Patterns and Developments in Subnational Constitutional Amendment Processes

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Abstract: Subnational constitutions have attracted increasing attention due to the recent creation of state and provincial constitutions in several federations as well as notable amendments and interpretations of state constitutions in some longstanding federations. My purpose is to examine patterns and developments in the design of subnational amendment processes, with a focus on their flexibility or rigidity, the opportunities they provide for popular participation, the role played by local governments, their reliance on conventions and commissions, and the supervisory role of national officials. It becomes clear through this analysis of the sixteen federations with subnational constitutions or their functional equivalents that subnational amendment processes are distinct in many ways from national amendment processes and becoming even more distinctive, particularly in regard to their flexibility, opportunities for popular participation, and reliance on revision commissions and constituent conventions.

Long overshadowed by national constitutions in political science and legal scholarship, subnational constitutions have in recent years attracted increasing attention. This resurgence of interest is due in large part to the recent creation of subnational
constitutions or their functional equivalents in several federal systems, especially in Europe and Africa.

During the German reunification process in the early 1990s, the five original East German Lander were reconstituted and drafted new constitutions.¹ In the mid-1990s, with the adoption of a new Ethiopian constitution in 1995 and establishment of a federal system, the nine Ethiopian states also adopted constitutions.² In South Africa, with the adoption of a national constitution and creation of a federal system in 1996, provinces were authorized to adopt their own constitutions; although the Kwa-Zulu Natal provincial constitution was not certified,³ the Western Cape provincial constitution took effect in 1998.⁴ Meanwhile, in Sudan, a Comprehensive Peace Agreement of 2005 called for creation of a decentralized system and drafting of a national constitution and a Southern Sudan constitution as well as constitutions for each of the 25 states.⁵ Moreover, adoption of the Spanish Constitution of 1978 and creation of a quasi-federal system led to the immediate adoption of Autonomous Community Statutes in Catalonia and the Basque Region and eventually in other regions. And a recent resurgence of interest in these Spanish Autonomous Community Statutes has led since 2005 to the replacement or redrafting of a number of these documents.⁶ Finally, although Canadian provinces have

⁶ Rosario Serra and Pablo Onate, “The Reform of the Spanish Subnational Constitutions: Rules and Regulations and Political Contexts” (prepared for a Workshop on “Subnational Constitutions in Federal
not drafted constitutions as such,\(^7\) except in the case of British Columbia,\(^8\) “[b]oth Quebec and more recently Alberta have shown interest in developing modern, democratic provincial constitutions.”\(^9\)

Consequently, as we near the end of the first decade of the 21\(^{st}\) century, the majority of federal systems boast subnational constitutions or their functional equivalents. It is true that subnational governments in several federations, most notably India and Nigeria, have not drafted constitutions. But subnational constitutions are now found in the federations of Argentina, Australia, Austria, Brazil, Ethiopia, Germany, Malaysia, Mexico, Russia, South Africa, Sudan, Switzerland, the United States, and Venezuela. Provinces in Canada have what has been termed constitutional statutes. And in Spain, a quasi-federal country, Autonomous Communities have autonomy statutes.

Scholarly interest in subnational constitutions has also been spurred by recent amendments or judicial interpretations with important public policy consequences, particularly in the United States but also in several other federations. In the U.S., where

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Scholars have advanced various reasons why Canadian provinces have not gone further in developing subnational constitutions along the lines found in many other federations. According to Morton, a leading explanation has long been that the notion of an entrenched constitution has not generally been seen as compatible with a Westminster system of parliamentary supremacy. However, as Morton notes there are signs that Canada has also overcome this concern with adoption of the 1982 Charter of Rights. A second and more persuasive explanation in the contemporary era, according to Morton, is a concern that the Supreme Court of Canada would be responsible for interpreting the meaning of Canadian provincial constitutional provisions, and so rather than contributing to an enhancement of provincial power, the entrenchment of provincial constitutions may in practice have the opposite effect (p. 3).
several states can lay claim to having drafted the world’s first modern constitutions, prior
to adoption of the federal constitution in 1789, state constitutions have long played a
prominent role in governance and continue to do so in the 21st century. In fact, it was
through interpretations of state constitutional provisions that state supreme courts in
Massachusetts (2003), California (2008), and Connecticut (2008) brought about
legalization of same-sex marriage. And it was by adopting a subsequent state
constitutional amendment that the citizens of California in November 2008 overturned
the California supreme court’s marriage ruling and prohibited issuance of any more
same-sex marriage licenses.10 This is only the most recent public policy issue in the U.S.
to be addressed primarily through interpretation and amendment of state constitutions.
One could also take note of recent state constitutional amendments limiting use of racial
preferences and providing heightened protection for private property by preventing
invocation of the eminent domain power for economic development purposes.11

Notable recent subnational amendments and interpretations have not been
confined to the U.S. In Mexico in late 2008 and early 2009, the states of Sonora, Baja
California, Morelos, and Colima adopted constitutional amendments granting rights to
persons from the moment of conception onward. This was done in an effort to prevent
enactment of more permissive abortion laws in the aftermath of a March 2008 Supreme
Court ruling declining to recognize a federal right to life beginning at conception.12
Meanwhile, in Australia, which does not have a national bill of rights but where the

KY: Council of State Governments, 2007), p. 6
Australian Capital Territory adopted a bill of rights in 2004, Victoria in 2007 became the first state to adopt a bill of rights.\(^\text{13}\)

These developments have led to a resurgence of public and scholarly interest in state, provincial, Lander and cantonal constitutions in particular federations; they have also generated calls for more comparative studies of subnational constitutions.\(^\text{14}\) Professors G. Alan Tarr and Robert F. Williams at the Center for State Constitutional Studies at Rutgers University have spearheaded recent efforts to increase comparative knowledge in this area.\(^\text{15}\) Among other things, these and other scholars have surveyed the amount of “space” that subnational constitution-makers have in which to innovate; they have also urged more comparative inquiries into the content of subnational constitutions and the processes by which they are created and changed.\(^\text{16}\) Regarding the content of subnational constitutions, Tarr has raised a series of research inquiries: “[H]ow similar are the subnational constitutions to one another? . . . Are governmental institutions, rights protections, distributions of powers and other matters different from or similar to those contained in the national constitutions? Is there a standard set of matters and issues – a

\(^{13}\) Larissa Dubecki, “Victoria to be first state to adopt a human rights charter,” The Age (Melbourne, Australia), December 8, 2007, p. 11.


checklist – that should be dealt with in any subnational constitution?” 17 Tarr has also set out a list of research questions regarding subnational constitution-making processes: “Is there anything in the national constitution that mandates certain provisions or matter be contained in the state constitutions? What is the role of popular sovereignty or constituent power in the process of adopting, amending and revising the subnational constitution . . .” 18

I am concerned with pursuing the latter of these research inquiries, by undertaking a comparative study of the design of subnational constitutional amendment processes. In general, constitutional processes, as distinct from outcomes, have attracted increasing scholarly attention from students of constitutionalism in recent years. 19 And several of these scholarly studies have been concerned in particular with examining constitutional processes in federal countries. 20 As for subnational constitutional processes in federal countries, brief efforts have been made at analyzing this topic as part of larger projects on

18 Ibid.
subnational constitutionalism.21 But we do not yet have the benefit of a sustained inquiry focused specifically on dominant patterns and developments in subnational constitutional amendment processes.

I seek to fill this gap by analyzing general patterns and recent trends in regarding to the processes for amending and reforming subnational constitutions. In particular, I analyze subnational amendment processes in regard, first, to their flexibility or rigidity, and particularly the degree of reliance on legislative supermajorities. Second, I analyze the degree to which they provide opportunities for direct popular participation in initiating or ratifying subnational amendments. Third, I analyze whether they provide opportunities for formal participation by local governments in the subnational amendment process. Fourth, I analyze the extent to which institutional mechanisms such as revision commissions and conventions are utilized in subnational amendment processes. Finally, I analyze whether national officials are required to supervise or approve subnational amendments.

The principal lesson to emerge from this study of the sixteen countries with subnational constitutions or their functional equivalents is that subnational amendment processes are distinct in many ways from national constitutional processes and are becoming even more distinctive, particularly in regard to their flexibility, opportunities for popular participation, and reliance on revision commissions and constituent conventions.

Flexibility versus rigidity

Although constitution-makers at national and subnational levels rely on a variety of procedures for initiating and ratifying constitutional changes, legislatures play an important role in nearly all constitutional reform processes at both levels. The ease or difficulty of securing legislative approval of amendments is a chief determinant of the rigidity or flexibility of these processes.

There are, of course, other factors affecting rigidity or flexibility other than the choice of a legislative majority versus supermajority requirement. For instance, several national constitutions – Australia and Canada are leading examples – require a bare legislative majority to propose amendments but are still quite difficult to amend because they have rigorous ratification requirements. Nevertheless, rigidity and flexibility of constitutional processes is determined in many instances by whether changes require legislative approval by a bare majority or a narrow supermajority on one hand or a substantial supermajority on the other hand.

National constitutions in federal countries invariably require amendments to be approved by a legislative supermajority, usually by a two-thirds vote. To be sure, exceptions can be found. The Brazil Constitution requires approval by only three-fifths of national legislators (albeit on two readings), as does the Constitution of Russia as part of the dominant amendment mechanism in that federation. And several countries permit changes to their national constitution to be approved by a bare legislative majority, as in Australia, Canada, Switzerland, and Venezuela, although this is just the first step in the amendment process in each of these countries. For the most part, however, federations
require constitutional changes to be approved by substantial supermajorities of national legislators.

In contrast, subnational amendment procedures are rarely more rigid than national procedures and are in some cases more flexible in their legislative approval requirements. Admittedly, some subnational amendment procedures fall on the rigid side, in that they require more than a two-thirds legislative majority. State constitutions in Ethiopia can be amended only by a three-fourths vote of state parliaments. And several Argentine provincial constitutions fall in the extra-rigid category, with Formosa requiring a four-fifths legislative vote for amendments, and Santiago del Estero requiring a three-fourths legislative vote for a total constitutional reform.

Still other subnational constitutions, it should be acknowledged, follow the dominant national pattern of requiring two-thirds legislative majority approval for constitutional changes, and so are neither more nor less flexible than most national constitutions. This is the dominant procedure for approval of subnational constitutional changes in Austria, Germany, Malaysia, Mexico, Russia, and South Africa. Some provinces in Argentina also allow amendments to be approved upon a two-thirds legislative vote. Some Australian states have entrenched particular constitutional provisions (mostly concerning the legislative institution), by requiring two-thirds legislative approval for any changes. And 18 U.S. states permit amendments to be approved by a two-thirds legislative vote.

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However, other subnational constitutions are more flexible, in that they permit constitutional changes upon less than a two-thirds legislative vote. Such is the case in Brazil, where provincial constitutions can be changed with approval of only three-fifths of legislators. Several Spanish autonomy statutes also permit amendments upon a three-fifths legislative vote.²⁶

Most notably, in several federations changes to subnational constitutions require only a majority legislative vote. In Canada, provincial constitutional statutes are changed by a mere majority of legislators. Such is also the case for changes to most Australian constitutions, at least the provisions that have not been entrenched by requiring supermajority approval. Moreover, and most distinctively, 17 U.S. state constitutions permit constitutional changes to be approved by a mere majority of state legislators.²⁷

In fact, focusing specifically on the U.S. states, constitutional reformers in several U.S. states have found that it is easier to enact policy reforms through the constitutional amendment process than through the legislative process. Such was the case recently in Wisconsin, where supporters of a voter-identification requirement in 2006 were unable to overcome a gubernatorial veto and so turned (ultimately unsuccessfully) to the constitutional amendment process, which requires only a majority of legislators to submit amendments and does not involve the governor in any way. A similar scenario unfolded in 2007 in Oregon, where supporters of a cigarette-tax increase to fund health care for children found their efforts blocked in the state legislature by a supermajority requirement for enacting tax increases, and so they turned instead (in a measure

ultimately defeated at the polls) to the constitutional amendment process, which requires only a bare legislative majority to submit changes to the people.\textsuperscript{28}

Popular participation

Another key decision in designing constitutional amendment processes is whether to provide any formal role for the citizenry. Of course, all constitution-making processes are responsive to public opinion in an informal sense, in that public officials in the course of submitting or approving constitutional changes can be expected to be responsive to their constituents and act in accord with popular opinion. But the pertinent question for constitutional design purposes is whether to institutionalize a formal role for the people in the amendment and revision process.

Popular involvement in constitution-making can be institutionalized in several ways. At a minimal level, this can take the form of permitting citizens to play a formal role in proposing amendments that are then considered by legislators. A greater degree of popular involvement is found in constitutions that require the citizenry to ratify changes proposed by legislators, convention delegates, or commissioners. And the most significant opportunities for direct popular participation in constitution-making are afforded in regimes where the citizenry can initiate and ratify constitutional changes independently of other public officials.

National constitutions in federal countries generally do not provide for direct popular participation in constitutional change in any of these respects. Only one federal

country examined in this study permits the people to formally propose amendments. Venezuela allows amendments or reforms to be formally proposed by 15 percent of registered voters, in which case they are then considered by the National Assembly.29

Seven federations in this study require or permit national constitutional changes to be ratified in a popular referendum. Australia and Switzerland require ratification by a majority of voters in a majority of states and cantons, respectively. And Venezuela requires all constitutional changes to be ratified by a majority of voters.30 In these three federations, then, all constitutional changes must be ratified by the people, regardless of the significance or circumstances. In another four of these federations, certain national constitutional changes can or must be submitted for popular approval. In Austria, a total constitutional revision must be ratified in a national popular referendum; a partial revision must be submitted to a referendum if one-third of the members of either legislative chamber request such a vote.31 The Constitution of Spain requires all constitutional revisions to be ratified by a majority of voters at a referendum and, moreover, it stipulates that minor amendments must be ratified in a popular referendum if requested by one-tenth of the members of either house of the national legislature.32 The Russian Constitution stipulates that in case a Constitutional Assembly is called to draft a new national constitution, the resulting constitution can be approved either by a two-thirds vote of the deputies to the Constitutional Assembly or ratified by a majority of the people in a referendum.33 And Sudan requires a popular ratifying referendum to be held in case the National Assembly approves an amendment “contrary to the basic principles”

29 Venezuela Constitution, Articles 341, 342.
30 Venezuela Constitution, Articles 341, 344.
31 Constitution of Austria, Article 44.
32 Spain Constitution, Articles 167, 168.
33 Russia Constitution, Article 135 (3).
underlying the constitutional system (which principles are set out in detail in the rest of the article).\(^{34}\)

Finally, only one federation permits the people to initiate and ratify national constitutional changes independently of other officials. Switzerland stipulates that if 100,000 citizens request a change in the national constitution, then this triggers the process of partial or total revision, and the proposed change must be submitted to a popular referendum.\(^{35}\)

These exceptions to the dominant pattern having been noted, the dominant pattern at the national level, as reflected in the choices made by a majority of federations, is not to provide any formal role for the people in making changes to their national constitutions. Such is the case in Argentina, Brazil, Canada, Ethiopia, Germany, Malaysia, Mexico, South Africa, and the United States, none of which involve the citizenry in a direct fashion in national constitutional changes.

Subnational constitutions, by contrast, are more prone to involving the people in a direct fashion in amendment and revision processes. In fact, the vast majority of federations contain at least some subnational constitutions that permit direct popular participation in constitutional change.

First, in several federations, some subnational constitutions permit the people to play a formal role in proposing amendments. In Russia, several federation subjects give the people this sort of opportunity, including the Republic of Ingushetia, where 10,000 citizens can make a formal proposal, and the Sverdlovsk region, where 50,000 citizens

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\(^{34}\) Sudan Constitution, Article 139 (3).

\(^{35}\) Switzerland Constitution, Articles 120, 121.
can make a proposal. Several Spanish Autonomous Communities also permit the people, among other bodies, to formally propose changes to certain parts of their autonomy statutes, as in Catalonia, where a petition containing 300,000 signatures triggers the constitutional reform process.

Second, a substantial number of subnational constitutions require a popular referendum to approve changes submitted by legislators, conventions, or commissions. Several provincial constitutions in Argentina require amendments approved by a supermajority of provincial legislators to be ratified in a popular referendum. In Australia, several states have entrenched state constitutional provisions (mostly concerning the legislative institution) by requiring changes to be ratified in a popular referendum. Two Austrian Lander – Salzburg and Vorarlberg – require that certain extraordinary constitutional changes be approved in popular referendums. Several German Lander require approval of all amendments in a popular referendum. The dominant pattern in Russian federation subjects is to require significant reforms of constitutional provisions to be drafted in a Constitutional Assembly, whose members are free to either adopt the reform themselves or submit it to a popular referendum. In Spain, meanwhile, all of the Autonomous Communities that gained their autonomy through a fast-track process – Catalonia, the Basque Country, Galicia, and Andalusia –

37 Cataloniia Autonomous Community Statute, Art. 222 (1)(a).
38 Hernandez, Argentina Subnational Constitutional Law, p. 45. See, for example, the Constitution of the Province of La Rioja, Art. 161.
are required to submit changes to a popular referendum.\textsuperscript{43} In Sudan, one Southern state constitution – Bahr el Jebel – requires approval of constitutional changes by a two-thirds supermajority in a popular referendum.\textsuperscript{44} Finally, 49 U.S. states – all but Delaware – require popular approval of constitutional changes, generally by a majority vote, but by a three-fifths popular vote in Florida and a two-thirds popular vote in New Hampshire.\textsuperscript{45}

Third, several subnational constitutions involve the people in the process of reforming constitutions in still a different sense, in that they require a popular referendum to be held after the legislature issues a call for a revision convention but before a convention is held. This is the case in several provinces in Argentina, where the legislature after declaring the need for a constitutional reform, must submit the matter to a popular referendum in order to determine whether the public supporting the calling of a constitutional reform convention.\textsuperscript{46} This is also the procedure in place in 43 U.S. states.\textsuperscript{47}

Finally, in three federations – Germany, the U.S., and Switzerland – some or all subnational constitutions go the furthest in providing for popular involvement in constitutional changes, in that they permit citizens to initiate and ratify amendments independently of the legislature. Thirteen German Lander provide for the constitutional initiative process, whereby citizens can initiate and force a vote on constitutional amendments.\textsuperscript{48} Eighteen U.S. states also allow for constitutional initiatives.\textsuperscript{49} Sixteen of these U.S. states utilize a direct constitutional initiative process, where varying numbers

\textsuperscript{44} Murray and Catherine Maywald, “Subnational Constitution-Making in Southern Sudan,” p. 1230.
\textsuperscript{45} Dinan, “State Constitutional Developments in 2006,” p. 11.
\textsuperscript{46} Hernandez, Argentina: Subnational Constitutional Law, p. 45. See, for instance, the Constitution of the Province of Buenos Aires, Article 206.
of citizens can force a vote on a constitutional amendment without any participation of the legislature. Another two states – Massachusetts and Mississippi – utilize an indirect constitutional initiative. In Massachusetts, the legislature can block a citizen-initiated amendment from going before the people, because one-fourth of the legislators must approve an initiated amendment before it can be submitted. In Mississippi, the legislature has the opportunity to consider an initiated amendment before it is placed on the ballot, and legislators can place before the people an amended or alternative version of the measure alongside of the original initiated amendment. Finally, every one of the Swiss cantonal constitutions provides for an indirect constitutional initiative procedure along the lines of the system in place in Mississippi.

Participation of local governments

Federal systems generally stipulate that when it comes to making changes in their national constitution that subnational governments play an important role. As Cheryl Saunders has written: “The same logic that requires an overriding constitution as the basis for federal arrangements suggests that the constitution should not be able to be amended by a single order of government.”

There are, to be sure, exceptions to the dominant pattern whereby changes to federal constitutions involve state, provincial, cantonal, or Lander governments in the

50 Massachusetts Constitution, Art. 48.
51 Mississippi Constitution, Section 273.
process. Argentina, Austria, and Venezuela, are the clearest exceptions; their national constitutions can be changed without any formal participation of subnational governments. Germany is another exceptional (though not so clear-cut) case, in that Lander play no formal role in the national amendment process; however, because Lander officials sit in the Bundesrat, whose approval is required for constitutional changes to the German constitution, the Lander can be said to play a role. Australia and Switzerland are two other exceptional (though, again, not clear-cut) cases. Although state and cantonal governments play no formal role in approving national amendments in either of these two federations, the processes do take account of subnational boundaries in so far as changes have to be approved by a majority of voters in a majority of subnational units.

All of the other federations examined in this study provide for some type of formal involvement of subnational governments in the national amendment process. At times, this involves stipulating that subnational governments can formally propose constitutional amendments that are then considered by the national government. Such is the case in Brazil, where amendments can be proposed by one-half of the state legislative assemblies;\(^54\) Ethiopia, where amendments can be proposed by one-third of the state parliaments;\(^55\) Spain, where amendments can be proposed by the legislative assemblies of the Autonomous Communities;\(^56\) Sudan, where amendments can be proposed upon the request of one-third of the state legislative councils;\(^57\) and Russia, where amendments can be proposed by legislative assemblies of the federation units.\(^58\) Moreover, in the U.S., if

\(^{54}\) Constitution of Brazil, Article 60 (III).
\(^{55}\) Ethiopia Constitution, Article 94.
\(^{56}\) Constitution of Spain, Article 87.
\(^{57}\) Constitution of Sudan, Article 139(1).
\(^{58}\) Constitution of Russia, Article 134.
two-thirds of the state legislatures petition Congress for a constitutional change, Congress is required to call a federal constitutional convention.\textsuperscript{59}

Even more important, national constitutional changes in a number of federal systems must be \textit{ratified} by some or all subnational governments. Sometimes, such approval is only required when an amendment applies to specific subnational government; in these instances, the affected governments must be given a chance to ratify or reject the proposed change. Such is the case in South Africa for amendments affecting any province.\textsuperscript{60} Such is also the case in Malaysia, at least for amendments affecting the Borneo states of Sabah and Sarawak, whose governors must approve any changes affecting their states.\textsuperscript{61}

For the most part, approval of subnational governments is required for any changes to national constitutions, not only for changes affecting particular subnational units. Changes to the Constitution of Mexico must be approved by a majority of state legislatures.\textsuperscript{62} The Russian Federation requires changes to the national constitution to be approved by two-thirds of the subnational governments.\textsuperscript{63} The Constitution of Ethiopia requires most changes to be approved by two-thirds of state legislatures;\textsuperscript{64} significant constitutional changes must be approved by all state legislatures.\textsuperscript{65}

Changes to the U.S. Constitution must be ratified by either three-fourths of state legislatures (utilized in 26 of

\textsuperscript{59} U.S. Constitution, Article V.
\textsuperscript{60} Constitution of South Africa, Article 74(8). In fact, South African provinces are given even more influence, in that they are given formal representation (much like in Germany and in a voting practice similar to the pre-1787 Articles of Confederation in the U.S.) in the upper house of the national legislature (Council of Provinces). And for significant constitutional amendments, approval of six of the nine provinces is required in the Council of Provinces.
\textsuperscript{61} Constitution of Malaysia, Article 161(2), noted in Watts, \textit{Comparing Federal Systems}, p. 163.
\textsuperscript{62} Constitution of Mexico, Article 135.
\textsuperscript{63} Constitution of Russia, Article 136.
\textsuperscript{64} Constitution of Ethiopia, Article 93(1)(a).
\textsuperscript{65} Constitution of Ethiopia, Article 93(2)(b).
the 27 ratified amendments) or three fourths of state conventions called into being for this purpose (utilized only once, to adopt the 21st Amendment that repealed national prohibition).66

As for changes to Canada’s constitution, most amendments must navigate a complex procedure requiring approval of the legislative assemblies in two-thirds of the provinces making up at least half of the country’s population.67 However, changes that affect important matters such as senate representation, composition of the supreme court, and use of the English or French language must be approved by all provincial legislatures.68 And changes that affect the powers or rights of a particular province must be approved by the affected provincial legislature.69

These, then, are the procedures in place for involving subnational governments in the process of changing national constitutions; the dominant pattern is for federal systems to require some sort of formal participation, although the type of participation varies widely. Subnational constitutional amendment processes, by contrast, are less prone to require involvement of sub-state governments. This is in part due to the fact that the relationship between national and subnational governments differs from the relationship between subnational and municipal governments. Subnational governments are often given formal representation in national governments and in some cases were created prior to them; states are therefore often entitled to formal representation in constitution-making processes. But municipal governments generally do not play the same sort of role in relation to state governments and so they are not given a formal part in changing state

66 U.S. Constitution, Article V.
68 Constitution Act, 1982, Article 41.
69 Constitution Act, 1982, Article 38(2).
constitutions. A second reason for the lack of a formal role for sub-state governments in changing state, provincial, cantonal, and Lander constitutions is that many of these subnational constitutions involve the people directly in these processes, and this is seen as obviating the need for involvement by local governments. Thus, whereas changes to national constitutions frequently require approval of state governments, subnational constitutions frequently require ratification by the people.

The subnational constitutions that do provide a formal role for sub-state governments are clear exceptions to the dominant pattern of not involving these governments in the process. At times, subnational constitutions permit sub-state governments to propose constitutional changes. Thus, in Spain, several autonomy statutes provide that one of the various routes to proposing amendments is through requests from city councils. Catalonia permits amendments to be proposed by 20 percent of the plenary city councils. Meanwhile, in Brazil, some state constitutions permit amendments to be proposed by a percentage of the city councils. A similar practice prevails in several Russian federation subjects. In the Tyumen Region, changes can be proposed, among other ways, by one-third of “the bodies of local self-government.”

In South Africa, municipal governments are given a formal consultative role in the process of changing the Western Cape constitution. In particular, proposed changes must be submitted to “municipalities within the Western Cape for their views,” and the

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70 Autonomy Statute of Catalonia, Article 222(1)(a).
71 Twomey, “The involvement of sub-national entities in direct and indirect constitutional amendment within federations,” pp. 28-29 n170.
sponsoring legislator or committee must submit “any written comments received from the public and from municipalities for tabling in the Provincial Parliament.”

Mexico is the only federal system where sub-state governments are permitted to play a formal role in approving changes to subnational constitutions. In a majority of Mexican states, changes proposed by a permanent state Constituent Congress only take effect if they are approved by a majority of the municipal councils in the state.

Reliance on conventions and commissions

Legislators and citizens are generally the dominant actors in constitutional reform processes, but some constitution-makers have devised other mechanisms that do not rely solely on legislatures and the citizenry. One possibility is to establish revision commissions, which can be staffed in various ways and can play various roles in the process. Another possibility is to make allowance for conventions that are responsible for undertaking major reforms. An important question for those charged with designing constitutional reform processes is therefore whether to permit or require use of commissions or conventions.

It is important here to distinguish between the processes used for the initial drafting of constitutions from the processes for the reform and amendment of existing

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73 Constitution of the Western Cape Province, Article 10(2).
75 The use of commissions and conventions is discussed in McWhinney, Constitution-Making, pp. 27-29, 33-36.
constitutions. It is not unusual for commissions to be established and given an advisory role in the initial drafting process in the formation of a polity. And constituent conventions and assemblies are seen as particularly appropriate in drafting inaugural constitutions for emergent political systems. But it is another matter to involve commissions and conventions in a formal fashion in the process of reforming constitutions.

Few federations make explicit provision for commissions or conventions in changing their national constitutions. No federations in this study make formal provision for commissions in revising or amending their national constitutions. To be sure, commissions can occasionally play an informal, advisory role in such reform processes. But there are no formal procedures by which commissions can initiate changes that are then considered by legislatures or are submitted to a popular referendum.

As for the use of constituent conventions to reform national constitutions, only four federations in this study allow for the convening of such assemblies. Argentina provides for the calling of a Constitutional Assembly in the event that two-thirds of the members of Congress declare the need for a constitutional reform. In the U.S., two-thirds of state legislatures can petition Congress to call a Constitutional Convention. Meanwhile, the Russian Federation provides for the calling of a Constituent Assembly when three-fifths of the members of the Federation Council and State Duma agree on the need for a reform. Moreover, such an Assembly has the power to either promulgate a new Constitution, if two-thirds of the deputies agree, or submit the proposed constitution

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77 Argentina Constitution, Article 30.
78 U.S. Constitution, Article V.
to a popular referendum. Finally, the Venezuelan Constitution provides that with the support of the president and his ministers, or two-thirds of the national assembly, or two-thirds of the municipal councils, or 15 percent of the voters, a National Constituent Assembly can be called “for the purpose of transforming the State, creating a new juridical order, and drawing up a new Constitution.”

Commissions and conventions are somewhat more prevalent in the reform of subnational constitutions. In terms of commissions, two states in the U.S. have in recent decades given commissions a formal role in state constitutional amendment processes. The Utah Legislature created a Constitutional Revision Commission and gave its members an ongoing charge to recommend constitutional amendments that are then considered by the legislature. In recent years, this commission has been responsible for initiating several successful amendments, including a clarification of the gubernatorial succession procedure. The Florida Constitution goes the furthest of any U.S. state, or any other constitution in the world for that matter, in empowering constitutional reform commissions to submit changes directly to the people for their approval. In 1968, Florida created a Constitution Revision Commission whose members are appointed by the governor and legislature and meet every 20 years to propose constitutional changes to the people. Then, in 1988, Florida created the Taxation and Budget Reform Commission, which also meets every 20 years and can submit constitutional changes dealing

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79 Constitution of Russia, Article 135.
80 Constitution of Venezuela, Article 348.
81 Constitution of Venezuela, Article 347.
82 Dinan, “State Constitutional Developments in 2008.”
specifically with fiscal matters. This commission finished its latest meeting in 2007-2008 and three of its recommendations were approved by voters in the 2008 election.83

Constituent conventions and assemblies are especially prevalent at the subnational level. In some federations, conventions play a role in reforming subnational constitutions that is very similar to their role in the reform of their national constitutions. Such is the case in Argentina, where provincial constitutions are generally reformed through Constituent Conventions or Reforming Conventions convened when two-thirds of provincial legislators declare the need for a reform.84 This is also the case in Russia, where some republics provide for the calling of a Constitutional Assembly to undertake a major constitutional reform, and such an assembly is permitted to either promulgate a new constitution or submit it for popular approval.85

In other federations, conventions can be used to reform both national and subnational constitutions but are used much more frequently at the subnational level. The U.S. is an exemplary case. Since the drafting of the U.S. Constitution in a convention in 1787, there have been no other federal conventions. But the 50 U.S. states have held a total of 233 constitutional conventions from 1776 to the present. The procedures vary for calling these state conventions into sessions, but ordinarily a convention call must be approved by a supermajority vote of the state legislature and by a majority vote of the people. Moreover, in a procedure that echoes Thomas Jefferson’s call for each generation to reassess the suitability of its constitution, fourteen U.S. states go so far as to require that the people vote periodically – often every 20 years – on whether to call a

83 Dinan, “State Constitutional Developments in 2008.”
84 Hernandez, Argentina Subnational Constitutional Law, p. 44.
convention to consider reforms of their state constitution.\textsuperscript{86} Three states – Connecticut, Hawaii, and Illinois – held periodic convention questions of this sort on November 2008; but each referendum was rejected by a healthy margin.\textsuperscript{87}

In several other federations, conventions are found only at the subnational level. In Mexico, the dominant mode of changing state constitutions is through a Permanent Constituent Congress, which is convened upon the vote of two-thirds of state legislators and has the power to draft reforms that usually must be approved by a majority of the municipal councils.\textsuperscript{88} In Switzerland, several cantons provide that a total constitutional revision shall be undertaken by a Constituent Assembly whose members are appointed for this task.\textsuperscript{89}

The supervisory role of national officials

A final question unique to the design of subnational amendment processes is whether to permit national officials to play a formal supervisory role in approving or rejecting constitutional changes. This question, it should be emphasized, is distinct from two other questions that might profitably be posed. This question is distinct, in the first place, from whether subnational constitutional provisions can be challenged in court as incompatible with supremacy, homogeneity, “republican form of government,” or other guarantees in national constitutions. Clauses of this sort are the norm in federations, as is

\textsuperscript{87} Dinan, “State Constitutional Developments in 2008.”
\textsuperscript{88} Gonzalez, “United Mexican States,” p. 215.
\textsuperscript{89} Biaggini, “Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Switzerland,” p. 220.
the opportunity for plaintiffs to invoke these clauses in the course of legal challenges seeking invalidation of state or provincial constitutional provisions.\textsuperscript{90} For instance, focusing on the U.S. case, it is well established that a state constitutional provision can be challenged in the course of litigation on the ground that it violates the equal protection clause or other rights guarantees in the federal constitution. The pertinent question for present purposes is a different one: whether there is a formal procedure whereby national officials are required to examine each subnational constitutional change and give their approval \textit{before} it takes effect.

The present question can also be distinguished from a second question that might be examined: whether national officials are required to play a supervisory role in approving the initial constitution of a subnational unit, as is the case in some federations. In the U.S., for instance, states entering the union after 1789 were required to secure congressional (and in some cases presidential) approval for their constitutions.\textsuperscript{91} And in some cases states were forced to change their constitutions to comply with presidential directives, as when Arizona had to remove its judicial recall provision upon entering the union in 1912. However, this initial supervisory role does not necessarily extend – and does not in the U.S. extend – to reviewing amendments of existing subnational constitutions. To continue the story about the Arizona judicial recall provision, Arizona complied with the directive to eliminate the offending state constitutional provision, but as soon as the state entered the union, the citizens of the state promptly reenacted the

\textsuperscript{90} For a discussion, see Tarr, “Taking Subnational Constitutions Seriously,” pp. 8-9.
\textsuperscript{91} Tarr, “Taking Subnational Constitutions Seriously,” p. 7.
provision and there was no procedure by which congress or the president could order its repeal. The provision endures in the Arizona Constitution to this day.92

The dominant pattern in the 16 federations in this study is not to give national officials an ongoing supervisory role in approving changes to subnational constitutions.93 However, to the extent that a recent trend can be identified it is in the direction of authorizing national officials to perform such a function. Thus, only four of the 16 federations in this study provide an ongoing supervisory role by national officials of some sort, but each of these national procedures was adopted in the last three decades. The South Africa Constitution requires that the Constitutional Court approve all amendments to provincial constitutions before they can take effect.94 The Sudan Constitution lodges this function in the Ministry of Justice.95 And the Spanish Constitution requires this function to be performed by the national parliament.96 Finally, in Canada, the Constitution Act stipulates that although provinces have the authority to amend their own constitutions,97 any effort by a province to alter the office of its Lieutenant Governor must be approved by the national parliament and the legislatures of all other provinces.98

Conclusion

93 For a discussion of several federations that do include such a provision, see Tarr, “Taking Subnational Constitutions Seriously,” p. 8.
94 South Africa Constitution, Article 144.
96 See, for instance, the Autonomy Statute of Catalonia, Article 222(1)(b).
97 Constitution Act, 1982, Article 45.
98 Constitution Act, 1982, Article 41(a).
The lesson to emerge from a review of dominant patterns and recent trends in subnational constitutional processes is that these processes are distinct in notable ways from national constitutional processes and are becoming more distinctive over time. First, subnational amendment processes are slightly more flexible than their national counterparts, in that they occasionally require a smaller legislative majority to approve constitutional changes. Second, subnational amendment processes are more likely than their national counterparts to involve the citizenry in a direct fashion in bringing about constitutional change and less likely to involve lower governmental actors. Third, subnational amendment processes are somewhat more likely than their national counterparts to rely on revision commissions and constituent conventions in the constitutional reform process. Finally, although the vast majority of federations do not require subnational amendments to be approved by national officials (as distinct from permitting legal challenges to these amendments and requiring approval of inaugural subnational constitutions), in the last several decades several federations have begun to impose such requirements. The benefit of this analysis and these conclusions is to show that scholarly efforts to derive and discuss general principles of constitutional design would do well to recognize that although some principles are equally applicable to national and subnational governments, other principles hold with greater or lesser force depending on whether they are applied to federal or subnational constitutions.