

PATTERNS OF SUBNATIONAL CONSTITUTIONALISM IN FEDERAL COUNTRIES

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Subnational constitutions have attracted increasing attention from scholars of U.S. politics, given the ongoing importance of state constitutions in structuring politics in the U.S. system,¹ and they have also begun to generate a proper level of scrutiny in other federal countries, due to their longstanding importance in a number of federations² and their recent drafting in countries such as Sudan.³ However, scholars have just started to build a body of comparative knowledge about the design of subnational

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1. See, e.g., G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2006); STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOL. 3: THE AGENDA OF STATE CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams eds., 2006).

2. As one sign of this renewed interest in subnational constitutions, Kluwer Law International has recently published monographs on subnational constitutions in five federations. See ANTONIO MARÍA HERNANDEZ, ARGENTINA: SUB-NATIONAL CONSTITUTIONAL LAW (2005); RASSIE MALHERBE AND DIRK BRAND, SOUTH AFRICA: SUB-NATIONAL CONSTITUTIONAL LAW (2001); MATTHIAS NIEDOBITEK, GERMANY: SUB-NATIONAL CONSTITUTIONAL LAW (2007); MARAT S. SALIKOV, RUSSIAN FEDERATION: SUB-NATIONAL CONSTITUTIONAL LAW (2005); ANNE TWOMEY, AUSTRALIA SUB-NATIONAL CONSTITUTIONAL LAW (2004).

3. On the recent drafting of state constitutions in the ten states in southern Sudan, see Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2006). One might also point to the recent drafting of state constitutions in the nine states in Ethiopia. Tsegaye Regassa and Addis Ababa, *State Constitutions in Federal Ethiopia 1* (March 2004) (unpublished paper, on file with the Rutgers Law Journal).

constitutions,⁴ and in particular about the degree to which subnational constitutions differ from national constitutions in federal countries.⁵ My purpose is to undertake such a comparative study of subnational constitutionalism and to contribute to our knowledge of the ways that subnational and national constitutions differ in institutional design.

It is certainly the case in the United States—the federation whose subnational constitutions have generated the most scholarly interest to date—that state and federal constitutions differ in important ways. The U.S. Constitution is quite difficult to amend, but the fifty state constitutions are uniformly easier to change and through a wider array of mechanisms.⁶ Regarding opportunities for direct democratic participation, whereas the U.S. Constitution provides no opportunities for direct democratic influence, over half of state constitutions allow for the initiative, referendum, and/or recall;⁷ most state constitutions require that popular referendums be held when debt is incurred;⁸ and some states require popular approval of tax increases, among other acts.⁹ Regarding the design of legislative and executive institutions, although presidentialism prevails at both levels, as does bicameralism (save for one exceptional state), there are notable differences. For instance, the U.S. Constitution provides for a unitary executive (in that the president and vice president are the only elected

4. For existing comparative studies of subnational constitutions, see Cheryl Saunders, *The Relationship Between National and Subnational Constitutions*, in SEMINAR REPORT: SUBNATIONAL CONSTITUTIONAL GOVERNANCE 23 (1999); Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons*, in FEDERALISM SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004) [hereinafter Williams & Tarr, *Subnational Constitutional Space*]; Ronald L. Watts, Foreword, *States, Provinces, Länder and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941 (2000) [hereinafter Watts, Foreword]; and G. Alan Tarr, *Subnational Constitutional Space: An Agenda for Research* (June 2007), (unpublished paper, on file with the Rutgers Law Journal) available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Tarr.pdf> [hereinafter Tarr, Agenda].

5. See, e.g., Cheryl Saunders, *Legislative, Executive, and Judicial Institutions: A Synthesis*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES 344, 372-374 (Katy Le Roy, Cheryl Saunders & John Kincaid eds., 2006) [hereinafter Saunders, *Synthesis*]; Watts, Foreword, *supra* note 4, at 953-58.

6. DINAN, *supra* note 1, at 29.

7. *Id.* at 64.

8. *Id.* at 76.

9. *Id.*, at 94.

executive officials), whereas many state constitutions provide for a plural executive whereby numerous executive officials are elected.¹⁰

The question I investigate here is whether these sorts of differences in subnational and national constitutional design in the United States are also found in other federal countries. Such an inquiry is worthwhile in that it can contribute to the line of research opened by Robert F. Williams and G. Alan Tarr in regard to how subnational constitution-makers have made use of the constitutional space allowed to them by their various federal systems.¹¹ That is, have subnational constitution-makers frequently departed from their national counterparts in designing their governing institutions, or have they generally followed their national arrangements? And to the extent that subnational constitution-makers have departed from their national counterparts, are there identifiable patterns of departure? To summarize: is it possible to identify general ways that subnational constitutions differ from national constitutions, thereby suggesting that certain aspects of institutional design are particularly suited for subnational constitutions?

Mention should be made of two research-design issues that I have faced in pursuing this inquiry: which federations to study and which institutional features to examine? First, a decision must be made about which federal countries to include. In general, I have followed Daniel J. Elazar's 1987 list of constituent states in federal systems that have either "separate written constitutions" or "constitutional statutes," although with some updating for developments in the intervening twenty years.¹² Elazar's list of federations whose constituent states had "separate written constitutions" comprised Argentina, Austria, Brazil, Czechoslovakia, German Federal Republic, Malaysia, Mexico, Switzerland, the United States, USSR, Venezuela, and Yugoslavia.¹³ Meanwhile, Elazar's list of federations whose constituent states had "constitutional statutes" included Australia and Canada.¹⁴ After making allowances for political developments in the past two decades, I settled on the following list of twelve federations to analyze: Argentina,

10. John Dinan, *United States of America*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 316, 328-329.

11. See, e.g., Williams & Tarr, *Subnational Constitutional Space*, *supra* note 4; Tarr, *Agenda*, *supra* note 4.

12. DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 178 (1987).

13. *Id.*

14. *Id.*

Australia, Austria, Brazil, Canada, Germany, Malaysia, Mexico, Russia, Switzerland, the United States, and Venezuela.¹⁵

To be sure, these twelve federal countries differ in the amount of space that they allow for subnational constitutional innovation. In some of these countries, the national constitution establishes specific guidelines that must be followed in the design of subnational constitutions, thereby opening up only a modest amount of subnational constitutional space. In other federal countries, subnational constitution-makers are allocated somewhat more space, in that they can design their institutions as they see fit, subject to a national homogeneity or compatibility clause. In still other federal countries, subnational constitution-makers have significant discretion in designing institutions, subject only to rarely invoked principles such as a republican-form-of-government guarantee.¹⁶ Therefore, it is important to take note, where

15. A case might be made for the inclusion in this study of other federations, such as South Africa, whose national constitution establishes a template for provincial constitutions but allows provinces to depart from this model if approved by the Constitutional Court. See Christina Murray, *Republic of South Africa*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 258, 274. So far, however, only one province, the Western Cape, has drafted a constitution that was then approved, and it resembles quite closely the national constitution. See Dirk Brand, *The Western Cape Provincial Constitution*, 31 RUTGERS L.J. 961, 961 (2000). The province of KwaZulu-Natal also drafted a constitution, but it was not certified by the Constitutional Court. See Jonathan L. Marshfield, *Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution*, 41 VAND. J. TRANSNAT'L L. 585, 613-620 (2008).

Others have taken note of the Regional Constitutions in Italy and the statutes of the Autonomous Communities in Spain as possible subjects for further study. However, scholars are divided as to whether these are properly characterized as subnational constitutions, especially in the case of Spain. See, e.g., Francesco Palermo, *Asymmetric, "Quasi-Federal" Regionalism and the Protection of Minorities: The Case of Italy*, in FEDERALISM SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS, *supra* note 4, at 107; Eduardo J. Ruiz Vieitez, *Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Spain*, in FEDERALISM SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS, *supra* note 4, at 133; Williams & Tarr, *Subnational Constitutional Space*, *supra* note 4, at 5; Antoni Abad i Ninet & Adrià Rodés Mateu, *Asymmetry in the Spanish State's Model of Territorial Organisation* (June 2007), (unpublished paper, on file with the Rutgers Law Journal) available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Abad.pdf>; Rosario Serra & Pablo Oñate, *The Reform of the Spanish Subnational Constitutions: Rules and Regulations and Political Contexts* (June 2007), (unpublished paper, on file with the Rutgers Law Journal) available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Serra.pdf>.

16. On these various ways that federal constitutions constrain subnational constitution-makers, see Saunders, *The Relationship Between National and Subnational Constitutions*, *supra* note 4, at 27-29; Williams & Tarr, *Subnational Constitutional Space*, *supra* note 4, at 7-11.

appropriate, of instances where subnational constitution-makers have freely chosen a certain institutional arrangement, as opposed to occasions where an institutional arrangement has been forced upon them by national mandates.

Second, a decision must be made about which institutional features to examine. For purposes of this study, I examine four features: constitutional amendment and revision procedures, opportunities for direct democratic participation, the choice of a presidential versus a parliamentary system, and adoption of bicameralism versus unicameralism. These are the aspects of constitutional design that have generally attracted interest from scholars of subnational constitutions, and it is my intent to build on and contribute to these studies.¹⁷ There are, to be sure, other institutional features to be examined, and it is hoped that scholars will take up these other topics in future studies.

To preview the conclusions, it turns out that subnational constitution-makers have made significant use of the constitutional space allotted to them, but in certain areas more than others. There has been little subnational innovation regarding the choice of presidentialism versus parliamentarism: subnational constitutions generally mirror their national counterparts in this area.¹⁸ However, in three other areas, subnational constitution-makers have departed from their national counterparts in important and patterned ways that suggest distinctive traits of subnational constitutionalism. Although all but a few federations have bicameral national legislatures, unicameralism is increasingly the norm in subnational constitutions.¹⁹ Subnational constitutions are invariably easier to amend than their national counterparts.²⁰ Subnational constitutions also generally provide more opportunities for direct democracy.²¹

I. CONSTITUTIONAL AMENDMENT AND REVISION PROCEDURES

Scholars of comparative federalism have undertaken careful studies of the procedures for amending and revising national constitutions.²² As has

17. See, e.g., Saunders, *Synthesis*, *supra* note 5, at 372-74 (discussing direct democracy, presidentialism/parliamentarism, and bicameralism/unicameralism); Watts, Foreword, *supra* note 4, at 953 (discussing presidentialism/parliamentarism).

18. See *infra* Part III.

19. See *infra* Part IV.

20. See *infra* Part I.

21. See *infra* Part II.

22. See, e.g., THOMAS O. HUEGLIN & ALAN FENNA, *COMPARATIVE FEDERALISM: A SYSTEMATIC INQUIRY* 247-74 (2006); RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 161-65 (3d ed. 2008); John Kincaid, *Comparative Observations*, in *CONSTITUTIONAL ORIGINS*,

been noted in this literature, a number of federal systems require some participation of constituent units in the process of amending national constitutions. Thus, in some federations, any changes to the national constitution must be ratified by at least a majority of constituent units. In some other federal countries, changes to the national constitution that have a particular effect on subnational units must be ratified by the affected units.²³ Regardless of the specific procedures in place in the various federations—and these procedures range widely—the common theme is “the relative difficulty of constitutional amendment” at the national level, with the notable exception of Switzerland.²⁴

Not as much has been done by way of comparative studies of subnational amendment procedures. Country-specific studies have been conducted along these lines, and some of these studies suggest that subnational constitutions are more easily changed than their national counterparts and through a wider array of mechanisms.²⁵ My purpose is to determine the extent to which this conclusion generally holds true when considering the twelve federations in this study.²⁶

It turns out that subnational amendment procedures are often quite different from the corresponding national procedures, and, in particular, are invariably more flexible and wide-ranging. To be sure, in several cases, federations are characterized by parallelism, in that their subnational and national amendment procedures are similar. However, in the majority of

STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES 442-44 (John Kincaid & G. Alan Tarr eds., 2005); Cheryl Saunders, *Constitutional Arrangements of Federal Systems*, 25 PUBLIUS: J. FEDERALISM, Spring 1995, at 61, 64-66; Anne Twomey, *The Involvement of Sub-national Entities in Direct and Indirect Constitutional Amendment Within Federations* (June 2007), (unpublished paper, on file with the Rutgers Law Journal), available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Twomey.pdf>. Mention should also be made of several volumes whose coverage is not limited to federal countries but that include discussion of amendment processes in many federal countries. See, e.g., THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS (Mads Andenas ed., 2000); K.C. WHEARE, MODERN CONSTITUTIONS 121-45 (rev. ed., 1964). Finally, for a comparative study of the difficulty of national amendment processes and an examination of the difficulty of some subnational constitutional amendment processes, see DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 145-82 (2006).

23. WATTS, *supra* note 22, at 162.

24. Saunders, *Constitutional Arrangements of Federal System*, *supra* note 22, at 65; see also WATTS, *supra* note 22, at 164.

25. See, e.g., DINAN, *supra* note 1, at 29.

26. Some steps have been taken toward a comparative analysis of this sort. See Twomey, *supra* note 22, at 28-29.

cases subnational procedures differ from national procedures by providing more flexibility.

To first consider the instances of parallelism, three federations contain generally similar amendment procedures at the national and subnational level: Brazil, Malaysia, and Switzerland. In Brazil, amendments can be proposed in several ways, but must be approved by a three-fifths vote of both houses of the national legislature and on two separate readings.²⁷ Brazilian state constitutions have the same general requirement for *approving* amendments.²⁸ Meanwhile, in Malaysia, the ordinary procedure for amending the national constitution (there are three other procedures) stipulates that an amendment must be supported by a two-thirds majority of the national legislature.²⁹ The same type of legislative supermajority requirement is also in place in most Malaysian state constitutions.³⁰ In Switzerland, both national and cantonal constitutions are amended rather easily and through a variety of mechanisms. At the federal level, constitutional changes can be proposed either by the legislature or initiative petition and must be ratified by a majority of the people and by voters in a majority of cantons.³¹ Cantonal constitutions vary in their specific amendment procedures, but they all resemble the federal constitution in permitting amendments to be proposed by initiative petition and also in requiring ratification by popular referendum.³²

27. Constituição Federal [C.F.] [Constitution] art. 60 (Braz.). The process allows amendments to be proposed by one-third of the members of the senate, or by the president, or by over half of the legislatures of the constituent units. See Luciano Maia, *The Creation and Amending Process in the Brazilian Constitution*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, *supra* note 22, at 54, 54-83.

28. Celina Souza, *Federal Republic of Brazil*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, *supra* note 22, at 85.

29. MALAY. CONST. art. 159. For a discussion of the four procedures of constitutional amendment, see Andrew Harding, *The Constitutional Amendment Process in Malaysia*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, *supra* note 22, at 250, 252-54.

30. MALAY. CONST. sched. 8, pt. I, art. 19, § 4.

31. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] Apr. 18, 1999, SR 101, RO 101, art. 138-39 (Switz.). On the initiative procedure as applied to constitutional changes, see DIRECT DEMOCRACY IN EUROPE: A COMPREHENSIVE REFERENCE GUIDE TO THE INITIATIVE AND REFERENDUM PROCESS IN EUROPE 119 (Bruno Kaufmann & M. Dane Waters eds., 2004).

32. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération Suisse [Cst] [Constitution] Apr. 18, 1999, SR 101, RO 101, art. 51; see Nicolas Schmitt, *Swiss Confederation*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, *supra* note 22, at 347, 354. For additional discussion of the process of revising cantonal constitutions, see Hanspeter Tschaeni, *Constitutional Change in Swiss Cantons: An Assessment of a Recent Phenomenon*, 12 PUBLIUS: J. FEDERALISM, Winter

The federations characterized by non-parallelism can be divided into two categories: (1) countries where subnational constitutions are easier to amend because additional and more accessible mechanisms are present at the state level but not at the national level; and (2) countries where subnational constitutions are easier to amend because they lack one or more burdensome requirements in place at the national level.

The first category of non-parallel federations—those whose subnational constitutions provide alternative amendment mechanisms not found at the national level—is comprised of Argentina, Germany, Russia, and the United States. In Argentina, the federal constitution is reformed through a constitutional convention, which is convened upon a vote of two-thirds of the two houses of the federal legislature.³³ This is also the process by which provincial constitutions are generally changed. However, some provincial constitutions provide for an alternative, easier amendment mechanism, whereby the legislature by a two-thirds vote can submit amendments for approval in a popular referendum.³⁴

The *Länder* constitutions in Germany can also be changed through an alternative mechanism not found at the federal level. The amendment procedure at the federal level requires amendments to be approved by a two-thirds vote of both houses of the federal legislature. The *Länder* constitutions are also amended by a two-thirds vote of *Land* legislatures. But, in most instances *Länder* constitutions also permit the people to initiate amendments, although these must first be submitted to and considered by the legislature before being voted on by the citizenry.³⁵

A number of Russian subnational units also provide for amendment mechanisms not found at the national level. There are three amendment procedures at the national level, but the main procedure requires the federal legislature to propose a change (by a three-fifths vote of the two houses), at which time a constitutional assembly is held, and the work of the assembly

1982, at 113. On the ease of amendment of cantonal constitutions, see Giovanni Biaggini, *Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Switzerland*, in *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS*, *supra* note 4, at 217, 219.

33. CONST. ARG. art. 30.

34. HERNANDEZ, *supra* note 2, at 45; Antonio M. Hernandez, *Republic of Argentina*, in *LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES*, *supra* note 5, at 22 [hereinafter Hernandez, *Republic of Argentina*].

35. Arthur B. Gunlicks, *State (Land) Constitutions in Germany*, 31 RUTGERS L.J. 971, 982 (2000); see also Hermann K. Heussner, *Direct Legislation in United Germany*, in *GERMAN PUBLIC POLICY AND FEDERALISM: CURRENT DEBATES ON POLITICAL, LEGAL, AND SOCIAL ISSUES* 148, 158 (Arthur B. Gunlicks ed., 2003).

can be approved by two-thirds of the members of the assembly or by a majority of the people.³⁶ Arrangements of this sort are in place in some subjects of the federation; however, some subnational constitutions also permit amendments to be proposed by initiative petition.³⁷

In the United States, state amendment procedures also differ from the national amendment procedures in that they provide for mechanisms of change not found at the national level. At the national level, amendments are proposed either by a two-thirds vote of both houses of Congress or by a convention called upon the petition of two-thirds of the state legislatures to Congress. Amendments are then ratified by three-fourths of the states, either by their legislatures or in ratifying conventions.³⁸ Amendments to state constitutions can be secured in additional ways. Just over one-third of the states provide for a constitutional initiative, whereby the people can not only propose amendments by initiative petition but also approve those same amendments in a popular referendum, without any participation of the state legislature.³⁹ In nearly one-third of the states, a referendum must be held periodically on whether to call a constitutional revision convention.⁴⁰ In one state, amendments can be submitted to a popular referendum by a constitutional revision commission.⁴¹ Many states permit legislatures to submit amendments to the people upon a mere majority vote, albeit sometimes in consecutive legislative sessions.⁴²

A second category of non-parallel federations (whose subnational constitutions are easier to amend because they lack some of the burdensome requirements found at the national level) includes Australia, Austria, Canada, Mexico, and Venezuela. Australian state constitutions are generally easier to amend than the national constitution, in that most state constitutional provisions can be amended by ordinary legislation, without a need for submission to the people.⁴³ In contrast, the federal constitution of Australia is quite difficult to amend, in that changes must be approved by both houses of

36. Marat Salikov, *Russian Federation*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, *supra* note 22, at 276, 306-07 [hereinafter Salikov, *Russian Federation*].

37. SALIKOV, *supra* note 2, AT 36-38 (2005).

38. U.S. CONST. art. V.

39. John Dinan, *State Constitutional Developments in 2007*, in 40 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 3, 14 tbl.1.3 (2008).

40. *Id.* at 3, 15 tbl.1.4.

41. *Id.* at 4.

42. *Id.* at 12 tbl.1.2.

43. This contrast is drawn in R. D. Lumb, *Fundamental Law and the Processes of Constitutional Change in Australia*, 9 FED L. REV. 148, 154, 163-73 (1978).

the national legislature and then ratified by a majority of voters and by popular majorities in a majority of states.⁴⁴ It is worth noting, however, that some states have in recent years “entrenched” various provisions of their state constitutions, thereby requiring legislative-proposed changes to be submitted to a popular referendum, and thus moving closer to the federal model.⁴⁵

The Canadian provinces present a similar situation, in that there is no need for a popular referendum on provincial constitutional changes (at least when the provisions to be changed are contained in provincial statutes); it is enough for these changes to be approved by ordinary provincial legislative acts.⁴⁶ In contrast, the national constitution is extremely difficult to amend. The main procedure—there are five in all—provides that amendments must be approved by both houses of the national legislature and ratified by two-thirds of the provinces (seven out of ten), and the ratifying provinces must make up at least 50% of the population.⁴⁷

Similarly, in a procedure set out in the Austrian Constitution, changes to the Austrian *Länder* constitutions only need a vote of two-thirds of the *Land* legislature, without any requirement for popular approval.⁴⁸ In contrast, the national constitution can also be amended by a two-thirds legislative vote, but if one-third of the members of either legislative chamber request a popular referendum or if the proposed change amounts to a total constitutional revision, then a popular referendum must be held.⁴⁹

Along these lines, some Mexican state constitutions can be amended by a two-thirds state legislative vote, without a ratifying referendum. However, other Mexican states resemble the federal model in that changes require a

44. AUSTL. CONST. §128. On the difficulty of the national amendment process, see Cheryl Saunders & Katy LeRoy, *Commonwealth of Australia*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 37, 40-41; Leslie Zines, *The Constitution of the Commonwealth of Australia*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, *supra* note 22, at 47, 49.

45. See, e.g., TWOMEY, *supra* note 2, at 24-25, 43-44 (2004); Cheryl Saunders, *Australian State Constitutions*, 31 RUTGERS L.J. 999, 1012 (2000).

46. Rainer Knopff & Anthony Sayers, *Canada*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, *supra* note 22, at 115.

47. Constitution Act, 1982, ch. 11 (U.K.) §§ 38-49. For a discussion, see Christopher Ram, *The Ongoing Search for an Acceptable Amending Formula in Canada*, in THE CREATION AND AMENDMENT OF CONSTITUTIONAL NORMS, *supra* note 22, at 87.

48. Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1920, art. 99 (Austria).

49. *Id.* art. 44.

two-thirds state legislative vote plus ratification by a majority of the municipal councils.⁵⁰

Venezuelan state constitutions follow a similar pattern, in that they can be changed by a super-majority vote of the state legislative council, without need of a popular referendum.⁵¹ This contrasts with the national amendment procedure, where constitutional “amendments” and “reforms” may be initiated in a variety of ways but must in each case be ratified by the people.⁵²

In conclusion, subnational constitution-makers have consistently departed from their national counterparts by establishing easier amendment procedures. In some cases, this takes the form of providing additional ways of proposing changes, generally by permitting constitutional initiative procedures. In other cases, subnational constitutions permit changes to be approved without having to go through the ratifying referendums that are seen as essential for obtaining the support of constituent units for changes to the national constitution.

II. DIRECT DEMOCRACY

An important question for constitution-makers at any level is whether to adopt some form of direct democracy, where the people are permitted to initiate measures or force a referendum on enacted measures or the legislature can refer measures to the people. This question, it should be noted, is separate from whether the public is required to ratify *constitutional* changes; the present question focuses on the power of citizens to pass

50. Juan Marcos Gutiérrez González, *United Mexican States*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, *supra* note 22, at 215.

51. Allan R. Brewer-Carías, *Some Problems of the Centralized Federation and Sub National Constitutionalism in Venezuela* (unpublished paper) (on file with Rutgers Law Journal) (Mar. 2004), *available at* <http://www.allanbrewercarias.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/I,%201,%20885.%20--Subnational%20constituationalism.%20Bellagio%2004-2004.pdf>.

52. According to article 341 of the Venezuela Constitution, “amendments” can be initiated by 15% of the citizens, 39% of the National Assembly, or the President sitting with the Council of Ministers. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA ASAMBLEA NACIONAL CONSTITUYENTE, CARACAS, 1999 [Constitution] art. 341(1) (Venez.). If the amendment is initiated by the National Assembly, it must then be approved by a majority of the Assembly. *Id.* at 341(2). In all cases, the amendment must be submitted for popular ratification. *Id.* at 341(3). According to articles 342 and 343, reforms can be initiated by 15% of the citizens, a majority of the National Assembly, or the President sitting with his Council of Ministers, and in all cases must be approved by two-thirds of the National Assembly and then submitted for popular ratification. *Id.* at 342-43

judgment on *non-constitutional* measures. Some scholarly attention has been given to this question at the national and subnational level,⁵³ and the general consensus, both from country-specific studies and some comparative studies, is that federations are characterized by non-parallelism. In particular, as Cheryl Saunders noted, “direct democracy is more likely to be used in the constituent units than in the national sphere, not only for constitutional change but also for other purposes as well.”⁵⁴

My purpose is to examine the twelve selected federations in order to determine the extent and precise ways in which each federation is characterized by parallelism or non-parallelism. As it turns out, some of these federations exhibit parallelism, in that the national and subnational constitutions are consistent in either rejecting or establishing direct democratic institutions. However, a good number of these federations are characterized by non-parallelism, in that direct democracy is permitted to a much greater degree in the constituent units.

Turning first to instances of parallelism, Australia, Malaysia, and Mexico do not provide explicitly for direct democratic participation in lawmaking at either the national or subnational level. This is not to say that legislatures in these federations have never submitted non-constitutional questions to the people for their consideration, as has been done in Australia.⁵⁵ But there are no formal provisions in the national or state constitutions for the exercise of direct democracy, aside from requiring popular participation in ratifying constitutional changes, as in Australia, and certainly there are no citizen-initiated referendums in any of these countries.⁵⁶

Another group of federations—Argentina, Brazil, and Venezuela—exhibits parallelism, in that both the national and subnational constitutions provide the same general provisions for direct democracy, even if they are employed more frequently at one of these two levels. Thus, in Argentina the

53. See, e.g., DIRECT DEMOCRACY IN EUROPE, *supra* note 31; REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (David Butler & Austin Ranney eds., 1978); K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 834-41 (2006); Saunders, *Synthesis*, *supra* note 5, at 373.

54. Saunders, *Synthesis*, *supra* note 5, at 373

55. See Don Aitkin, *Australia*, in REFERENDUMS, *supra* note 53, at 123, 125-28 tables 6-1 & 6-2 (showing referendums on non-constitutional questions in Australia at both the state and national level).

56. See, e.g., George Williams & Geraldine Chin, *The Failure of Citizens' Initiated Referenda Proposals in Australia: New Directions for Popular Participation?*, 35 AUSTL. J. POL. SCI. 27 (2000) (discussing the failure to enact any direct democratic procedures at the state or national level in Australia).

national constitution permits the people to initiate measures for the consideration of the national legislature, and it also permits the legislature to refer measures to the people for consultative purposes.⁵⁷ Similar provisions are found in some Argentine provincial constitutions.⁵⁸ Meanwhile, Brazil is an example of forced parallelism, in that the national constitution permits the people to use the initiative process to present measures for the consideration of the national legislature,⁵⁹ and it also stipulates that the people will have the same power of “[public] initiative in legislative proceedings of the States.”⁶⁰ In another example of forced parallelism, the Venezuelan Constitution provides for direct democratic institutions at both the national and state level, in that the legislature and the people can call for measures to be submitted to a referendum at both levels.⁶¹

A second broad category of federations comprises countries that exhibit non-parallelism regarding direct democracy, and in each of these cases the subnational constitution provides more opportunities for popular participation than does the national constitution. In three of these—Russia, Germany, and the United States—there are no formal opportunities for direct democracy at the national level, but some or all of the constituent units permit direct democracy. In Russia, some of the federation subjects provide for referendums, and some also provide for the popular recall of subnational officials.⁶² Meanwhile, in Germany, efforts to establish direct democracy in the national constitution have so far been resisted.⁶³ However, as of 1997, all of the *Länder* provide for the popular initiative process, whereby the people

57. CONST. ARG. arts. 39-40; *see also* Hernandez, *Republic of Argentina*, *supra* note 34, at 9.

58. *See, e.g.*, the Constitution of the Province of Buenos Aires, pt. V, ch. 1, § 3, art. 67, in HERNANDEZ, *supra* note 2, at 118 (2007).

59. Constituição Federal [C.F.] art. 61(2) (Braz.). In particular, the public initiative can be exercised when a petition is signed by “one percent of the national electorate, distributed throughout at least five States, with not less than three-tenths of one percent of the voters of each of them.” *Id.*; *see also* Souza, *supra* note 28, at 90.

60. Constituição Federal [C.F.] art. 27(4) (Braz.).

61. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA ASAMBLEA NACIONAL CONSTITUYENTE, CARACAS, 1999 [Constitution] art. 71 (Venez.). There are slight differences in the referendum requirements at the state and national level, and these are rare instances among the federations in this study where the requirements for direct democracy are slightly *more* burdensome at the subnational level. Thus, at the national level, referendums can be submitted to the people upon a *majority* vote of the legislature or on the petition of 10% of the people. *Id.*, art. 71. However, subnational referendums can be submitted upon a *two-thirds* vote of the legislature or on the petition of 10% of the people. *Id.*

62. SALIKOV, *supra* note 2, at 58.

63. DIRECT DEMOCRACY IN EUROPE, *supra* note 31, at 63.

can force the legislature to consider a measure, and if rejected by the legislature, the measure is submitted to the people and, if approved, it becomes law.⁶⁴

The United States is the classic case of a federation whose national constitution provides no opportunity for direct democracy, but whose state constitutions provide numerous opportunities. Half of the American states provide for a popular initiative and/or referendum.⁶⁵ Many states require popular approval of certain acts such as assumption of debt and levying of taxes.⁶⁶ Some states permit the legislature to submit measures to the people for their approval.⁶⁷ One-third of the states permit the popular recall of public officials.⁶⁸

Another three countries in this second category—Canada, Austria and Switzerland—also exhibit non-parallelism, albeit in a slightly different sense: direct democracy is found at both levels of government but is permitted to an even greater degree at the subnational level. Thus, in Canada, referendums have been held at the national level on issues of national importance, and questions can also be referred to the people at the provincial level.⁶⁹

64. On the procedures in subnational constitutions in Germany, see *id.* at 64; PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* 80-81 (1997); Gunlicks, *supra* note 35, at 986; Hermann K. Heussner, *Direct Legislation in United Germany*, in *GERMAN PUBLIC POLICY AND FEDERALISM: CURRENT DEBATES ON POLITICAL, LEGAL, AND SOCIAL ISSUES* 148, 151-53 (Arthur B. Gunlicks ed., 2003); Susan E. Scarrow, *Party Competition and Institutional Change: The Expansion of Direct Democracy in Germany*, 3 *PARTY POL.* 451, 458, 462-63 (1997).

65. DINAN, *supra* note 1, at 94-95. A popular initiative occurs when citizens force a vote on a statute without any participation of the legislature. A referendum occurs when citizens can force a vote on an already enacted measure and repeal it through a successful vote. *Id.* Of the twenty-six states that have adopted the initiative and/or referendum, only New Mexico, Maryland and Kentucky have adopted the referendum alone. *Id.* at 328 n.151. Mississippi's initiative and referendum procedures were invalidated by that state's supreme court—although Mississippi later re-adopted the constitutional initiative. *Id.*

66. Richard Briffault, *State and Local Finance*, in 3 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 211, 216, 224 (G. Alan Tarr & Robert F. Williams, eds. 2006).

67. DINAN, *supra* note 1, at 84.

68. 40 *COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES*, 353-55 tbl.6.19 (2008).

69. See J. PATRICK BOYER, *LAWMAKING BY THE PEOPLE: REFERENDUMS AND PLEBISCITES IN CANADA* 39-41 (1982). For information about referendums at the provincial level, see MOLLIE DUNSMUIR, *LIBRARY OF PARLIAMENT (CANADA), REFERENDUMS: THE CANADIAN EXPERIENCE IN AN INTERNATIONAL CONTEXT* 2 (1992) *available at* <http://www.parl.gc.ca/information/library/PRBpubs/bp271-e.pdf>. For information about referendums at the national level, see PIERRE MARQUIS, *LIBRARY OF PARLIAMENT (CANADA), REFERENDUMS IN CANADA: THE EFFECT OF POPULIST DECISION-MAKING ON REPRESENTATIVE*

However, in recent years, several provinces have begun to institute additional direct democratic procedures.⁷⁰ In 1995, British Columbia instituted the initiative and recall, and several other provinces instituted compulsory referendums on tax increases.⁷¹

In Austria, the *Länder* constitutions for many years went further than the national constitution in providing for direct democracy. Thus, whereas the Austrian Constitution permits the people to initiate consideration of a measure on the part of the national legislature and also permits the national legislature to submit measures to the people for their consideration, several *Länder* had gone even further.⁷² Among other things, in some *Länder*, the people were able to force a popular vote on a proposed or enacted measure, and if approved by the people, the *Land* legislature was required to enact it.⁷³ Citizens in several *Länder* could also use the referendum process to reconsider acts of the executive branch.⁷⁴ However, a 2001 ruling by the Constitutional Court of Austria has reduced the amount of discretion that subnational governments have in this area, thus bringing about a degree of forced parallelism.⁷⁵ In particular, the court invalidated a powerful initiative procedure in Vorarlberg, and held more broadly that direct democracy procedures in *Länder* cannot be used to supplant representative democracy.

DEMOCRACY 10 (1993) available at <http://www.parl.gc.ca/information/library/PRBpubs/bp328-e.pdf>.

70. Several Canadian provinces also provided for direct democracy for brief periods in the early twentieth century. See BOYER, *supra* note 69, at 29-39; Matthew Mendelsohn, *Introducing Deliberative Direct Democracy in Canada: Learning from the American Experience*, 26 CAN. REV. AM. STUD. 449 (1996); Campbell Sharman, *The Strange Case of a Provincial Constitution: The British Columbia Constitution Act*, 17 CAN. J. POL. SCI. 87, 105-06 (1984).

71. Shaun Bowler, Todd Donovan & Jeffrey A. Karp, *When Might Institutions Change? Elite Support for Direct Democracy in Three Nations*, 55 POL. RES. Q. 731, 736 (2002); Mendelsohn, *supra* note 70, at 453; New Brunswick Commission on Legislative Democracy, *Democratic Reform (Direct Democracy)*, Presentation to Commissioners, Jan. 8-9, 2004, www.gnb.ca/0100/ppt/PDF/democracy-e.pdf.

72. See DIRECT DEMOCRACY IN EUROPE, *supra* note 31, at 34.

73. See *id.*; Anna Gamper, *Homogeneity and Democracy in Austrian Federalism: The Constitutional Court's Ruling on Direct Democracy in Vorarlberg*, 33 PUBLIUS: J. FEDERALISM 45, 50 (2003) [hereinafter Gamper, *Homogeneity*].

74. Friedrich Koja, *Instruments of Direct Democracy in the Austrian Federal State and in its Länder*, 45 AUSTRIAN J. PUB. & INT'L L. 33, 40 (1993).

75. See Gamper, *Homogeneity*, *supra* note 73, at 49.

Moreover, the court indicated that the *Länder* may not go beyond the direct democracy procedures found in the national constitution.⁷⁶

In Switzerland, cantonal constitutions have for many years permitted more expansive use of direct democracy than at the national level. However, recent developments have expanded national institutions of direct democracy so that they are coming closer to paralleling the cantonal institutions. At the national level, for many years the main direct democratic power was the ability of the people to force a referendum on an enacted measure—though not on budget measures—and to defeat the measure at the polls.⁷⁷ Meanwhile, residents of cantons have traditionally enjoyed an even wider range of direct democratic powers. They can force referendums on spending measures as well as general statutes.⁷⁸ And they can use the initiative process to force consideration of statutory measures—a power long unavailable at the national level.⁷⁹ Two cantons even hold people's assemblies, where measures are voted on "by a show of hands."⁸⁰ However, a national constitutional amendment in 2003 introduced a "General Citizens' Initiative," that, once fully implemented, will move the national government closer to the cantons in this regard, by permitting use of the initiative process to force national legislative consideration of statutory proposals.⁸¹ Even with passage of this measure, the cantons will still permit more direct democracy than at the national level.

To conclude, although some federations exhibit parallelism regarding direct democracy, half of the federations in this study are characterized by important differences between national and subnational constitutions. And the near universal tendency in these non-parallel federations is for subnational constitutions to permit citizens to play a more direct role in governance and through a wider range of democratic mechanisms than at the national level.

76. See *id.*; Anna Gamper, *Republic of Austria*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 77, 88-89 [hereinafter Gamper, *Republic of Austria*].

77. KRIS W. KOBACH, THE REFERENDUM: DIRECT DEMOCRACY IN SWITZERLAND 43-44 (1993); Jean-François Aubert, *Switzerland*, in REFERENDUMS, *supra* note 53, at 39, 40-43.

78. Aubert, *supra* note 77, at 40.

79. *Id.*

80. Biagini, *supra* note 32, at 221; see also Wolf Linder & Isabelle Steffen, *Swiss Confederation*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 289, 305.

81. DIRECT DEMOCRACY IN EUROPE, *supra* note 31, at 122. In Switzerland, the initiative has always been an option at the national level for proposing constitutional changes. *Id.* at 119-120.

III. PRESIDENTIALISM VERSUS PARLIAMENTARISM

The adoption of a presidential versus a parliamentary system at the national level has been much discussed by scholars of comparative federalism.⁸² South American federations have mostly followed the United States' separation of powers model, where the national executive is elected and holds office independently of the legislature, and where the national executive and legislators are elected for fixed terms of office.⁸³ Meanwhile, most other federations, beginning with Canada in 1867, have more or less followed the British Westminster model, in that the executive is selected by and is responsible to the legislature, and neither the executive nor the legislators are elected for fixed terms.⁸⁴

The choice of presidentialism versus parliamentarism at the subnational level has also been the subject of some scholarly discussion. As Ronald Watts notes, in several instances

where the principle of the separation of powers has prevailed at the federal level . . . the form of government prevailing at the subnational level has in practice been in parallel In those federations, or quasi-federations with parliamentary regimes at the federal level . . . the subnational regimes have also been parliamentary in form. Where there has been a mixed form involving a combination of presidential and parliamentary institutions at the federal level . . . this has also been reflected in the prevailing form of subnational governments.⁸⁵

When we turn to examine in detail the twelve federations in this study, we find, as expected, a significant degree of parallelism between national and subnational constitutions along these lines. In fact, there is a greater degree of parallelism in this area than in any of the others examined in this study. Several notable instances of non-parallelism are deserving of mention, however.

Nearly all of these federations exhibit parallelism in the design of their executive and legislative branches at the subnational and national levels. One group of five federations—consisting of Argentina, Brazil, Mexico, the United States, and Venezuela—has presidential systems in both its national

82. See HUEGLIN & FENNA, *supra* note 22, at 58-59; WATTS, *supra* note 22, at 136-144.

83. See WATTS, *supra* note 22, at 136.

84. See *id.* at 137; Saunders, *Synthesis*, *supra* note 5, at 352-56.

85. Watts, Foreword, *supra* note 4, at 953; see also WATTS, *supra* note 22, at 138-39.

and subnational constitutions. Two of these federations are cases of voluntary parallelism. Thus, in the United States, state constitution-makers have complete discretion in structuring their state institutions, subject only to the national constitutional requirement that they be “republican” in form;⁸⁶ therefore the decision to follow the federal model has been freely chosen by state constitution-makers. To be sure, no states follow the Electoral College system in place at the national level, and two states differ in the length of terms for their state governors—two years as opposed to four years for the national president.⁸⁷ But in providing for an independently elected executive and establishing fixed terms for the executive and legislators, the states parallel the arrangement at the national level.⁸⁸ In Argentina, where subnational constitution-makers also have discretion in structuring their institutions, subject to guidelines established in the national constitution, provinces have also followed the national model of presidentialism with state and national executives elected for four-year terms.⁸⁹

The other three of these federations that are presidential at both levels are instances of forced parallelism, in that the national constitution explicitly sets out the institutional structure of the subnational executive and legislature. This is the case in Brazil—where executives at both levels serve four-year terms,⁹⁰ Mexico—where executives at both levels serve a non-renewable six-year term,⁹¹ and Venezuela—six-year terms for the president and four-year terms for governors.⁹²

Another group of federations—Australia, Austria, Canada, Germany, and Malaysia—is also characterized by parallelism, in that parliamentarism prevails at the national and subnational levels, albeit occasionally with notable differences in particular respects. Canada⁹³ and Malaysia⁹⁴ have parliamentary systems at both the national and subnational level. Germany and Austria are also characterized by parliamentarism at both levels, albeit

86. U.S. CONST. art. IV.

87. Dinan, *supra* note 10, at 329.

88. *Id.* at 327, 329.

89. Hernandez, *Republic of Argentina*, *supra* note 34, at 22.

90. Constituição Federal [C.F.] art 28 (Braz.)

91. Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], art. 115, 8 de enero de 1943 (Mex.).

92. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA ASAMBLEA NACIONAL CONSTITUYENTE, CARACAS, 1999 [Constitution] arts. 160, 230 (Venez.).

93. Thomas O. Hueglin, *Canada*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 101, 120-21.

94. Gordon P. Means, *Malaysia*, in HANDBOOK OF FEDERAL COUNTRIES, 2002 178, 182-89 (Ann L. Griffiths ed. 2002).

with notable differences regarding the head of state at the national level. Germany provides at the national level for a largely ceremonial president who serves as head of state and is selected through an Electoral College mechanism; no similar position is found in the *Länder*.⁹⁵ Meanwhile Austria provides at the national level—but not the subnational level—for a president who is popularly elected and performs some important executive functions, to the point that Anna Gamper has referred to Austria as having “a moderately presidential form” at the national level.⁹⁶ In Australia, parliamentarism prevails at the national and state level; but, as Cheryl Saunders and Katy LeRoy have written, it is noteworthy that “in the last decades of the twentieth century, the terms of the assembly in four states changed from the traditional Australian flexible three-year term to fixed or partly fixed four-year terms.”⁹⁷

Only two federations in this study—Russia and Switzerland—are characterized by a significant degree of non-parallelism in the structure of their executive and legislative branches. In Switzerland, the national constitution provides for a hybrid parliamentary/presidential system. The seven members of the executive—known as the Federal Council—are elected by the Federal Assembly, but they serve fixed four-year terms and do not depend on the support of the legislature for continuance in office.⁹⁸ However, cantonal constitution-makers have come closer to providing for a presidential system, in that the five to seven members of the cantonal executive councils are elected by the people and are independent of the legislature for their continuance in office.⁹⁹

Russia had, until recently, exhibited parallelism in that presidentialism prevailed at the national and subnational level. However, recent developments have brought about a situation of forced non-parallelism. The national constitution provides for presidentialism, where the president is directly elected for a maximum of two four-year terms, and there has been no change in this procedure.¹⁰⁰ There have been several recent developments

95. Stefan Oeter, *Federal Republic of Germany*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 135, 146-47, 152-53.

96. Gamper, *Republic of Austria*, *supra* note 76, at 80; *see also id.* at 89 (discussing *Land* executives).

97. Saunders & LeRoy, *supra* note 44, at 54.

98. Linder & Steffen, *supra* note 80, at 298-99.

99. *Id.* at 304-05.

100. Salikov, *Russian Federation*, *supra* note 36, at 293. However, Ronald L. Watts notes that in the Russian national government “a directly elected president with some significant executive powers is combined with a parliamentary cabinet responsible to the federal legislature.” WATTS, *supra* note 22, at 137.

regarding the federation subjects, which for the most part had also previously adhered to a presidential system. One development occurred in the 1990s, when one of the federation subjects sought to provide for legislative selection of the executive. This was rejected by the Constitutional Court as a violation of federal law.¹⁰¹ However, it has been made clear that regions that had already maintained alternative selection mechanisms in their constitutions or charters prior to adoption of this federal law may retain their different arrangements.¹⁰² Second, and even more important, President Putin in late 2004 pushed for elimination of the traditional direct election of regional governors, and legislation was soon passed making such a change.¹⁰³ This new procedure has itself undergone some revisions in the last few years, though. Originally, the president was empowered to nominate individuals to regional executive positions; this was then amended to give the nominating power to the dominant party in the regional legislature.¹⁰⁴ In any case, the Russian Federation is now characterized by forced non-parallelism, in that the national executive is directly elected, but due to recent changes in federal law such an arrangement is no longer an option for constituent units.

To conclude, these twelve federations are characterized by a significant degree of parallelism in the structure of their respective executive and legislative branches. To the extent that subnational constitutions depart from their national counterpart—and these departures are relatively rare—the deviating provisions have generally dealt with the head-of-state positions. Only in Switzerland and Russia does one find a substantial degree of non-parallelism on other important issues.

IV. BICAMERALISM VERSUS UNICAMERALISM

The decision of whether to adopt bicameralism or unicameralism at the national level has been well explored by scholars of comparative federalism, and the persistence of bicameralism at the national level of federations is well detailed.¹⁰⁵ In fact, it is rare for a federal system to establish a

101. Salikov, *Russian Federation*, *supra* note 36, at 296.

102. SALIKOV, *supra* note 2, at 60. Dagestan is one particular example of such a region. *Id.* Allowance has also been made, in similar fashion, for subjects of the federation to permit executives to serve more than the prescribed two terms, as long as their constitutions or charters had such provisions prior to the adoption of the federal law on this topic. *Id.*

103. Alexander Domrin, *The Russian Federation*, in LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES, *supra* note 5, at 224, 237.

104. *Id.* at 237-38.

105. See MICHAEL BURGESS, *COMPARATIVE FEDERALISM: THEORY AND PRACTICE* 204 (2006); HUEGLIN & FENNA, *supra* note 22, at 59; WATTS, *supra* note 22, at 147.

unicameral national legislature,¹⁰⁶ given the desire to provide some representation for constituent units in one house, whether by giving these units equal representation or allowing them some role in selecting members of the upper house.¹⁰⁷

Some scholarly attention has also been given in recent years to the decision of whether to adopt bicameralism or unicameralism at the subnational level. As Louis Massicotte wrote in a 2001 survey, “[e]ven among federations, the almost universal acknowledgment that second chambers are appropriate, indeed indispensable, at the national level often obscures the fact that at the subnational level of federal countries, only 73 state legislatures are bicameral out of over 450.”¹⁰⁸ In fact, Massicotte noted in 2001 that the long-term trend during the twentieth century was for subnational units within federations to gradually eliminate their second chambers,¹⁰⁹ in part, as Cheryl Saunders has explained, because “[t]he rationale for bicameralism in this sphere is difficult to establish . . . beyond a general belief in the value of a second opportunity for deliberation, whatever the party composition of the second chamber.”¹¹⁰

When we turn to examine the degree of parallelism along these lines in these twelve federations, we find that these countries can be divided into three categories. First, the majority of these federations exhibit non-parallelism, in that the national legislature is bicameral, but all subnational legislatures are unicameral. Second, several federations exhibit a degree of both parallelism and non-parallelism, in that the national legislature is bicameral and most of the subnational legislatures are unicameral, but some subnational legislatures are bicameral. Finally, one federation exhibits parallelism, in the unusual sense that both its national and subnational legislatures are now unicameral.

The first group of countries—those exhibiting non-parallelism—comprises Austria, Brazil, Canada, German, Malaysia, Mexico, and Switzerland.¹¹¹ In some cases, as in Austria, Brazil, and Malaysia, this is a

106. Currently, the federations without bicameral national legislatures are St. Kitts and Nevis, Micronesia, Comoros, the United Arab Emirates, and Venezuela. WATTS, *supra* note 22, at 147; Saunders, *Synthesis*, *supra* note 5, at 356, 381-82 n.21.

107. Saunders, *Synthesis*, *supra* note 5, at 357.

108. Louis Massicotte, *Legislative Unicameralism: A Global Survey and a Few Case Studies*, 7 J. LEGIS. STUD. 151, 151 (2001).

109. *Id.* at 153.

110. Saunders, *Synthesis*, *supra* note 5, at 373.

111. Bicameralism prevails in the national governments in each of these federal countries. See WATTS, *supra* note 22, at 149-50 tbl. 19. Unicameralism prevails in every

result of forced non-parallelism, in that the national constitution requires the constituent units to adopt unicameralism, even though the national legislature is bicameral.¹¹² In other cases, as in Canada and Germany, subnational constitution-makers have been free to choose between unicameralism and bicameralism, and at the current time all of the constituent units have chosen unicameralism. It is not that the constituent units in these federations have always been unicameral. Rather, the upper houses, where they once existed, have over time been eliminated. Thus, the five Canadian provinces that once had bicameral legislatures—Quebec, Ontario, Prince Edward Island, Nova Scotia, and New Brunswick—have long ago switched to unicameralism,¹¹³ as have the seven Brazilian states that were once bicameral.¹¹⁴ With Bavaria having eliminated its upper house in 1998, Germany also has no current bicameral *Land* legislatures.¹¹⁵

The second group of countries—those exhibiting some degree of both parallelism and non-parallelism—can be further subdivided into two subgroups. In two countries—Argentina and Russia—the subnational units generally depart from the federal model by choosing unicameralism, but some constituent units are bicameral. Thus, in Argentina, as Antonio Hernandez reports

Fifteen provinces and the city of Buenos Aires have unicameral legislatures; the remaining eight provinces have bicameral legislatures. Generally, the former are the smaller and less populous provinces, with the exception of Cordoba, which abolished its second chamber, the Senate, in 2001, largely for reasons of cost. Provinces with a bicameral system tend, conversely, to be the more populous provinces. In such provinces, the lower house . . . is constituted so as to represent the people by reference to population size, while the provincial upper house . . . represents the various geographic departments of the province.¹¹⁶

subnational government in each of these federal systems. See Massicotte, *supra* note 108, at 151.

112. On Austria, see Gamper, *Republic of Austria*, *supra* note 76, at 88. On Brazil, see Massicotte, *supra* note 108, at 166 n.14. On Malaysia, see MALAY. CONST., sched. 8, pt. I, art. 3.

113. Knopff & Sayers, *supra* note 46, at 115 & 138 n.62.

114. Massicotte, *supra* note 108, at 166 n.14.

115. Gunlicks, *supra* note 35, at 984.

116. Hernandez, *Republic of Argentina*, *supra* note 34, at 23.

In Russia, the vast majority of subnational legislatures are unicameral, but as Marat Salikov has noted, “some republics have established bicameral legislatures—for example, the Republic of Bashkortostan’s State Assembly-Kurultayi Among territorial constituent units, only the Sverdlosk region’s Legislative Assembly consists of two chambers.”¹¹⁷

In another two of these mixed countries—Australia and the United States—the constituent units invariably follow the national model of bicameralism, except for one deviating unicameral state in each case. Thus, in Australia, each state is bicameral, except for Queensland, which adopted unicameralism in 1922.¹¹⁸ And in the United States, where three states were unicameral in early American history—Pennsylvania, Vermont, and Georgia—only Nebraska is currently unicameral.¹¹⁹ This remains the only unicameral state in the United States, even as support for adopting unicameralism has grown in some other states in the aftermath of the U.S. Supreme Court’s 1960s rulings requiring both houses of state legislatures to be apportioned on a one-person/one-vote basis.¹²⁰

Finally, Venezuela, alone of these twelve federations, exhibits parallelism in the sense that its national and subnational legislatures are both unicameral. As Allan Brewer-Carias has explained, the 1999 Venezuela Constitution eliminated the upper house of the national legislature, leaving Venezuela as a rare federation with a unicameral national legislature, and thereby bringing the national legislature into line with the states.¹²¹

In summary, bicameralism is an area where subnational constitutions have generally departed from their national counterparts, and increasingly so over time. Of the twelve federations in this study, only three currently exhibit a substantial degree of parallelism in this area: Australia, the United States, and—since 1999—Venezuela. And in only two of these countries is bicameralism in place in a majority of the subnational units. Thus, whereas bicameralism is clearly the dominant choice of national constitution-makers in federations, unicameralism is just as clearly the dominant choice of subnational constitution-makers.

117. Salikov, *Russian Federation*, *supra* note 36, at 296.

118. Massicotte, *supra* note 108, at 153. The Northern Territory and Australian Capital Territory are also unicameral. Saunders & LeRoy, *supra* note 44, at 54.

119. DINAN, *supra* note 1, at 138.

120. *Id.* at 172-82.

121. Allan R. Brewer-Carias, *Centralized Federalism in Venezuela*, 43 DUQ L. REV. 629, 636 (2005).

V. CONCLUSION

My purpose has been to examine two questions: first, to what extent have subnational constitutions departed from national constitutions regarding institutional design, and second, can any patterns be identified in the differences between subnational and national constitutions? I have found that subnational constitution-makers have made rather significant use of the constitutional space allotted to them, but in certain areas more so than others. On one hand, there has been very little subnational constitutional innovation in regard to presidentialism and parliamentarism; only a few constituent units depart from their national counterparts in this regard. In three other areas, however, subnational constitutions have frequently deviated from their national counterparts, and in a particular direction. Subnational constitutions are generally easier to amend than national constitutions, whether by providing alternative amendment mechanisms not found at the national level or by eliminating burdensome ratification requirements prevalent at the national level. Subnational constitutions have frequently provided more opportunities for direct democratic participation, such as by permitting greater use of the popular initiative, referendum, and recall, and in a wider range of cases, than at the national level. And unicameralism is increasingly the norm in subnational constitutions, except for in two federations where a minority of the constituent units are bicameral, as well as another two federations where bicameralism prevails in all but one state.

These findings should be useful not only for scholars interested in building a comparative literature on subnational constitutionalism, but also for practitioners responsible for designing subnational constitutions. A leading question for individuals charged with drafting subnational constitutions is whether their efforts should be informed by the same understandings and principles as are relied upon by national constitution-makers, or whether there is something distinctive about subnational constitutions that suggests a different logic of institutional design.

As it turns out, three of the four institutions featured examined in this paper do reveal a different logic for subnational constitutionalism. To be sure, no such logic was apparent in the choice of presidentialism versus parliamentarism, as subnational constitution-makers have apparently not found that a presidential or parliamentary system is particularly ill or well-suited for subnational governance. But a distinctive logic can be discerned from the choices made by subnational constitution-makers in other areas.

Thus, the attraction of bicameralism for national constitution-makers is readily apparent, as a means of representing subnational units in the national legislature. However, bicameralism holds less appeal for subnational

constitution-makers who see little need to represent local governments in subnational legislatures.

As for constitutional amendment procedures, subnational constitution-makers have opted for easier and more accessible procedures, in part because they have been more willing to reject the complex ratifying referendum requirements that are necessary to ensure broad-based support of constituent units in national amendment processes, and in part also because they have been more willing to permit citizen-initiated constitutional change.

Finally, subnational constitution-makers have in a number of cases provided more opportunities for direct democratic participation in lawmaking than are found in national constitutions, presumably because of the greater applicability of direct democracy to smaller territories.