serves this purpose by parceling out government powers among different levels of government, giving each level of government, national and sub-national, powers sufficient to

[6] This principle is of course familiar to Europeans in the debate over a European Constitution, with its accompanying anxiety about the loss of local (in this case, historically national) identity.

[7] *New York* v. *United States*, 505 US 144, 158 (1992).

[8] E.g., Thomas Dye, *American Federalism* (Lexington, Mass., D.C. Heath 1990).

[9] *The Federalist*, No. 47, at p. 301 (James Madison) (Clinton Rossiter (ed.) 1961).

allow each to monitor and check the abuses of the other.[10] Although power is fragmented in such a system, its use is ultimately unified because each level of government pursues the same goal: serving the interests of the people.[11] As Madison put it, '[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes.'[12] Federalism, on this model, is thus a dynamic system designed to be manipulated by the people to produce results they desire. Madison's co-author Alexander Hamilton put this point clearly:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into the scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.[13]

On the Madisonian view of federalism, then, popular allegiance to any government is not organically fixed, but rather will ebb and flow according to that government's instrumental value to the populace at any given time. Contestatory federalism therefore does not define a static relation among national and sub-national governments, but a living, dynamic one, and sub-national governments must accordingly have sufficient autonomy and power to play their assigned roles.

Notwithstanding the rapid expansion of US national power in the twentieth century, contestatory federalism to this day is woven into the structure of American intergovernmental relations. Although it does not describe the historically dominant relationship between the state and national governments, which has more often been co-operative than hostile, intergovernmental contestation remains nonetheless a background potentiality built into the system that influences interactions between the two levels of government.

[10] Andrzej Rapaczynski, 'From Sovereignty to Process: The Jurisprudence of Federalism after *Garcia*', 1985 *Sup. Ct. Rev.* 341, p. 380-395.

[11] Vincent Ostrom, *The Political Theory of a Compound Republic* (Lanham, Md., Lexington Books 1987), p. 23.

[12] *The Federalist*, *supra* n. 9, No. 46 (Madison), at p. 294.

[13] *The Federalist*, *supra* n. 9, No. 28 (Hamilton), at p. 180-181. *See also* id., No. 46 (Madison), at p. 295, in which Madison, after remarking that Americans place their faith and trust primarily in their state governments, observes: 'If . . . the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistable proofs of a better administration as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due . . . .'

The American states have thus frequently understood themselves, and have been understood by their inhabitants, as important, autonomous, and often effective defenders of the local citizenry against central tyranny. As Madison anticipated, US states have a long record of inserting themselves between their citizens and Washington, and of deploying their powers in ways intended quite self-consciously to thwart the operation of national policies that they have determined to be destructive of their citizens' liberties and others interests. Examples include the Virginia and Kentucky Resolutions of 1798, which loudly protested the national government's suppression of political criticism; the Nullification Crisis of 1832, in which South Carolina threatened to use force to prevent national customs officials from collecting tariffs on goods unloaded in Charleston Harbor; numerous instances in which states have refused to co-operate with national officials in the implementation of national regulatory regimes; and the frequent use today by states of lawsuits to challenge national regulatory authority. Even state courts have occasionally become involved, protesting exercises of national authority, disputing interpretations of the US Constitution given by federal courts, or ostentatiously construing state constitutions in ways that are nakedly critical of rulings of the US Supreme Court.[14]

The relation between sub-national constitutionalism and contestatory federalism

Although they are distinct concepts, sub-national constitutionalism and contestatory federalism rest on very similar assumptions, and can exist only in similar circumstances. Most importantly, the political self-consciousness and de facto autonomy of sub-national populations required for the emergence of sub-national constitutionalism are also required for any meaningful contestatory federalism. To be sure, there is no logically necessary connection between the two concepts. Politically self-conscious and autonomously powerful sub-national units are quite capable of using their powers to oppose or impede national initiatives of which they disapprove without subjecting themselves to formal constitutional self-constraint. Yet just as national constitutions can institutionalize a system of contestatory federalism from the top down, so sub-national constitutions may play a potentially significant role in institutionalizing contestatory federalism from the bottom up.

First, sub-national constitutions may grant, allocate, and regulate the use of sub-national power so that it can be effectively deployed to check improper uses of national power. Second, sub-national constitutions may formalize commitments that sub-national populations make to themselves and to the people of the nation

[14] These and many other incidents are described in James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (Chicago, University of Chicago Press 2005), ch. 3.

by publicly identifying and defining the objectives for which sub-national governments are authorized to use their power to obstruct abuses at the national level. Third, sub-national constitutions may define and institutionalize the circumstances in and methods by which sub-national power may be deployed against national abuses of power. For example, a sub-national constitution might grant authority to the sub-national executive to withhold sub-national resources or co-operation from the national government when it proposes to use such resources or co-operation in ways that threaten sub-national economic or environmental interests, or that threaten to invade nationally or sub-nationally guaranteed rights. Or it might provide a set of procedures of escalating urgency for resolving intergovernmental disputes. In any case, the greater the degree to which a sub-national constitution expresses the agenda and aspirations of a sub-national population that aspires to autonomous local self-governance – the more, that is, the constitution reflects a commitment to sub-national constitutionalism – the more likely it is to contain such provisions.

A final, pragmatic connection between contestatory federalism and sub-national constitutionalism lies in the possibility that the protection of rights might itself become an arena of intergovernmental contestation. Each level of government, that is, might compete for popular allegiance by positioning itself as the more reliable and aggressive protector of human rights. Such competition can most obviously occur where sub-national constitutions impose greater constraints on the activities of the sub-national government than the national constitution imposes on the national government. Yet the protection of human rights at the sub-national level can sometimes also serve as a form of resistance to invasions or abusively inadequate protection of human rights at the national level.[15] For example, aggressive sub-national constitutionalization of protection for human rights can offer a forceful and very public critique of the national position, which can in the long run influence the formation of public and official opinion on the adequacy of human rights observance at the national level. Again, the likelihood that such a competition might arise depends closely on the degree to which sub-national populations conceive of their constitutions as vehicles for the assertion of independent sub-national aspirations or of an independent sub-national political identity, a factor in turn related to the presence of sub-national constitutionalism.

[15] James A. Gardner, 'State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions', 91 *Georgetown L. J.* (2003), p. 1003.

Detecting sub-national constitutionalism and contestatory federalism

The proliferation of sub-national constitutions over the last few decades clearly has been driven by increasing demands by sub-national populations for an opportunity to adopt their own constitutions, as well as a corresponding increase in recognition by central state governments that such demands are legitimate and ought to be accommodated. But what is the source of these demands, and why do states increasingly perceive them as legitimate? In particular, does the spread of sub-national constitutions constitute evidence of an underlying spread in commitment to sub-national constitutionalism or structures of contestatory federalism? I consider below three reasons why this might be the case. The first possibility, and the one that represents the strongest claim, is that a meaningful federalism by definition gives rise to sub-national constitutionalism. A second possibility is that increasingly prevalent ethnocultural justifications for federalism may suggest that sub-national constitutions often, or even typically, reflect distinctive values and choices of sub-national populations, a situation consistent with the widespread existence of sub-national constitutionalism and contestatory federalism. The third and mildest claim is that the characteristics of at least some actual sub-national constitutions in federal states demonstrate the existence of sub-national constitutionalism and contestatory federalism in those states. I take up each of these possibilities in turn.

Sub-national constitutionalism as an inherent consequence of federalism

It is possible that federalism, properly understood, operates in such a way that the creation of a sub-national constitution in a federal system inherently reflects the presence of sub-national constitutionalism. The absolute minimum function of a sub-national constitution, like any other constitution, is to create and order sub-national power by defining and authorizing it, and establishing constraints on its use. In so doing, a sub-national constitution necessarily establishes a framework for the practice of self-governance by the sub-national population to which it applies. However, the creation of a constitution at the sub-national level might also be said inevitably to do something else: it might contribute to the construction of a relationship between national and sub-national power, and by extension to a relationship between the national and sub-national populations whose governments exercise such powers. These actions, one might then say, are inherently constitutive of a sub-national identity, and it follows that a well-drafted sub-national constitution therefore will inevitably express to some degree the beliefs and aspirations of the people of the sub-national unit, and their conclusions about how their rights ought best to be protected.

To this it might be responded that there is nothing in the adoption of a sub-national constitution that necessarily transforms it into either the matrix of an independent sub-national political identity,[16] or the source of mechanisms for protecting human rights above and beyond those provided nationally. A national constitution might, for example, authorize the sub-national unit to do nothing more than administer locally a set of laws and norms generated at the national level – to serve, that is, as a local agent of the central government. Numerous provisions of actual sub-national constitutions follow such a pattern. The constitution of Austria, for example, expressly requires that policies created by the national government be implemented by the executive authorities of the *Länder*. Article 102(1) provides that, in the absence of direct federal administration, *Land* authorities 'exercise the executive power of the Federation'. Article 103(1) goes even further by explicitly subordinating *Land* power to national power when the state institutions execute federal tasks:

> In matters of indirect Federal administration the *Land* Governor is bound by the instructions of the Federal Government as well as the individual Federal Ministers . . . and he is obligated, in order to effect the implementation, to employ also the means which are at his disposal in his capacity as a functionary of the Land's autonomous sphere of competence.[17]

Although the reality of intergovernmental relations in Austria may be more complex than the constitutional text alone reveals, these provisions on their face seem to contemplate *Land* governments as agents of the central government in areas of national competence, an arrangement that is largely incompatible with sub-national constitutionalism and overtly antithetical to contestatory federalism.[18]

[16] Some of the complications in such a view are spelled out in greater detail in James A. Gardner, 'Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix', 46 *Wm & Mary L. Rev.* (2005), p. 1245.

[17] The Federal Constitutional Law of 1920 (Austria), Arts. 102(1), 103(1). Such a requirement would clearly violate the US Constitution, as the Supreme Court held in *Printz* v. *United States*, 521 US 898 (1997), in which it established an 'anti-commandeering' principle under which the national government is forbidden from conscripting state executive officials into national service. Nothing in this doctrine, however, forbids states from voluntarily consenting to implement federal law, and they frequently do so. Most US social welfare programs, for example, are administered in this way.

[18] The weakness of this argument is suggested further by the fact that federalism need not even presuppose national constitutionalism, much less its sub-national counterpart. *See* J.H.H. Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*', in Kalypso Nicolaidis and Robert Howse (eds.), *The Federal Vision: Legitimacy and Levels of Government in the United States and the European Union* (Oxford 2001).

Ethnocultural self-determination as a justification for federalism

Modern accounts of federalism have gone well beyond Madison to broaden substantially the range of considerations accepted as justifications for the creation of a federal structure of governance.[19] One of the most prominent of these justifications holds that federalism is desirable because of its capacity to permit some degree of self-determination to ethnoculturally distinctive subgroups when they are geographically concentrated.[20]

As federalism has spread around the globe, ethnocultural self-determination has increasingly been invoked as a justification for adoption of a federal system. Such reasoning has long played a role in Canadian debates about the status of Quebec, for example, but it also provides the main justification for the more recent adoption in Spain of devolutionary *Estatutos de Autonomía*, an action taken mainly in response to demands for self-determination by Basque, Catalonian, and Galician subpopulations. Claims of ethnocultural pluralism have played a role in shaping federalism in Belgium, Bosnia, Russia, Switzerland, and even in devolution in the United Kingdom, among others.

The justification of federalism as a vehicle to provide self-determination to ethnocultural subgroups resonates strongly with the conceptual foundations of sub-national constitutionalism. If a constitution is in some sense an expression of the beliefs of a self-governing populace as to how its members ought to live, and some ethnocultural groups see themselves as sufficiently distinct from the national populations among whom they reside to justify some form of sub-national self-determination, then any sub-national constitution such a group creates for itself might be very likely to reflect the distinctive traits that by hypothesis entitle the group to political self-determination in the first place. Ethnocultural justifications for federalism thus may lend plausibility to the premises of sub-national constitutionalism, which in turn may provide a justification for a federal structure that is more contestatory than co-operative.

The characteristics of actual sub-national constitutions

Sub-national constitutionalism and contestatory federalism rest on the premise that an important purpose of sub-national constitutions is the direct or indirect protection of rights through the independent agency of sub-national power. Many existing sub-national constitutions contain provisions that are clearly intended to specify and protect the rights of sub-national populations in ways that are consis-

[19] *See*, e.g., Thomas Dye, *American Federalism* (Lexington, Mass., D.C. Heath 1990).

[20] *See* generally G. Alan Tarr, Robert F. Williams, and Josef Marko (eds.), *Federalism, Sub-national Constitutions, and Minority Rights* (Westport, Connecticut, Praeger 2004).

tent with commitments to both sub-national constitutionalism and contestatory federalism.

The most direct and obvious method of protecting rights in sub-national constitutions is through express specification in a charter or declaration of rights. In Germany, for example, the *Land* constitution of Bavaria expressly protects rights of human dignity, personal freedom, private property, conscience, speech, and press, among others.[21] The constitution of North Rhine-Westphalia provides express protection for rights of religious association and the right to work.[22] The constitutions of the Swiss cantons of Geneva and Lucerne both guarantee rights of equality, property, religion, and free speech.[23]

Interestingly, provisions found in sub-national declarations of rights often duplicate protection for rights entrenched in the national constitution. For example, Bavarian constitutional protections for human dignity, freedom of action, and freedom of the person replicate similar protections provided in the German Basic Law.[24] Numerous sub-national constitutions appear to provide duplicate protection for entire sets of nationally guaranteed rights that are simply incorporated by reference. The constitutions of Spain's sub-national regions, for example, tend to incorporate by reference rights established nationally; Catalonia's provision, which is typical, provides: 'The citizens of Catalonia have the fundamental rights and duties that are set out in the national Constitution.'[25]

Duplicate protection of rights at the national and sub-national levels might well provide evidence, where it occurs, of contestatory federalism. Where a supreme national constitution already provides express protection for some kind of right, protection of the same right in a sub-national constitution appears at first glance to be superfluous. In the United States, where such duplication occurs with some frequency, the best explanation seems to be that sub-national units intend thereby to assert a kind of simultaneous jurisdiction over the protection of the rights in question. Sub-national units, in other words, do not simply cede to the national government responsibility for protecting the duplicated right, for it is always possible that the national government will fail to protect the right with sufficient vigour. If the sub-national unit possesses independent authority to protect the same right, then it may be able to fill any void left by a failure of national power or national will.[26] Such a relationship between national and sub-national

[21] Constitution of the Free State of Bavaria (Germany), Arts. 98-118.

[22] Constitution of the State of North Rhine-Westphalia (Germany), Arts. 19, 24.

[23] Constitution of the Republic and Canton of Geneva (Switzerland), Arts. 2-11; Constitution of the Canton of Lucerne, Arts. 2-9.

[24] Compare Constitution of the Free State of Bavaria (Germany), Arts. 100-102, with Basic Law for the Federal Republic of Germany, Art. 1(1), 2(1), 2(2).

[25] Statute of Autonomy of Catalonia (Spain), Art. 8(1).

[26] James A. Gardner, 'State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions', 91 *Georgetown L.J.* (2003) p. 1003.

power seems to reflect the workings of a Madisonian contestatory federalism. It suggests that sub-national units understand themselves not only as independent agents for the protection of popular liberty, but, at least potentially, as competitors with the national government for popular allegiance based on the effective performance of the function of protecting human rights.

Many constitutional systems around the world also create the conditions under which sub-national units may protect the liberty of citizens indirectly, through the affirmative exercise of granted powers. This may occur most commonly where national and sub-national areas of competence overlap, i.e., there are areas of shared competence. For example, Article 74 of the German constitution establishes concurrent legislative competence of the federal and *Land* governments over criminal law, public welfare, economic affairs, labour, and many other areas.[27] Title III of the Swiss constitution establishes concurrent legislative competence of the confederal and cantonal governments in numerous areas, including culture, the environment, natural resources, energy policy, and economic affairs, among others.[28]

Concurrent competence creates the conditions for competition between national and sub-national governments even where national law is supreme. This is because a grant of concurrent authority often permits sub-national governments to enter fields in which the national government has failed to act, or acted incompletely, or irresponsibly, or counterproductively, in an effort to correct the damage. Consider environmental regulation, for example. If a national government fails to use its power to protect the environment in ways that are necessary to fulfil popular interests or protect popular rights to health or to a clean environment, a sub-national government with concurrent authority in the area may enact legislation that the national government has failed to enact, or may supplement weak national measures with stronger ones that better comport with the wishes of the sub-national population whose interests it has a duty to protect.

In short, the distribution of constitutional powers into overlapping spheres provides some evidence of a structure that is in principle capable of supporting a robust contestatory federalism, although the presence of such a structure may not be sufficient, by itself, to produce sub-national constitutionalism.

Why sub-national constitutionalism and contestatory federalism may be rare

Up to this point, I have indicated several grounds upon which one might plausibly think that in many federal states the conditions for sub-national constitutionalism

[27] Basic Law for the Federal Republic of Germany, Art. 74.
[28] New Constitution of the Swiss Federation, Arts. 69, 74, 89, 94.

and contestatory federalism exist. Whether they have in fact arisen in such places, however, is another question. That the conditions exist says nothing about actual sub-national constitutional practices – how sub-national power is conceived by citizens, how it is deployed by governmental actors, and how it functions within the federal structure of any particular national constitutional system. Consequently, to determine whether a genuine and robust sub-national constitutionalism exists in any particular place requires answering challenging empirical questions that are far beyond the scope of this paper.[29]

I shall therefore pursue in the balance of the paper the much more modest goal of suggesting some reasons for caution in concluding that the appearance of sub-national constitutions in a federal state implies the appearance of sub-national constitutionalism or contestatory federalism. In particular, I discuss below three such reasons: (1) the easy availability of national constitutional politics as a vehicle for resolving questions of social and political significance; (2) the rise of subsidiarity as the prevailing political theory of sub-national power; and (3) the growing emphasis on supranational and international regimes as primary protectors of human rights.

Easy access to national constitutional politics

With the notable exception of the United States, the national constitutions of the world's federal states have been adopted only recently. Switzerland, for example, adopted its current national constitution in 1998, Ethiopia did so in 1995, Argentina in 1994, Russia in 1993, Brazil in 1988, Spain in 1978, India in 1950, Germany in 1949, Austria in 1920, and Mexico in 1917.[30] The older of these constitutions have, moreover, been amended with some frequency – the German constitution more than fifty times and the Austrian constitution hundreds of times[31] – and some of these amendments have been far from trivial. The national constitutions of Germany and Spain, for instance, were amended in 1992 to reflect membership in the European Union (EU), a major constitutional change involving significant alterations to fundamental aspects of national power.[32] Finally, a fair number

[29] Investigating such questions is made particularly difficult by the limited availability in translation of sub-national constitutions, and the even more limited availability of translations of national or sub-national judicial decisions construing such constitutions.

[30] I am concerned here only with the date of the most recently adopted version of the national constitution. In some cases, the original version of the constitution at issue is much older than the most recently adopted version. I thank Walter Carnota for bringing this point to my attention.

[31] For a comparative overview of amendment rates of national constitutions, *see* Donald S. Lutz, Toward a 'Theory of Constitutional Amendment', in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton 1995), at p. 261, Table 11.

[32] Similarly significant changes have been made to the German constitution upon reunification in 1990 and to conform to a series of multinational defence treaties, including NATO.

of recent amendments to national constitutions have dealt specifically with the respective competence of national and sub-national governments. The German Basic Law, for example, has been amended on several occasions to make extremely fine adjustments in the reach of concurrent powers, such as a 1959 amendment adding the production of nuclear energy to the list of concurrent powers, a 1971 amendment extending concurrent power to the terms of employment of certain public employees, and the 2006 reform of the division of powers.[33]

All this constitutional adoption and amendment activity suggests that national constitutional politics is, in most federal states, a readily available and highly responsive forum in which a polity may work out answers to important questions of constitutional significance – questions of the scope of civil liberties, for example, or of the proper allocation of authority between national and sub-national governments. National constitutions are thus likely to reflect with some accuracy the most recent thinking of the national polity, and to institutionalize that thinking directly in the terms and provisions of constitutional law.

Indeed, in this respect, national constitutional politics in most federal states bears a striking resemblance to sub-national constitutional politics in the United States. In the United States, replacement of the national constitution with a more contemporary model is simply unthinkable, and constitutional amendment is made so difficult both by procedural requirements and by a culture of constitutional veneration, that resort to national constitutional politics is virtually never a realistic option for addressing fundamental social and political questions. In contrast, American sub-national constitutions are frequently discarded and replaced, and even more frequently amended, so that they are far more likely than the national constitution to reflect contemporary views about how important issues should be resolved.[34]

This difference may be significant for sub-national constitutionalism because it suggests that, outside the United States, sub-national constitutions are not very likely to serve as important forums for working out difficult policy questions. Because questions concerning the structure and content of government power, and of the allocation of power between levels in a federal system, are routinely and readily addressed in the context of national constitution-framing and constitutional amendment, any pressure to address these questions in sub-national constitutions is likely to be correspondingly reduced. And a constitution that does not serve as a vehicle for registering and pursuing the deeply held goals of a sub-national polity is unlikely to become the focal point of either a robust constitutionalism or a contestatory variety of federalism.

[33] *See* Basic Law for the Federal Republic of Germany, Art. 74 (11a) and 74a, which have both been removed again with the general revision of Aug. 2006; *see* Rudolf Hrbek, 'The Reform of German Federalism Part I', 3 *European Constitutional Law Review* (2007), p. 225-243.

[34] G. Alan Tarr, *Understanding State Constitutions* (Princeton, N.J., Princeton University Press 1998).

The subsidiarity theory of sub-national power

In the United States, and subsequently elsewhere in the Americas, principles of federalism evolved from an eighteenth-century conceptual framework of natural rights in which even good government was seen as an inherently dangerous, potential enemy of popular liberty, and thus at best a necessary evil to be tolerated rather than a good to be affirmatively desired.[35] From these premises, it followed that the primary goal of constitutional design was to construct a government capable of delivering a small number of indispensable benefits, while simultaneously adopting as many mutually reinforcing constraints on government as needed to confine it within the desired boundaries, thereby preventing it from fulfilling its potential for tyranny. Federalism served this purpose by pitting sub-national power directly against national power in the form of an institutionalized competition between the state and national governments for popular loyalty.[36] In the US system, federalism therefore serves its purpose best when state and national power are allocated in such a way so that each level of government is capable in principle of fighting the other to a draw.

Contemporary global federalism, particularly of the European variety, is rooted in very different soil and takes for itself very different objectives. Emerging from a post-World War II consensus that substantial national power is critical to the ultimate success of a state and to the prosperity of its citizens, European federalism tends to conceive of the decentralization of power not as a mechanism for restraining the application of government power to the citizenry, but, on the contrary, as a mechanism for making the use of such powers more effective and efficient. This outlook is expressed in the constitutional principle of *subsidiarity*, which in a federal context made its first appearance in Article 72 of the German constitution. Under the Basic Law, national power is divided into those powers that are exclusively national and those which may be exercised concurrently with the *Länder*. Under Article 72, however, the federal government may not employ its concurrent powers just because doing so seems desirable; it may invoke these powers only 'if and insofar as the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.'[37] In 1992, signatories of the Maastricht

[35] *The Federalist*, *supra* n. 9, No. 51 (Madison): 'But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.'

[36] *The Federalist*, *supra* n. 9, Nos. 47, 48, 51 (Madison).

[37] Basic Law, Art. 72(2). This is the relevant text as amended in 1994. Before that amendment, the provision contained an even more explicit statement of the principle of subsidiarity: 'The Federation shall have the right to legislate in these matters to the extent that a need for regulation by federal legislation exists because: (1) a matter cannot be effectively regulated by the legislation of the

Treaty adopted the principle of subsidiarity for the newly restructured European Union. Article 5 of the EC Treaty provides:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community.

According to these provisions, power in a regime of subsidiarity is allocated among levels of government so that it is exercised at the lowest possible level consistent with successful management of the problem addressed. As a result, power is to be exercised at the national level only when necessary to the achievement of collective goals. The principle of subsidiarity, then, limits the exercise of national power, but does so for distinctly non-Madisonian reasons. Power is allocated to sub-national units in a subsidiarity regime not to make it available for deployment against national power, much less for the purpose of thwarting the achievement of national goals to which the sub-national government objects, but because sub-national power can under the circumstances accomplish nationally identified goals even more completely and effectively than can national power.

Power organized by subsidiarity thus contemplates a federalism that is co-operative rather than competitive.[38] National and sub-national units do not compete for the allegiance of the people by demonstrating their superiority in achieving popularly desired goals, but instead routinely yield to one another where the other's competence is objectively greater. Subsidiarity thus appeals not to the pragmatic, but to the rational; it rests not on the skeptical fear that governments will act aggressively to consolidate their power, but on the belief that they will, with proper guidance, pursue shared policies through optimal means. In a federalism based on subsidiarity, if national power threatens liberty, the threat does not arise from the mere use of power to displace private autonomy, but from inefficiency and bureaucratic incompetence caused by its inelegant use.

Although subsidiarity has been constitutionally formalized only in Germany and the EU, it seems increasingly to be invoked as the dominant justification for

individual Länder, or (2) the regulation of a matter by a Land law might prejudice the interests of other Länder or of the people as a whole; or (3) the maintenance of legal or economic unity, especially by the maintenance of uniformity of living conditions beyond the territory of any one Land, necessitates such regulation.' David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago, University of Chicago Press 1994), p. 43.

[38] The concept of co-operative federalism emerged in the US roughly contemporaneously with the emergence in Europe of the principle of subsidiarity. *See*, e.g., Morton Grodzins, *The American System: A New View of Government in the United States* (Edison, N.J., Transaction Publishers 1966).

federalism throughout the Union,[39] a development that is in some tension with any perceived rise in contestatory federalism. Whereas contestatory federalism treats sub-national units as independent popular agents with the autonomy to interpose themselves between the central government and the people, subsidiarity treats sub-national units much more like administrative agents of the central state. Instead of exercising independent judgment about the wisdom and content of policy goals, sub-national units in a regime of subsidiarity are understood to play mainly a collaborative role in implementing policy choices made by national consensus.

Supranational and international regimes as primary protectors of human rights

The most important justification by far for contestatory federalism is the benefit it confers in the protection of human rights. Instead of a single regime of rights protection implemented at the national level, contestatory federalism allows for the creation of a second, and to some degree competing, regime of rights protection at the sub-national level. Contestatory federalism thus allows sub-national units to use their autonomy to protect the rights of their citizens either by identifying and protecting rights in an enforceable sub-national declaration of rights, or by using other powers to block rights-invading actions of the central authorities.

Although the recent proliferation of sub-national constitutions containing express rights-protecting provisions might suggest a trend towards an emerging second layer of rights protection at the sub-national level, this must be evaluated in light of another and conflicting recent trend: the emergence of a powerful and increasingly effective layer of rights protection at the supranational and international levels. Indeed, much of the existing evidence seems to suggest that in many parts of the world aggrieved groups and individuals seeking additional security for their human rights are more inclined to look upward, towards transnational institutions, than they are to look downward, towards sub-national institutions.

Any discussion of rights protection at the international level must begin with the United Nations. UN conclusions concerning the content of human rights are widely accepted and command considerable deference, even to the extent that governments disinclined to respect UN-backed rights seem more likely to argue their contingent inapplicability than to dispute the substance of the rights on the merits.[40] Many states have incorporated into their own constitutions the rights set

[39] Subsidiarity has also been invoked as an organizing principle for national-sub-national relations in unitary EU states such as Poland. *See* Ewa Poplawska, 'The Principle of Subsidiarity under the 1997 Constitution of Poland', *St. Louis-Warsaw Transatlantic L.J.* (1997), p. 107.

[40] For example, one of the most serious challenges to the global human rights regime contemplated by the U.N., the 'Asian Way' movement promoted by some east Asian governments, tends to argue not that U.N.-backed human rights are not universal, but that their enforcement against states

out in United Nations documents. Article 10(2) of the Spanish constitution, for example, provides:

> The norms relative to basic rights and liberties which are recognized by [this] Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.

Although the source of the UN's power to protect human rights comes more often from the dignity of its role as a definer of aspirations and the apparent appeal of its vision of universal human rights, it has occasionally moved beyond the hortatory to the actual enforcement of human rights. For example, the UN has played a role in policing the human rights of national minorities in places such as Kosovo and Bosnia and Herzegovina.

At the regional European level, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its system of enforcement through the European Court of Human Rights has had a great impact in the legal orders of European states, penetrating into the domestic political systems of those states,[41] while it has also become the EU's principal human rights document.

These developments suggest that in many places, and especially in Europe, it is possible that sub-national units are unlikely to be viewed by either the public or by governmental actors as playing the kind of significant role in the protection of human rights that would indicate a robust contestatory federalism. It seems at least as likely that members of sub-national groups who view their national government as a potential human rights scofflaw would turn to supranational or international organizations, rather than sub-national ones, for enhanced protection. To the extent this turns out to be the case, the possibility of contestatory federalism and, by implication, sub-national constitutionalism are correspondingly diminished.

must be tempered or modified in some circumstances so as to give proper weight to countervailing cultural norms (such as a desire for consensus) or economic contingencies (such as giving priority to economic development objectives). *See*, e.g., Asoka De Z Gunawardana, 'An Asian Perspective on Human Rights', *Singapore Journal of Legal Studies* (1994) p. 521; Michael Haas, *The Asian Way to Peace: A Story of Regional Cooperation* (1989) p. 2-10; Richard Klein, 'Cultural Relativism, Economic Development, and International Human Rights in the Asian Context', 9 *Touro Int'l L. Rev.* (2001), p. 1.

[41] For example, in 2004 the Court invalidated a British law disenfranchising all prisoners serving life sentences, *Hirst* v. *United Kingdom* (*No. 2*), No. 74025/01 (30 March 2004), and in 2002 it upheld Turkey's dissolution of a religious political party. *Refah Partisi* (The Welfare Party) v. *Turkey*, 35 *Eur. H.R. Rep*. 3 (2002).

Conclusions

The spread of federalism, and the accompanying spread of sub-national constitutions, offer a tempting leap of logic: that where there's smoke, there's fire – that the proliferation of sub-national constitutions reflects a spreading belief in the efficacy of sub-national power as a check on national power, and that this in turn implies a growing tendency around the globe to embrace contestatory federalism and sub-national constitutionalism. The evidence, however, is mixed. Some aspects of the spread of sub-national constitutions are consistent with underlying ideologies of contestatory federalism and sub-national constitutionalism, but other factors suggest that such appearances may be deceiving.[42]

In reviewing the evidence, we must also remember that practices of constitutional self-governance can evolve, and it is always possible that changing political circumstances can cause corresponding changes in the ways that democratic polities make use of the constitutional structures they have created. So, for example, a sudden collapse in efficacy of supranational and international regimes of human rights protection could greatly increase demand for a well-functioning supplemental regime of rights protection at the sub-national level. Or growth in the scale and intensity of sub-national identity politics could redirect public trust from national to sub-national governments, encouraging them to take on new roles or to exercise existing powers more aggressively.

Ultimately, substantial additional research is needed to determine how sub-national power functions on the ground in the various federal states. Is it used in the ways contemplated by national and sub-national constitutions? Do government officials work within the constitutional framework? Is there a struggle for dominance between national and sub-national governments? If so, are sub-national units capable of prevailing? To what extent do people identify with their national or sub-national polities, and is this identity stable? No search for sub-national constitutionalism or contestatory federalism will be very effective until such basic questions are addressed.

[42] *See* Ivo D. Duchacek, 'State Constitutional Law in Comparative Perspective', 496 *Annals of the Am. Acad. of Pol. and Soc. Sci* 128 (1988), p. 139: 'the existence of sub-national constitutions is not a necessary or sufficient condition for a federal political culture. Only in the United States and Switzerland do both the birth and subsequent modifications of state constitutions seem to offer a significant confirmation of federal political culture and a two-way traffic in federal practices between the federal and state governments.'