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Recommended Citation

Antoni A. i Ninet & James A. Gardner, *Distinctive Identity Claims in Federal Systems: Judicial Policing of Subnational Variance*, 14 Int'l. J. Constit. L. 378 (2016).

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Distinctive identity claims in federal systems: Judicial policing of subnational variance

Antoni Abat i Ninet* and James A. Gardner**

It is characteristic of federal states that the scope of subnational power and autonomy are subjects of frequent dispute, and that disagreements over the reach of national and subnational power may be contested in a wide and diverse array of settings. Subnational units determined to challenge nationally imposed limits on their power typically have at their disposal many tools with which to press against formal boundaries. Federal systems, moreover, frequently display a surprising degree of tolerance for subnational obstruction, disobedience, and other behaviors intended to expand subnational authority and influence, even over national objection. This tolerance, however, has limits. In this article, we examine a set of rulings by national constitutional courts invalidating formalized claims by subnational units to a distinctive subnational identity. The emphatically negative reactions of these courts suggest that the legal formalization of distinctive identity claims is perceived by courts to pose an unusually acute threat to the state.

1. Introduction: national-subnational contestation in federal states

Federalism is a tool that groups of people who aspire to live together deploy in an effort to manage tensions and disagreements that they anticipate may from time to time divide them. It seeks not to eliminate such tensions, which it regards as to some degree inevitable, but instead to channel and defuse them in ways that do not threaten the

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This article has profited enormously from comments received from workshop audiences at Hebrew University, Lewis and Clark Law School, SUNY Buffalo Law School, the University of Copenhagen, the World Congress of the International Association of Constitutional Law in Oslo, Norway, and the European Academy, Institute for Studies in Federalism and Regionalism in Bolzano, Italy, where Professor Gardner served as Federalism Scholar-in-Residence in February, 2015. We also received helpful comments on an earlier draft from Or Bassock, Guyora Binder, Graham Butler, Helle Krunke, Jack Schlegel, and Rick Su. We thank Amat Fatimah for her tireless and meticulous research assistance.

long-term survival of the collectivity. Intrasocietal tensions can, of course, take many forms, and thus might both manifest themselves, and respond to control, in any number of ways. What distinguishes federalism from other methods of internal social tension control is the specific mechanism to which it resorts: the deliberate creation and perpetual maintenance of partially autonomous subnational polities within a larger polity that is national, and therefore in some meaningful sense unified.¹

The dominant characteristic of federal systems is thus a plan of institutional design that channels the most serious anticipated intrasocietal tensions into the mold of national-subnational conflict. Once contained within that arena, conflicts are then managed in federal systems through maintenance of a careful—and sometimes surprisingly flexible and responsive—balance between the powers, competencies, and ultimately the political salience of national and subnational institutions of self-governance. Most constitutional systems seek to establish their own permanence by creating firm and static ground rules in a unique constitutional founding.² Federal systems, in contrast, attempt to secure their own permanence by establishing a system of intergovernmental contestation that produces a perpetually moving yet dynamically stable equipoise.³

Although the precise tools available to governments for engaging each other in these intergovernmental tests of strength can vary considerably depending upon the details of the relevant constitutional order,⁴ they generally fall into one of two related categories: exercising power and claiming power. The idea that national and subnational governments struggle against one another by deploying powers they indisputably command is perhaps most familiar in the “mutual checking” theory of federalism propounded by James Madison. In Madison’s account, the dispersion of power among national and subnational governments protects liberty by preventing a potentially catastrophic concentration of power at either level.⁵ National and subnational governments then exercise their powers to compete for popular allegiance,⁶ either affirmatively, by using their powers to achieve substantively good outcomes preferred by their respective polities; or negatively, by deploying their powers against the other to impede, thwart, or otherwise “check” its capacity to achieve outcomes that are substantively bad.⁷

¹ WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 11 (1964); Daniel J. Elazar, *Introduction*, in *FEDERAL SYSTEMS OF THE WORLD*, at xv (Daniel J. Elazar ed., 2d ed. 1994).

² This is certainly the governing premise of social contract theory. See, e.g., JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* ¶ 220 (Thomas P. Pearson, ed. 1952 [1690]) (“When the government is dissolved, the people are at liberty to provide for themselves by erecting a new legislative, differing from the other by the change of persons or form, or both, as they shall find it most for their safety and good.”). On the importance of constitutional foundings, see also THE FEDERALIST, No. 1 (Hamilton); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 205 (1991).

³ Arthur Benz & Jörg Broschek, *Federal Dynamics: Introduction*, in *FEDERAL DYNAMICS: CONTINUITY, CHANGE, AND THE VARIETIES OF FEDERALISM* 1, 2, 7, 14 (Arthur Benz & Jörg Broschek eds., 2013).

⁴ We describe some of the tools available in two systems in James A. Gardner & Antoni Abat i Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 *AM. J. COMP. L.* 491 (2011).

⁵ THE FEDERALIST, Nos. 48–51 (Madison).

⁶ *Id.*, No. 46 (Madison), No. 28 (Hamilton).

⁷ JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* ch. 3 (2005); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, *SUP. CT. REV.* 341, 380–395 [1985].

The second strategy of contestation available to governments in federal states concerns not exercising power, but claiming it. Because federalism creates a system of competition among governments by dividing power, governments have obvious incentives to struggle over the constitutional allocation of power. While all constitutional systems tend to evolve in response to changes and pressures arising in their immediate environment,⁸ “in a federal government the problem is even more acute because the distribution of powers between states and nation gives rise to demands for shifts in the allocation of functions from one government to the other.”⁹ In federal states, in other words, the precise allocation of power between national and subnational governments is a source of constant contention and dispute, one that is, moreover, “particularly prone to entrepreneurial redefinition.”¹⁰ In these circumstances, the contest is waged on a different playing field: any available constitutional flexibility “is . . . likely to be exploited by some national or subnational actors who continuously seek to extend their power by changing the rules of the game and the allocation of resources, thus producing permanent instability.”¹¹

Federalism, then, is a structure of governance that is likely to be in nearly constant motion.¹² Federalism expressly contemplates, and indeed invites, intergovernmental contestation not only within the established constitutional framework, but over the dimensions of the constitutional framework itself. The regular and predictable outbreak of these kinds of conflicts thus reflects not a design flaw but the existence of a healthy, well-functioning, and indeed organically alive federal system.¹³

In prior work, we have concentrated on cataloguing and analyzing the wide array of constitutional and extra-constitutional tools to which some subnational governments have at times resorted in order to influence and, when necessary, to thwart and undermine exercises of national power that they view as inimical to national or subnational interests and commitments. Such tactics include, for example, withholding requested cooperation, exerting political influence through party channels, bringing pressure through popular political mobilization, appealing to supranational organizations, filing lawsuits, and even engaging in open and illegal defiance of national authority.¹⁴ Here, in contrast, we focus on one particular subnational tactic for contesting national authority: claims of *distinctive identity* or *sovereignty* (“DIS claims”).

⁸ WILLIAM S. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* 11, 295–318 (1956).

⁹ *Id.* at 11–12.

¹⁰ Jörg Broschek, *Conceptualizing and Theorizing Constitutional Change in Federal Systems: Insights from Historical Institutionalism*, 21 *REGIONAL & FED. STUD.* 539, 548 (2011).

¹¹ César Colino, *Constitutional Change without Constitutional Reform: Spanish Federalism and the Revision of Catalonia’s Statute of Autonomy*, 39 *PUBLIUS* 262, 263 (2009).

¹² Benz & Broschek, *supra* note 3, at 2.

¹³ JENNA BEDNAR, *THE ROBUST FEDERATION: PRINCIPLES OF DESIGN* (2009).

¹⁴ See Gardner & Abat, *supra* note 4, at 498–503, 507–512; GARDNER, *supra* note 7, at 87–120. Regarding such tactics in the US case, see also JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* (2009).

DIS claims are claims by subnational units either to a distinctive subnational identity, whether ethnic, linguistic, cultural, or political, or to an enhanced measure of sovereignty within the federation based on such distinctiveness. We view DIS claims as predominantly instrumental, and thus typically asserted for the purpose of obtaining some benefit. Most often, DIS claims are made in the course of jockeying for improved position within the federation. The subnational unit may, for example, seek a more generous allocation of constitutional competencies, or it may wish for greater deference from national actors toward exercises of subnational power, and believes that recognition of its distinctiveness by other actors in the federal system will help produce the desired result. At the margins, DIS claims can be made to justify actual or threatened secession—itsself an important bargaining tool in federations¹⁵—or to take up present positions that make the possibility of future secession more credible. But regardless of whether they are asserted to back secession threats or merely to gain a marginally improved position in routine intergovernmental contestation, DIS claims are among the more aggressive tactics available to subnational units to get their way in struggles with national governments.

As will be seen below, DIS claims are most often asserted initially in political fora—for example, in intergovernmental ministerial negotiations or in national legislative committees—and addressed to national actors in the executive and legislative branches. Our main focus here, however, is what happens when DIS claims are made or subjected to examination in judicial forums, in particular the national constitutional court. In these venues, they seem to receive a uniformly hostile reaction. The aim of the article is to explain why DIS claims receive such negative treatment in judicial forums, a result we attribute to the distinct institutional position of national courts in federal systems.

The balance of this article is organized as follows. Section 2 lays out our data, which comprises a small but, so far as we have been able to determine, complete set of decisions by constitutional courts squarely addressing and fully analyzing in constitutional terms DIS claims made by subnational units. These rulings issue from the courts of four federal or quasi-federal states—Spain, Italy, the United States, and Canada—and one unitary state, France. The decisions offer a rich variety of circumstances for judicial consideration. Some cases involve a negotiated political settlement in which the national government recognizes and makes significant concessions in response to subnational DIS claims (Spain, France). In others, subnational units unilaterally assert DIS claims in processes that have been nationally approved (Italy), nationally disapproved (United States), or are subjects of ongoing and inconclusive negotiation (Canada).

Regardless of the circumstances, however, the national constitutional courts in our sample reject subnational DIS claims. They draw no distinction between DIS claims asserted in the context of actual or threatened secession and those asserted during routine jockeying for position in the course of intergovernmental contestation. Nor do the courts distinguish between DIS claims made unilaterally by subnational

¹⁵ BEDNAR, *supra* note 13, at 77–85.

governments and those agreed to by the national government in the course of negotiated intergovernmental political settlements. Instead, all such claims are rejected as a matter of national constitutional law. Moreover, the judicial treatment of DIS claims in the four federal states is no more accommodating or deferential than it is in the unitary state in our sample, suggesting that the presence of a federal structure matters less to national judicial actors than it does to national executive and legislative actors.

Section 3 turns to analysis of the reasons for the different and hostile treatment of DIS claims in constitutional courts. We argue that this result is best explained by the distinct institutional position of national constitutional courts, and we explore four aspects of the judiciary's institutional role that might be relevant. First, constitutional courts may be more likely to understand their role as enforcing the constitutional bargain than to understand it to include making the constitutional bargain work in practice. Second, unlike national executives and legislatures, which engage in constant contestation with subnational units, constitutional courts are not repeat players in these kinds of conflicts, and thus may lack a perspective that might encourage greater tolerance of DIS claims as mere moves in an ongoing process of mutual competition.

Third, as organs of the national government, constitutional courts may not be quite the impartial referees they appear to be when intervening in intergovernmental contests, and there are reasons to believe that they may sometimes have incentives not only to favor the exercise of power at the national level, but to favor assertions of their own power over conflicting assertions of national executive and legislative power.

Finally, national constitutional courts may be hostile to informal rearrangements of the constitutional allocation of powers if they understand themselves to have a special role to play in the protection of national minorities, especially those that in a federation are weak on account of being geographically dispersed. National recognition of DIS claims often occurs in informal bilateral negotiations between national and subnational officials, a process from which many constitutional stakeholders may be excluded. National constitutional courts appear especially sensitive to this kind of bilateralism. By rejecting informal settlements, and thereby insisting that constitutional changes be made exclusively in formal processes of constitutional amendment, national constitutional courts may see themselves as discharging a distinct responsibility to ensure to all relevant stakeholders an appropriate place at the bargaining table. This possibility in turn raises difficult questions of judicial choice concerning which national minorities are entitled to the court's solicitude.

2. Subnational DIS claims in national constitutional courts

Before examining the rulings of the constitutional courts, a preliminary word is in order about the states represented in our sample. The pitfalls of case selection can be a particularly acute problem in the comparative study of federalism. The number of federal states is small—perhaps a dozen or two, depending upon how one counts—and they diverge widely along many relevant dimensions. A rigorous working definition of federalism helps assure the similarity of states compared, but confines the breadth and power of inferences because of the small size of both the sample and the universe

by hypothesis deemed relevant. A more generous definition allows more powerful and far-reaching inferences, but carries a risk of inaccuracy by sweeping in sample variation that the analysis may not take into account.

Here, we have opted for a more inclusive set of criteria.¹⁶ We think, however, that the choice is well justified for two reasons. First, the objects we are comparing—a particularly narrow class of judicial rulings—are so few in number that the only way to generate even a modest sample size is to take an inclusive approach. Second, as will appear below, the reasonableness of this choice is, in our view, confirmed by the remarkable similarity of the rulings and the analytic concepts invoked by the various courts. Finally, as will be seen in Section 3, we compensate for the risks of an inclusive comparison by practicing modesty in our inferences and conclusions. Thus, rather than purporting to derive a definitive explanation of the phenomenon we describe, we offer instead several possible, alternative accounts, and invite readers to use their own judgment in assessing the plausibility of the alternatives we adduce.

We turn now to the rulings of the constitutional courts themselves. In each instance, we attempt to contextualize the judicial rulings by providing background information on the history of national-subnational conflict in the state at issue and the events, if any, leading up to the particular conflict that ends up in court. This section accordingly discusses rulings by the constitutional courts of four federal or quasi-federal states: Spain, Italy, the United States, and Canada. We set the stage, however, perhaps paradoxically, with an intergovernmental dispute and subsequent judicial ruling from a non-federal state—France.

2.1. France and Corsica

France is often held up as the exemplar of a modern unitary state.¹⁷ The French Constitution opens by declaring France “an indivisible . . . Republic.”¹⁸ It provides explicitly that “national sovereignty shall vest in the people”¹⁹—by which it means the entire French people—and declares that “no section of the people may arrogate

¹⁶ In our sample, the United States and Canada are, by consensus, deemed indisputably federal. See, e.g., RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 29–30, 32–33 (3d ed. 2008). Italy is generally thought of as a non-federal state engaged in a process of regionalization that may in the end make it federal. Compare *id.* at 25 (not listing Italy even among “quasi-federal” states or “emerging federations”) with Francesco Palermo, *Italy: A Federal Country without Federalism?*, in *CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUBNATIONAL PERSPECTIVES* 237 (Michael Burgess & G. Alan Tarr, eds. 2012) (arguing that Italy has the institutions of federalism but not its politics). Whether Spain counts as federal is a question that has engaged many scholars. For an overview, see, e.g., Gemma Sala, *Federalism without Adjectives in Spain*, 44 *PUBLICUS* 109 (2013). Making the problem even more complex is the fact that even core theoretical definitions of federalism can change over time. See, e.g., Carl J. Friedrich, *The Political Theory of Federalism*, in *FEDERALISM AND SUPREME COURTS AND THE INTEGRATION OF LEGAL SYSTEMS* 34 (Edward McWhinney & Pierre Pescatore, eds., 1973) (noting a “profound transformation” in the concept of federalism from one centered on competencies to one centered on “process”).

¹⁷ NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM* 429 (2d ed. 2010); Xavier Philippe, *France: The Amendment of the French Constitution “On the Decentralized Organization of the Republic,”* 2 *INT’L J. CONST’L L.* 691, 692 (2004).

¹⁸ CONSTITUTION OF FRANCE (1958), art. I.

¹⁹ *Id.*, art. 3.

to itself . . . the exercise thereof,”²⁰ thus excluding a federal form of organization. Nevertheless, this constitutional declaration of national unity ignores a degree of internal diversity that has on occasion erupted into calls for local recognition and sovereignty.²¹

Corsica is a small island lying off the coasts of France and Italy that, after changing imperial masters many times over several centuries, was acquired permanently by France in 1768, becoming a *département* following the French Revolution.²² Along with French and Italian, Corsican (*corso*), a language considered by UNESCO to be “potentially endangered,” is spoken on the island, and Corsicans appear to have plausible grounds to claim some degree of cultural distinctiveness.²³ In any event, a “growing renewed awareness of a specifically Corsican identity . . . took a political turn in the 1960s with calls for greater self-determination.”²⁴ The French government responded to these demands with a series of measures, each devolving additional power and autonomy to local Corsican governments.

In 1960, shortly following the birth of the Fifth Republic, Corsica was attached for administrative purposes to the region of Provence-Alpes-Côte d’Azur, one of twenty-one *circonscriptions d’action régionale*.²⁵ This arrangement was altered in 1972 when the *circonscriptions* were redenominated *régions*, and authorized to adopt competencies, create regional councils, and exercise certain financial powers.²⁶ In 1975, Corsica was detached from Provence-Alpes-Côte d’Azur and became the twenty-second *région*, thus acquiring regional competencies

²⁰ *Id.*

²¹ See, generally, John Bell, *Devolution: French Style*, 6 EUR. PUB. L. 139 (2000) (describing demands for devolution and self-governance relating to Polynesia and New Caledonia). French legal and political culture has been an obstacle to the recognition of regional diversity and granting of local political autonomy. Farimah Daftery, *The Matignon Process and Insular Autonomy as a Response to Self-determination Claims*, 2001(2) EUR. YBK 302, 306 (2003). Due to the founding constitutional principles of the indivisibility of the Republic and the equality of French citizen before the law, “France has been reluctant to develop asymmetric solutions and to grant collective rights.” *Id.*

²² GRACE L. HUDSON, *CORSICA*, at xxi–xxiii (1997).

²³ On the status of the Corsican language, see UNESCO Red Book, available at http://www.helsinki.fi/~tasalmin/europe_index.html; on Corsican culture, see HUDSON, *supra* note 22, at xxvii–xxix. The use of *corso* persisted well into the twentieth century, and French only became widely spoken in Corsica after World War II. Kathleen Cunningham, *Divided and Conquered: Why States and Self-determination Groups Fail in Bargaining over Autonomy* 92 (Unpublished Ph.D. Dissertation, UC San Diego, 2007), available at <http://escholarship.org/uc/item/3rk9m7gk#page-122>. Corsica’s distinctiveness has been enhanced partly due to its physical separation from mainland France: *id.*; Daftery, *supra* note 21, at 302; Helen Hintjens, John Loughlin, & Claude Olivesi, *The Status of Maritime and Insular France: The DOM-TOM and Corsica*, in *THE END OF THE FRENCH UNITARY STATE?* 121 (John Loughlin & Sonai Masey eds., 1995), and to its economic insularity and lack of development. Daftery, *supra* note 21, at 302–303.

²⁴ HUDSON, *supra* note 22, at xxix. Post-war economic and social decline led some Corsicans to advocate radical solutions including autonomy within France or complete independence in the early 1970s. Hintjens et al., *supra* note 23, at 121; Daftery, *supra* note 21, at 303; Cunningham, *supra* note 23, at 92–94. For a concise account of Corsica’s identity claims in different eras, see Hintjens et al., *supra* note 23, at 121. For more detail, see Daftery, *supra* note 21, at 303.

²⁵ Decree No. 60 516 of June 2, 1960. The Region of Paris had a special organization regulated by Law No. 64–707 of July 10, 1964.

²⁶ Law 72–619 of July 5, 1972.

of its own. It was, however, divided into two *départements*, Haute-Corse and Corse-du-sud.²⁷

The pace of decentralization picked up significantly in 1982, when Corsica became France's only *collectivité territoriale "de plein exercice,"* a status not achieved by the rest of the Regions for another four years, with its own organization, competences and specific resources.²⁸ The same law authorized the creation of the Corsican Assembly (*Assemblée de Corse*)—a significant elevation of Corsica's status among the Regions, the rest of which were permitted only a Regional Council (*conseil régional*) rather than an *assemblée*.²⁹ Although President Mitterand purported to support the change of terminology as a mere linguistic concession,³⁰ the word *assemblée* has important historical and symbolic resonance in France, and its use "reflected the fact that the Corsican Assembly had greater competences than other *régions* . . ." ³¹ In addition, unlike the Regional Councils, which were elected from *départements* on a constituency basis, election to the Corsican Assembly was from a single Corsican constituency by means of proportional representation,³² an innovation intended to "give [the Assembly] a greater feeling of identity and unity."³³ Finally, the 1982 law created a unique pathway for Corsican influence on national policy making. Under these procedures, the Corsican government was authorized to propose directly to the Prime Minister amendments to national regulations and laws concerning cultural affairs, local development, and other areas of express Corsican competence, to which the Prime Minister was obliged to respond.³⁴

Despite these reforms, Corsican nationalist demands continued to intrude into French politics, and in 1990 the Socialist government of François Mitterand took up the issue as part of a more comprehensive package of policies that promoted

²⁷ The decision to opt for "bidepartmentalization" was made by the Corsican Government and ratified by the Municipal Councils of Ajaccio and Bastia, the General Council, and the assemblies. This administrative reform changed in some sense an 1811 Napoleonic Decree that unified the two previous entities, Golo and Liamone, in a unique department. Corsica thus settled upon an arrangement that made it bidepartmental but a sole region. La documentation française, *L'évolution institutionnelle de l'île*, <http://www.ladocumentationfrancaise.fr/dossiers/corse/evolution-institutionnelle.shtml> (last visited 12 May, 2016); Conseil départementale de la Corse du Sud, Du département de la Corse au département de la Corse du Sud, <http://www.cg-corsedusud.fr/collectivite-departementale/son-histoire/>.

²⁸ Law No. 82–214 of March 2, 1982. This recognition of Corsica's special character was later diluted by a more general process of decentralization during 1982–1986, which extended similar measures to the other regions. This "banalization" of the Corsican statute, "which was no longer very special" coupled with "a certain withdrawal by the state and the erratic functioning of the regional institutions in Corsica" led to demands for new reform of the Corsican statute. Hintjens et al., *supra* note 23, at 122; see also Daftery, *supra* note 21, at 307.

²⁹ See Law No. 82–214 of Mar. 2, 1982, "on the particular statute of the region of Corsica: administrative organization."

³⁰ <http://www.droitconstitutionnel.net/Corsestatut.htm>.

³¹ Claudina Richards, *Devolution in France: the Corsican Problem*, 10 Eur. Pub. L. 481, 484 (2004).

³² Direction de l'Information Légale et Administrative, *Découverte des institutions: Approfondissement*, LA VIE PUBLIQUE, www.vie-publique.fr/decouverte-institutions/institutions/approfondissements/

³³ Richards, *supra* note 31, at 484. This arrangement was upheld by the CONSEIL CONSTITUTIONNEL [CC] [CONSTITUTIONAL COURT] Decision no. 82–138 DC, Feb. 25, 1982, which ruled that the creation of a category of administrative unit containing only a single member did not violate the constitutional principle of the indivisibility of the French Republic.

³⁴ Law no. 82–214 of Mar. 2, 1982, art. 27.

decentralization of government authority generally, as well as harmonization of the status of French territories and overseas possessions specifically.³⁵ Under the leadership of Interior Secretary Pierre Joxe, the French government enacted a new statute in 1991 that gave Corsica a unique and novel status among French subnational units.³⁶ The *statut Joxe*, inspired by French law relating to the territory of French Polynesia,³⁷ created a new entity, the Corsican Territorial Collectivity. The statute required the French Prime Minister to consult the Corsican Assembly on drafts of laws and decrees containing provisions specific to Corsica. New competences granted by the *statut Joxe* related to education, communication, cultural activities, the environment, and transportation. Under the 1991 law, these competences were to be exercised according to a process by which the Assembly of Corsica developed a plan which would become enforceable after a period of consultation with the State.

Most significant for present purposes, however, is the opening section of the 1991 statute. That section adopted a tactic that earlier devolutionary provisions had not—it made an express DIS claim. In highly sensitive and closely scrutinized language, Article 1 declared in explicit terms:

The French Republic guarantees to the historical and culturally living community which constitutes the Corsican people, part of the French people, the rights to preserve its cultural identity and to defend its specific economic and social interests. These rights of insularity are to be exercised with respect for national unity, within the constitutional framework, the laws of the Republic, and the present statute.³⁸

Earlier laws creating asymmetrical advantages for Corsica may of course very well have been enacted in response to Corsican claims, asserted in political forums and addressed primarily to the French parliament and executive, of historical, cultural, and linguistic distinctiveness. The 1991 statute went further, however, by writing such sentiments into national law.³⁹

In a decision issued in May 1991, the French Conseil constitutionnel invalidated this provision on constitutional grounds.⁴⁰ Although the court had previously

³⁵ Richards, *supra* note 31, at 488.

³⁶ Law no. 91–428 of May 13, 1991.

³⁷ Law no. 84–240 of Sept. 6, 1984.

³⁸ Law no. 91–428 of May 13, 1991, art. 1:

La République française garantit à la communauté historique culturelle vivante que constituait le peuple corse, composante du peuple français, les droits à la préservation de son identité culturelle et à la défense de ses intérêts économiques et sociaux spécifiques. Ces droits, liés à l'insularité, s'exercent dans le respect de l'unité nationale, dans le cadre de la Constitution, des lois de la République et du présent statut.

Note that the phrase “droits, liés à l'insularité” is translated on the website of the Conseil constitutionnel as “rights that flow from its island status.”

³⁹ The expression *peuple corse* was included in the original version of the earlier 1982 statute, but was replaced, after objection, with a compromise phrase recognizing “[t]he Corsican people, a component of the French people,” which was relocated from the bill’s text to a section on legislative purpose. Cunningham, *supra* note 23, at 101.

⁴⁰ The Conseil constitutionnel is a hybrid body that exercises a mix of administrative and judicial functions, but serves as the functional equivalent of a constitutional court in the sense of exercising final judgment about the constitutionality of laws. See CONSTITUTION OF FRANCE, arts. 56–63.

been willing to tolerate the devolution of at least some asymmetrical competencies to Corsica, this provision went too far. The court based its decision largely on the principle of the indivisibility of the French people. The court read Article 1 to establish the existence within the French people of a constituent part (a sort of subdivision), the “Corsican people,” an act that contravened constitutional principles asserting the uniqueness of the French people, consecrating the indivisibility of the Republic, and identifying the French people as a whole as the bearers of national sovereignty.⁴¹ Where the expression “the people” applies to the French people, the court held, it must be considered a unitary category incapable of subdivision by law.

The court also emphasized the constitutional obligation of France, as an indivisible, secular, democratic, and social republic, to ensure the equality of all citizens before the law, without distinction of origin. The law’s characterization of the “Corsican people” as a “part of the French people,” the court held, violated this principle, which recognizes only the French people, composed of all French citizens without distinction of origin, race, or religion. In the court’s view, to define Corsicans as a “people” in their own right effectuated a kind of discrimination against the rest of the French people,⁴² who received no such additional recognition. In sum, the provision was seen as deeply threatening to the coherence of the basic French constitutional arrangement, thereby jeopardizing national unity.⁴³

2.2. Spain and Catalonia

The origins of modern-day Spain lie in “the vagaries of dynastic politics and demographic reality.”⁴⁴ From 1492 until 1712, Spain consisted of numerous political communities enjoying varying degrees of independence. After the War of Spanish Succession, which concluded in 1714, the Crown of Catalonia and Aragon lost its political and economic independence in favor of Castilla. The Basque Country, in contrast, because it supported the winning side, continued for a time to enjoy substantial autonomy.⁴⁵ Thus, the configuration of present-day Spain, the degree of autonomy enjoyed from time to time by its constituent units, and the nature and amicability

⁴¹ CONSEIL CONSTITUTIONNEL [CC] [CONSTITUTIONAL COURT] Decision no. 91–290 DC, May 9, 1991, ¶¶ 11–14.

⁴² “Une régime discriminatoire,” *id.*, ¶ 22.

⁴³ The court also invalidated some aspects of the statutory devolution of authority to Corsica. *See id.*, ¶¶ 51, 55, 59. Following these events, negotiations between Paris and Corsica continued. In 1999, a summit between the State government, Prime Minister Lionel Jospin, and representatives of Corsica initiated the “Matignon process,” culminating in a new statute granting Corsica various forms of autonomy. Daftery, *supra* note 21. Several important provisions of this law were invalidated by the Conseil constitutionnel. *See* CC, Decision No. 2001–454 DC, Jan. 17, 2002. In 2003, the National Assembly enacted a new decentralization law, Law No. 2003–276 of Mar. 28, 2003, but an attempt by the Corsican government to invoke it was defeated in a referendum. *See* 2002: *Des pouvoirs renforcés*, COLLECTIVITÉ TERRITORIALE DE CORSE, May 2, 2002, available at http://www.corse.fr/2002-des-pouvoirs-renforces_a394.html. In 2011, the Corsican Assembly enacted a law providing a roadmap for making Corse an official language by 2014.

⁴⁴ WILLIAM D. PHILLIPS, JR. & CARLA RAHN PHILLIPS, *A CONCISE HISTORY OF SPAIN* 82 (2010).

⁴⁵ SIMON BARTON, *A HISTORY OF SPAIN* 139 (2004).

of relations among its various components all result to some extent from historical contingencies relating to the military superiority of one nation over another and the shifting fortunes of allies of various contestants in nationwide and European power struggles.

Catalonia, a populous and prosperous province occupying Spain's northeast corner, has a long history as an intermittently independent nation, and indeed as an imperial power in its own right. Its indigenous language is Catalan, a language suppressed for decades by the Franco regime during the mid-twentieth century, and it claims a cultural patrimony distinct from that of Castillian Spain.⁴⁶

The present Spanish Constitution dates to 1978, but some of its important institutions owe their origins to events surrounding adoption of the Constitution of 1931. The model of territorial organization, in particular, echoes understandings first reached between republican and leftist political parties in negotiations conducted in San Sebastian in 1930 (*los pactos de San Sebastián*).⁴⁷ During these negotiations, the parties discussed both federal and regional models of territorial organization for a future Spanish Republic. The final agreement declared the abolition of the Spanish monarchy, the establishment of public liberties, and confederation of the Iberian nationalities.⁴⁸ Following a brief but contentious period of misunderstandings and sometimes tense negotiations between representatives of Madrid and Barcelona,⁴⁹ a newly elected Catalan government joined the Spanish Republic. Its authority was set out in a Statute of Autonomy, which was approved by popular referendum in Catalonia and ratified by the future Spanish Constituent Assembly.⁵⁰

Shortly thereafter, in the summer of 1931, the parliament in Madrid adopted the Constitution of the Second Spanish Republic, which declared Spain to be “an ‘integral’ State, compatible with the autonomy of the towns and regions,”⁵¹ a concept that placed its territorial organization somewhere between unitary and federal,⁵² and prefigured the arrangements adopted in the current Constitution of 1978. Following

⁴⁶ In its modern, self-conscious form, Catalan nationalism dates approximately to the beginning of the twentieth century, where the deliberate cultivation of a distinct cultural identity became a project of “Catalan intellectuals.” CATALONIA: A EUROPEAN HISTORY 113 (Ramon Grau & Josep M. Muñoz eds., 2006).

⁴⁷ ADOLFO HERNÁNDEZ LAFUENTE, AUTONOMÍA E INTEGRACIÓN EN LA SEGUNDA REPÚBLICA 23 (1980).

⁴⁸ *Id.* at 30. It is also important to remark that the most important leftist party in Spain in 1931, the Spanish Party (PSOE), did not ratify the agreement.

⁴⁹ In April of 1931, Francesc Macià, the Catalan leader, briefly proclaimed an independent Catalan Republic. The Spanish provisional government in Madrid rejected this proclamation and sent emissaries to Barcelona to urge the Catalan leadership to adhere to the agreements reached at San Sebastian. After tense negotiations, the Catalan leadership agreed to join the new Spanish Republic. See ALFONSO XIII, UN POLÍTICO EN EL TRONO (Javier Moreno Luzón ed., 2003); HERNÁNDEZ LAFUENTE, *supra* note 47, at 25.

⁵⁰ See COMELLAS JOSE LUIS, HISTORIA DE ESPAÑA MODERNA Y CONTEMPORANEA (2003); PTO MORA, EL DERRUMBE DE LA SEGUNDA REPÚBLICA Y LA GUERRA CIVIL (2001); Vergés Oriol & Cruañas Josep, *The Generalitat in the History of Catalonia*, Dept. de Cultura de la Generalitat de Catalunya, University of Indiana, 2001.

⁵¹ CONSTITUTION OF THE SECOND SPANISH REPUBLIC (1931), art. 1.

⁵² As will be seen below, this model was followed by the Italian Constitution of 1947 with its “regional” organization. See Juan Ferrando Badía, *Teoría y Realidad del Estado Autonómico*, 3 RATA DE REVISTA DE POLÍTICA COMPARADA III, 38 (1980–1981); see also CESAR AGUADO RENEDE, LOS ESTATUTOS DE AUTONOMIA EN ITALIA (1998).

adoption of the 1931 constitution, the Spanish Parliament approved a new Statute of Autonomy for Catalonia—one more limited in scope than Catalonia had sought⁵³—that defined Catalonia as an autonomous region within the Spanish State.⁵⁴

The successful evolution of a Spanish democratic state was disrupted at this point by several events including a sudden unilateral declaration of Catalan secession in 1934 by President Lluís Companys,⁵⁵ the Spanish Civil War,⁵⁶ and the Franco dictatorship. When the process was resumed in 1975 after the fall of Franco, Spain's 1978 Constitution carried forward the suspended effort to establish a modern state that gave adequate recognition to the pluralism and diversity of its society. However, the new context was different: because of fears in many quarters that the sudden easing of decades of central repression might lead to a rapid disintegration of a refounded, democratic Spanish state, care was taken to assure strong central control of the process.

In consequence, the present Spanish Constitution begins with an emphatic statement of national identity. "National sovereignty," it proclaims, "belongs to the Spanish people, from whom all state powers emanate."⁵⁷ "The Constitution," it goes on, "is based on the indissoluble unity of the Spanish Nation."⁵⁸ Despite this fundamental commitment to a national model, the Spanish Constitution contains elaborate provisions authorizing a substantial degree of decentralization of power. Specifically, the Spanish Constitution "recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed."⁵⁹ An entire chapter of the Constitution makes good on this promise by recognizing the "right to self-government" of Autonomous Communities (*Comunidades Autónomas*).⁶⁰ However, unlike constitutions of fully federal states, the Spanish Constitution does not guarantee the autonomy, or even the existence, of any particular subnational region. Rather, the Constitution delegates all decisions to recognize and empower Autonomous Communities to the Spanish Parliament (*Cortes Generales*) as a matter of legislative discretion through a process of central legislative approval of proposed subnational Statutes of Autonomy (*Estatutos de Autonomías*),⁶¹ as well as any subsequent amendments to the Statutes.⁶²

Catalonia's first Statute of Autonomy, approved in 1979, was modest in its claims. Article 1 of the Statute defined Catalonia as a "Nationality," but this language was designed to be consistent with Article 2 of the Spanish Constitution, which used the same term for essentially the same purpose, and raised no concerns in Madrid.

⁵³ Antònia Pallach, *La Identitat Catalana: El Fet Diferencial: Assaig de Definició 280* (2000); Enciclopèdia cat, *Estatut de Catalunya del 1932*, available at <http://www.enciclopedia.cat/EC-GEC-0025216.xml>.

⁵⁴ A comparison between the text approved by the Catalan citizenship and public organizations and the text passed by the Spanish Parliament is available at <http://www.vilaweb.cat/media/attach/vweds/docs/comparativaestatut.pdf>.

⁵⁵ ARNAU GONZÁLEZ & GISELA BOU, *LA CREACIÓ DEL MITE DE LLUÍS COMPANYS, EL 6 D'OCTUBRE DE 1934 I LA DEFENSA DE COMPANYS* (2007).

⁵⁶ JULIO GIL PECHARROMÁN, *LA SEGUNDA REPÚBLICA* (1989).

⁵⁷ SPANISH CONSTITUTION, art. 1(2) (emphasis added). English translations of the Constitution are available at <http://www.senado.es/web/conocersenado/normas/constitucion/index.html?lang=en>.

⁵⁸ *Id.*, art. 2.

⁵⁹ *Id.*

⁶⁰ *Id.*, art. 143(1).

⁶¹ *Id.*, arts. 144(1), 151(2)(ii), 151(2)(v).

⁶² *Id.*, art. 147(3).

Sentiments of Catalan nationalism, however, increased over the ensuing decades, and by the beginning of the new century political pressure in Catalonia to alter the existing relationship with the Spanish state had grown too intense to resist. Catalan governments began to speak openly of seeking greater subnational autonomy, and there was even talk of secession. Under the Spanish Constitution, however, approval of the Spanish Parliament was necessary to amend the Catalan Statute of Autonomy, and central Spanish governments, often controlled by the conservative *Partido Popular*, were resistant to any sign of resurgent Catalan nationalism.

In the mid-2000s, however, changes of partisan control at both levels presented an opportunity. The major Catalan nationalist party, *Convergència i Unió*, assumed control of the Catalan Parliament (*Generalitat*) on a platform committed to seeking changes in the existing relationship with Spain. In 2004, the left-leaning Spanish Socialist Workers' Party (*Partido Socialista Obrero Español*, or PSOE) assumed control in Madrid with the support of Catalan deputies. This change in the political landscape created an opening for an agreement amending the Catalan Statute of Autonomy, an opportunity that the Catalan government immediately seized.

In 2005, Catalonia proposed a new Statute of Autonomy that aggressively asserted an integrated set of very strong and interactive DIS claims. The Preamble provided that “Catalonia’s self-government is founded on the Constitution, and also on the historical rights of the Catalan people, which, in the framework of the Constitution, give rise to recognition in this Statute of the unique position of the Catalan Government.” It claimed that “Catalonia [is] a nation”; that Article 2 of the Spanish Constitution “recognizes the national reality of Catalonia as a nationality”; and that the new Statute of Autonomy fulfills “the inalienable right of Catalonia to self-government.”⁶³

Article 1 of the Statute provides that “Catalonia, as a nation, exercises its self-government by constituting itself as an Autonomous Community.”⁶⁴ Article 3 declares that “The relations between the *Generalitat* and the State are founded on the principle of mutual institutional loyalty and are governed by . . . the principle of autonomy, that of bilateralism and also that of multilateralism.”⁶⁵ It goes on to state that “Catalonia has its geographical and political space of reference in the State and the European Union and incorporates the values, principles and obligations that derive from the fact of being part of them.”⁶⁶ Article 5 asserts that Catalan “self-government . . . is also founded on the historic rights of the Catalan people.”⁶⁷ These are clearly provocative assertions.

The Statute goes on at considerable length in this manner. It provides that “Spanish citizens” resident in Catalonia “enjoy the political status . . . of Catalan citizens.”⁶⁸ It names the Catalan flag as a “national symbol,”⁶⁹ and creates a right of “citizens of Catalonia”

⁶³ Organic Law No. 6/2006 of July 19, 2006, Preamble [hereinafter Catalan Statute of Autonomy 2006].

⁶⁴ *Id.*, art. 1.

⁶⁵ *Id.*, art. 3(1).

⁶⁶ *Id.*, art. 3(2).

⁶⁷ *Id.*, art. 5.

⁶⁸ *Id.*, art. 7(1).

⁶⁹ *Id.*, art 8(1).

to use Catalan in all interactions with public authorities,⁷⁰ an obligation it purports to apply to all judges and judicial officers “who occupy a post in Catalonia,”⁷¹ presumably including national judges. It creates a “Council of Justice of Catalonia,” which it deems “the governing body of the judicial power in Catalonia,”⁷² an apparent attempt either to establish an independent provincial judiciary or to assert Catalan control over the existing national judiciary, rearrangements that would challenge the regime created by the Spanish Constitution, which establishes a unified judiciary under central control.⁷³ Another provision declares that in areas marked by the Spanish Constitution for shared national and subnational power, ultimate authority to interpret the scope of subnational authority lies with the Catalan legislature and executive, relegating the national government and the Spanish Constitutional Court to establishing only basic or minimal rules.⁷⁴

The proposed Statute, in short, offered a considerably different vision of the status of Catalonia within Spain than the 1979 Statute of Autonomy, one that at a minimum proceeded to the very outermost limits of subnational autonomy authorized by the Spanish Constitution. In fact, though, a better reading of the new Statute, particularly in light of the historical and political background of its enactment, is that it rather straightforwardly attempted to extend the scope of Catalan subnational autonomy beyond limits contemplated by the 1978 Spanish Constitution. Yet notwithstanding the ambitious scope of the proposed alterations, the Zapatero government in Madrid approved the changes, and in 2006 Parliament passed a law bringing them into effect.

Almost immediately, a politically fraught lawsuit was brought in the Spanish Constitutional Court challenging the constitutionality of the new Statute.⁷⁵ In a decision that took four years to produce, the Court decisively rejected all the most significant portions of the Statute.⁷⁶ Its strategy, however, was odd. Rather than take the Statute for what it transparently was—a rewriting of the constitutional relationship between national and subnational power, approved by the central government following bilateral negotiations with Catalonia—the Court chose instead to take the view that the Statute was the complete opposite: a well-intentioned and altogether minor alteration to prevailing norms and practices that suffered from clumsy drafting. Thus, the Court chose repeatedly to rely on a rule of interpretation under which it construed language in the Statute, no matter how significant and challenging to the existing constitutional order, in a way that rendered it consistent with existing constitutional principles. A “maximalist conception,” the Court said early in its ruling, “must always be opposed.”⁷⁷

⁷⁰ *Id.*, art. 33.

⁷¹ *Id.*, art. 102.

⁷² *Id.*, art. 97.

⁷³ SPANISH CONSTITUTION, art. 117.

⁷⁴ Catalan Statute of Autonomy 2006, art. 111.

⁷⁵ The plaintiffs included the opposition Partido Popular and the governments of Aragon, Valencia, Murcia, la Rioja, and the Balearic Islands. On the political context of these challenges, see Gardner & Abat, *supra* note 4, at 519–520.

⁷⁶ S.T.C., June 16, 2010 (31/2010), English translation available at www.tribunalconstitucional.es/es/jurisprudencia/restrad/Paginas/JCC2862010en.aspx.

⁷⁷ *Id.*, ¶ 6.

The Court's approach is evident from the beginning. Constitutional challenges to strong language in the preamble were rejected on the ground that preambles have no binding legal effect.⁷⁸ Similarly, the Court sustained Article 5, which declared "the self-government of Catalonia" to be "based on the historical rights of the Catalan People." This provision, the Court said, "would be clearly unconstitutional if it attempted to gain for the Statute of Autonomy a foundation outside the Constitution."⁷⁹ Although the deeply nationalist context in which the Statute was drafted suggests precisely that meaning, the Court went on instead to hold that "the entire language of the provision allows that interpretation to be ruled out." The phrase "historical rights," the Court said, must refer only to "rights and traditions of private law" or perhaps to forms of public law uncontroversially within the control of Autonomous Communities under the Spanish Constitution.⁸⁰ To understand the rights in question as "legally a foundation for the self-government of Catalonia" would thus be to understand them "incorrectly."⁸¹ Similarly, provisions of the Statute elevating the status of the Catalan language were interpreted away as merely offering "a linguistic option."⁸²

The opinion goes on in this vein for another 137 paragraphs, interpreting contextually significant language to have no significance, and very occasionally invalidating a provision of the Statute when it is susceptible to no saving interpretation. As Giacomo Delledonne aptly observes, the Court's approach is that "any norms which may appear a legal contribution to the building up of a Catalan nation, if they cannot be interpreted consistently with the Constitution, are illegitimate or without legal value."⁸³ While the Court's hostility to Catalonia's DIS claim—and its official recognition by Spain—is thus covered by a thin veneer of polite condescension, it is hostility nonetheless.⁸⁴

2.3. Italy and Sardinia

Modern Italy was created between about 1860 and 1870 by the military unification of the various cities, duchies, and kingdoms that for centuries had occupied the peninsula.⁸⁵ Its establishment has thus from the beginning required a deliberate program of nation-building designed to impose central control over a diverse and sometimes unruly collection of communities with long histories of political, cultural, and linguistic independence. As Massimo d'Azeglio, a writer and politician of the Italian founding period, summed up the dilemma of Italy's creators, "Having made Italy, we must

⁷⁸ *Id.*, ¶¶ 7–8.

⁷⁹ *Id.*, ¶ 10.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*, ¶ 21.

⁸³ Giacomo Delledonne, *Speaking in the Name of the Constituent Power: The Spanish Constitutional Court and the New Catalan Estatut*, 3 PERSPECTIVES ON FEDERALISM 1, 9 (2011).

⁸⁴ Interestingly, provisions similar to those invalidated in the Catalan Statute of Autonomy had not previously been thought to present constitutional problems in the Statutes of Autonomy of other Autonomous Communities. See Gardner & Abat, *supra* note 4, at 519.

⁸⁵ LUCY RIALI, RISORGIMENTO: THE HISTORY OF ITALY FROM NAPOLEON TO NATION STATE 32–36 (2009).

now make Italians.”⁸⁶ Italy’s contemporary history has accordingly been one of periodic struggle to establish a satisfactory and sustainable balance between national and subnational loyalties and institutions of governance.

For many decades, Italy’s leaders focused their attention primarily on the task of establishing effective central control, deliberately appropriating aspects of the French model of “centralized and bureaucratic administration.”⁸⁷ Following the Second World War and the collapse of the highly centralized Fascist regime, however, Italy chose a different path. The 1948 Constitution, still in force today, “represented a compromise between the centralized State, which had existed in Italy since unification, and a looser federal State.”⁸⁸ The Italian Constitution thus opens with a declaration that “Sovereignty belongs to the [whole] people and is exercised by the [whole] people in the forms and within the limits of the Constitution,”⁸⁹ a provision gesturing toward a central form of organization. At the same time, however, it provides that Italy “is composed of Municipalities, Provinces, Metropolitan Cities, Regions and the State,” and describes these subnational units as “autonomous entities having their own statutes, powers and functions,”⁹⁰ a provision establishing some significant degree of decentralized regionalism.

This regionalization, moreover, is asymmetrical: five regions of Italy are expressly granted “special forms and conditions of autonomy.”⁹¹ Pursuant to this grant, the “special” regions are authorized to adopt statutes of autonomy which, like their Spanish counterparts, must be approved by both the regional parliament and by the national Parliament as a “constitutional law.”⁹² Adoption of such a statute authorizes the special region to assume various powers of local self-governance that would otherwise be exercised by the central government.

One of these “special” regions is Sardinia, a large island of about two million inhabitants lying off the west coast of Italy and the south coast of Corsica, from which it is separated by only a few miles of open water. Although it has been “traditionally isolated from the mainland,”⁹³ Sardinia, like much of modern Italy, has been a site of frequent political conflict, having been at various times occupied by, incorporated into, or allied with Rome, the Vandals, Byzantium, Arab states, Genoa, Pisa, Spain, the Holy Roman Empire, Savoy, Piedmont, and of course Italy.⁹⁴ In spite of this constant ferment in its political identity, or perhaps because of it, the residents of Sardinia have

⁸⁶ “Fatta l’Italia, dobbiamo fare gli italiani,” quoted in ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 18 (1993).

⁸⁷ Palermo, *supra* note 16, at 238.

⁸⁸ Martin A. Rogoff, *Federalism in Italy and the Relevance of the American Experience*, 12 *TULANE EUR. & CIV. L. FORUM* 65, 68 (1997).

⁸⁹ CONSTITUTION OF ITALY, art. 1.

⁹⁰ *Id.*, art. 114.

⁹¹ *Id.*, art. 116. The five regions are Friuli–Venezia Giulia, Sardinia, Sicily, Trentino–Alto Adige/Südtirol and Valle d’Aosta/Vallée d’Aoste. *Id.*

⁹² *Id.*

⁹³ Palermo, *supra* note 16, at 247.

⁹⁴ ERIC WHELPTON, *A CONCISE HISTORY OF ITALY* (1964); *A SHORT HISTORY OF ITALY* (Harry Hearder & Daniel Phillip Waley eds., 1966).

retained a distinctive culture⁹⁵ and among them speak several languages now considered by UNESCO to be endangered.⁹⁶

Sardinian nationalism has waxed and waned over the last century. A burst of such nationalism was responsible for Sardinia's designation as a special region in the 1948 Constitution.⁹⁷ Temporarily satisfied by this concession, Sardinians gravitated away from the Sardinian Party of Action (*Partito Sardo d'Azione*), Sardinia's main nationalist party, but nationalist sentiments enjoyed a resurgence during the 1960s.⁹⁸ By the 1970s, repackaged in cultural and anti-colonial terms, Sardinian nationalism embraced not only continuing and increased support for federal-style devolution and regional autonomy but also at times support for outright independence.⁹⁹

Nationalist sentiment sputtered again in the late 1970s and 1980s due to a combination of Sardinia's economic dependence on Rome and popular disillusionment with the nationalist parties,¹⁰⁰ but it reignited following national constitutional reforms in 1991 and 2001. These reforms implemented a long-term plan of Italian "federalization" that narrowed the differences between the "special" and "ordinary" regions by authorizing the latter to assume a range of competencies closer to those previously allowed only to the special regions.¹⁰¹ These changes "precipitated something of a crisis of identity in the five 'special regions,' who [*sic*] were stripped of their *specialità* In response, all parties in Sardinia . . . began advocating Sardinian 'sovereignty' and the rights of the Sard people."¹⁰²

These sentiments eventually found formal legal expression in a new Statute of Autonomy adopted in 2006 by the Sardinian regional parliament.¹⁰³ Drafted by a provocatively named "commission for drafting the new statute on autonomy and sovereignty of the Sardinian people,"¹⁰⁴ the statute began by declaring the "autonomy and sovereignty of the Sardinian People";¹⁰⁵ went on to describe "principles and characters of regional identity founded on autonomy and sovereignty";¹⁰⁶ and proceeded

⁹⁵ Palermo, *supra* note 16, at 247.

⁹⁶ The languages are Campidenese, Logudorese, Gallurese, Sassarese, and Algherese Catalan. See UNESCO *Interactive Atlas of the World's Languages in Danger*, <http://www.unesco.org/culture/languages-atlas/index.php>.

⁹⁷ Eve Hepburn, *The New Politics of Autonomy: Territorial Integration and the Uses of European Integration by Political Parties in Scotland, Bavaria and Sardinia, 1979–2005*, at 159 (Unpublished Dissertation, European University Institute, Apr. 2007), available at http://cadmus.eui.eu/bitstream/handle/1814/6944/2007_04_Hepburn.pdf. See also GIANCARLO ROLLA, *DIRITTO REGIONALE E DEGLI ENTI LOCALI* 75 (2009).

⁹⁸ Hepburn, *supra* note 97, at 159.

⁹⁹ *Id.* at 163.

¹⁰⁰ *Id.* at 172–175.

¹⁰¹ These reforms produced the current versions of Title V of the Constitution of Italy. See Palermo, *supra* note 16, at 239–240; Giacomo Delledonne & Giuseppe Martinico, *Legal Conflicts and Subnational Constitutionalism*, 42 *RUTGERS L.J.* 881, 891–892 (2011); Fernando Dominguez Garcia, *Autonomy Experiences in Europe:—A Comparative Approach: Portugal, Spain and Italy*, in *ONE COUNTRY, TWO SYSTEMS, THREE LEGAL ORDERS—PERSPECTIVES OF EVOLUTION* 416, 417 (Jorge Oliveira and Paulo Cardinal eds., 2009).

¹⁰² Hepburn, *supra* note 97, at 175.

¹⁰³ Legge regionale 23 maggio 2006, n. 7 (It.).

¹⁰⁴ Palermo, *supra* note 16, at 247.

¹⁰⁵ Legge regionale 23 maggio 2006, n. 7, art. 1 ("autonomia e sovranità del popolo Sardo").

¹⁰⁶ *Id.* ("principi e cratteri della identità regionale: ragioni fondanti dell'autonomia e sovrenità").

to offer “other relevant arguments to define autonomy and the elements of regional sovereignty.”¹⁰⁷ Like its Catalan counterpart, the Sardinian *Statuto* “insinuated,” as Palermo observes, “that Sardinians wanted to exercise their self-determination internally and thus enjoy (special) autonomy within the Italian state.”¹⁰⁸ Notwithstanding the Italian government’s official policy of encouraging the *regioni* to assume additional powers and responsibilities, Sardinia’s proposed law was immediately challenged by the government in the Italian Constitutional Court (ICC) on the ground that it exceeded constitutionally permissible limits of subnational autonomy.

The ICC agreed.¹⁰⁹ As in the French statute relating to Corsica discussed earlier, the key defects in Sardinia’s *Statuto* were its overreaching DIS claims, and in particular its references to Sardinian “sovereignty” and a “Sardinian people.” The Constitution, the Court said, “refers to regions ‘mentioning always and only autonomy and never sovereignty.’”¹¹⁰ The Constitution’s uses of the term “people,” moreover, refer exclusively to “the entire national community,”¹¹¹ not to communities resident within subnational units of the state. Furthermore, implicit in the constitutional creation and empowerment of regions is an underlying “principle of uniqueness and indivisibility of the Republic.”¹¹² Sovereignty, by this principle, “must refer to the entire, and for this reason inseparable, national community.”¹¹³ Claims to constitutionally relevant distinctiveness or sovereignty, the Court continued, cannot rest on “ethnic, cultural, and environmental elements,” for doing so would “define subjective and privileged situations for a category of subjects of the national set of rules.”¹¹⁴

Finally, the Court said, the challenged provisions of the Sardinian *Statuto* express “a conception of the relationship between State and Region which is totally different from the regionalism envisioned by our constitutional system.”¹¹⁵ Instead, those provisions “connote, by their nature, extension, and quantity, a regional structure more from the point of view of federalism than from the point of view of regional autonomy.”¹¹⁶ Yet the Italian Constitution from its inception “excluded absolutely conceptions that could be even remotely ascribable to federal or confederal models.”¹¹⁷ Thus, the Court intimated, Sardinia’s DIS claim, made in its new *Statuto*, represented an illicit, unilateral attempt to amend the national constitution outside of formally specified processes.¹¹⁸

¹⁰⁷ *Id.*, art. 2 (“ogni altro argomento ritenuto rilevante al fine di definire autonomia e elementi di sovranità regionale”).

¹⁰⁸ Palermo, *supra* note 16, at 247.

¹⁰⁹ Corte Cost., sentenza no. 365/2007 (It.).

¹¹⁰ *Id.*, Findings of Fact, ¶ 1.2, quoting Corte Cost., sentenza no. 29/2003.

¹¹¹ Corte Cost., sentenza no. 365/2007.

¹¹² *Id.*, ¶ 1.3 (“il principio dell’unicità ed indivisibilità”).

¹¹³ *Id.* (emphasis in original).

¹¹⁴ *Id.*, Findings of Law 1, ¶ 3.

¹¹⁵ *Id.*, 4, ¶ 3.

¹¹⁶ *Id.*, 6, ¶ 2.

¹¹⁷ *Id.*, 7, ¶ 1.

¹¹⁸ *Id.*, Findings of Fact, ¶ 1.3. For critiques of the Court’s ruling as going well beyond what was necessary to decision of the case, see Omar Chessa, *La resurrezione della sovranità statale nella sentenza n. 365 del 2007 di 1, Le Regioni*, 36 (1); Alessandro Mangia, *If federalismo della descrizione e il federalismo della prescrizione*, 6 *GIURISPRUDENZA COSTITUZIONALE* 52 (2007).

2.4. The United States and Texas

The United States is usually perceived to be culturally and linguistically homogeneous by global standards. This is not because the American populace lacks internal diversity; a long history of immigration (voluntary and otherwise) has in fact endowed the US with a fairly impressive ethnocultural pluralism. The impression of homogeneity arises instead from the fact that American diversity does not for the most part track political boundaries. In the United States, distinct cultural, linguistic, and religious groups tend to be geographically dispersed, and even where they are concentrated, as in urban areas, they tend not to comprise majorities capable of exercising political control at the regional level. That dispersion, combined with a longstanding national project of assimilation, has tended to undermine the conditions necessary for ethnocultural distinctiveness to evolve into the kind of substate nationalism sometimes encountered elsewhere. As a result, American states today rarely assert any kind of distinct identity or sovereignty. On the few occasions when states do make such claims, they tend to be asserted either in circumstances where acceptance or rejection of the claim is incapable of issuing in legal consequences,¹¹⁹ or in which any legal consequences are confined to institutions wholly within the state's control, such as the meaning of subnational constitutions.¹²⁰

There is, however, one important episode in American history during which some states did make highly significant DIS claims—the Civil War. Indeed, these claims were the most serious kind that subnational units in a federal state are capable of asserting, for they were deployed to justify actual secession from the federation. Acts of secession generally require justification. During the period preceding the US Civil War, and for some time even well after the war's conclusion, Southern states sometimes justified secession on the basis of a distinctive Southern cultural identity,¹²¹ which was said to be characterized variously by ethnic homogeneity,¹²² an agrarian way of life,¹²³ an

¹¹⁹ In the context of tourism, for example. See, e.g., Tennessee Department of Tourist Development, *History & Heritage*, <https://www.tnvacation.com/history-heritage> (“A green, rugged land produced bold men and women unafraid to change the world. Wilderness roads became interstates, pioneers became politicians and Tennessee's past gave richness to its present.”).

¹²⁰ For example, state courts have sometimes claimed that subnational cultural distinctiveness requires giving a different interpretation to language in state constitutions than is given by the US Supreme Court to similar or identical language appearing in the US Constitution. See James A. Gardner, *Southern Character: Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1221–1224 (1998).

¹²¹ Among the enormous number of historical works to grapple with the question of Southern distinctiveness, the most helpful include: WILBUR JOSEPH, CASH, *THE MIND OF THE SOUTH* (1941); AVERY O. CRAVEN, *THE GROWTH OF SOUTHERN NATIONALISM, 1848–1861* (1953); COMER VANN WOODWARD, *THE BURDEN OF SOUTHERN HISTORY* (rev. ed. 1960); CLEMENT EATON, *THE MIND OF THE OLD SOUTH* (1964); HOWARD ZINN, *THE SOUTHERN MYSTIQUE* (1964); DAVID M. POTTER, *THE SOUTH AND THE SECTIONAL CONFLICT* (1968); CARL N. DEGLER, *PLACE OVER TIME: THE CONTINUITY OF SOUTHERN DISTINCTIVENESS* (1977); JOHN MCCARDELL, *THE IDEA OF A SOUTHERN NATION* (1979); and DREW GILPIN FAUST, *THE CREATION OF CONFEDERATE NATIONALISM: IDEOLOGY AND IDENTITY IN THE CIVIL WAR SOUTH* (1988).

¹²² EMORY M. THOMAS, *THE CONFEDERATE NATION: 1861–1865*, at 9 (1979).

¹²³ Frank Lawrence Owsley, *The Irrepressible Conflict*, in *I'LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION* 72–76 (Twelve Southerners, eds., Harper Torchbook 1962) [1930].

honor-based culture,¹²⁴ or a cultural predisposition to violence.¹²⁵ Historians tend to view these claims with skepticism; Kenneth Stampp, for example, argues bluntly that “the notion of a distinct southern culture was largely a figment of the romantic imaginations of a handful of intellectuals and proslavery propagandists.”¹²⁶ Nevertheless, even if Southern assertions of *cultural* distinctiveness may in the end be unpersuasive, there is no doubt that the seceding Southern states made very real and serious claims of *political* distinctiveness. Invoking the principles of the American Revolution, they claimed a natural right to dissolve existing political arrangements, form a new civil society, and reestablish self-government in a form more to their liking.¹²⁷

The American Civil War was of course resolved through military and political rather than judicial intervention. Still, on one occasion shortly after the War’s conclusion the US Supreme Court was called upon to evaluate Southern DIS claims against national constitutional standards. In *Texas v. White*,¹²⁸ the Court decisively rejected the legitimacy of those claims.

It is often the case in American jurisprudence that weighty and complex constitutional issues arise for decision in disputes involving unrelated and even trivial issues. So it was here. In 1850, the State of Texas, then part of the Union, had settled certain financial claims against the US government by accepting federal bonds, redeemable in 1865. Following its secession in 1861, the Texas government transferred the bonds to private entrepreneurs as payment for wartime supplies. When the war concluded, a new, pro-Union government sought return of the bonds on the ground that their transfer by the temporary Confederate government had been illegal. To vindicate this claim, Texas brought suit directly in the US Supreme Court under a provision of Article III of the US Constitution granting the Court jurisdiction over cases “in which a state shall be party.”¹²⁹ The fate of the bonds is unimportant. What mattered was whether a state that had seceded and been militarily conquered could be considered a “state” for purposes of the Supreme Court’s Article III jurisdiction.

In a wide-ranging decision, the Court held that Texas was a “state” within the meaning of Article III and emphatically rejected any suggestion that Texas might at any time have acquired a political identity other than its identity as a member state of the Union. The Court’s principal strategy was to draw a distinction between a political community and a government. A “state,” the Court held, is properly understood as “a people or community,” and it is the “people” rather than the government that comprises the state.¹³⁰

¹²⁴ EATON, *supra* note 121, at 297, 298.

¹²⁵ FRANK E. VANDIVER, *THE SOUTHERNER AS EXTREMIST, IN THE IDEA OF THE SOUTH: PURSUIT OF A CENTRAL THEME* 43 (1964).

¹²⁶ KENNETH M. STAMPP, *THE IMPERILED UNION: ESSAYS ON THE BACKGROUND OF THE CIVIL WAR* 256 (1980).

¹²⁷ *See, e.g.*, CONFEDERATE STATES OF AMERICA CONSTITUTION (1861), Preamble:

We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity invoking the favor and guidance of Almighty God do ordain and establish this Constitution for the Confederate States of America.

¹²⁸ 74 U.S. 700 (1868).

¹²⁹ U.S. Const. art. III, § 2, cl. 2.

¹³⁰ 74 U.S. at 720.

On this view, the Court ruled, the United States comprises “one people and one country.”¹³¹ The relationship among members of this *demus*, the Court said, is not “a purely artificial and arbitrary relation”¹³²—is not, in other words, a matter purely of rational choice. In fact, the relationship is organic, having grown “out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations.”¹³³ The Court’s foundational premise thus denied outright the possibility of meaningful cultural differentiation.

Moreover, the Court continued, the Union itself was perpetual—it was “an indestructible Union, composed of indestructible States.”¹³⁴ Admission of Texas to the Union marked “the incorporation of a new member into the political body,” and this incorporation “was final.”¹³⁵ The state’s declaration of secession was thus “null,” and “the State did not cease to be a State, nor her citizens to be citizens of the Union.”¹³⁶ Even popular ratification in Texas of its secession ordinance did not and could not alter this relationship, which was at most “suspended.”¹³⁷

It is true, the Court said, that during this period “Texas was controlled by a government hostile to the United States.”¹³⁸ Nevertheless, the Court’s analysis intimates, the proper way to understand the period of secession and rebellion is not that Texans had grown apart from other Americans, or that they had either acquired or deliberately chosen a distinct political identity, but that the political community of Americans living in Texas had essentially been taken over by a rogue and in some sense alien government. Following military action by the United States against that government, Texans consequently “retain their identity” as members of the American body politic.¹³⁹

The US Supreme Court’s analysis thus denies utterly at every step the validity and basic assumptions of Southern DIS claims made before and during the Civil War. There was no distinctive subnational identity, either culturally or politically. Since there was no distinctive identity, there could be no legitimate claim to self-sovereignty, and secession was therefore void, even when measured by the principles of just revolution shared by all Americans. Instead, secession resulted from the hostile occupation of Texas by a rogue and alien government—it was, as Justice Grier observed mockingly in dissent, an episode of collective “*insanity*, and [Texas now] asks the court to treat all her acts made during the disease as void.”¹⁴⁰ It is hard to imagine a more hostile judicial reaction to a subnational DIS claim.

¹³¹ *Id.* at 721.

¹³² *Id.* at 724–725.

¹³³ *Id.* at 725.

¹³⁴ *Id.*

¹³⁵ *Id.* at 726.

¹³⁶ *Id.*

¹³⁷ *Id.* at 727.

¹³⁸ *Id.*

¹³⁹ *Id.* at 728.

¹⁴⁰ *Id.* at 740 (Grier, J., dissenting).

2.5. Canada and Quebec

By an accident of colonial conquest, Canada has since its founding contained two very large and distinct settler communities: a linguistically and culturally British majority, and a linguistically and culturally French minority.¹⁴¹ Although members of the latter group can be found to some extent throughout Canada, they are for the most part geographically concentrated in the province of Quebec, where they comprise a significant majority.¹⁴² As a result, whereas English is by far the dominant language in most of Canada, Quebec's primary language is French. Similarly, Quebec retains a civil law code and institutions inherited in great part from France, whereas English Canada's legal and institutional inheritance derives from English common law and customary institutions.¹⁴³

Although relations between French and English Canada have never been trouble-free,¹⁴⁴ things took a marked turn for the worse in the 1980s following consolidation of Quebec's "Quiet Revolution," during which its populace came to a kind of enhanced self-consciousness as a distinct cultural and linguistic community.¹⁴⁵ This self-awareness led Québécois to understand themselves to a much greater extent than before as a frequently overwhelmed minority in Canadian national politics and policy, a situation that in turn came to be perceived, with some degree of alarm, as constituting a threat to the long-term survival of Quebec's linguistic and cultural distinctiveness.¹⁴⁶

In accordance with this new self-understanding, Quebec's leadership made repeated demands during the 1980s and 1990s for national constitutional changes that would give Quebec an enhanced status among the Canadian provinces, changes that were said to be necessary to furnish Quebec with tools adequate to preserve its language and culture from majoritarian pressures. On two occasions Canadian leaders reached agreements in principle that would have given Quebec at least some of what it wanted, but the first deal was subverted by a sudden withdrawal of approval by some provincial leaders, and the second deal was scuttled by a failure of popular ratification.¹⁴⁷ Frustrated by their inability to make significant headway in national political forums, Quebec's leaders—along with a sizable segment of the provincial public—began by

¹⁴¹ KENNETH McROBERTS, *MISCONCEIVING CANADA: THE STRUGGLE FOR NATIONAL UNITY* 2–8 (1997).

¹⁴² *Id.* at 85.

¹⁴³ Anglophone Canada is also predominantly Protestant, whereas Quebec is overwhelmingly Catholic. See David Cameron, *Quebec and the Canadian Federation*, in *CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY* 46 (Herman Bakvis & Grace Skogstad, eds., 3d ed. 2012), but the salience of these religious differences to questions of subnational distinctiveness and authority appears to have declined substantially over the course of the late twentieth century.

¹⁴⁴ See, e.g., McROBERTS, *supra* note 141, at 2–29 (describing numerous conflicts from colonial times to the mid-twentieth century).

¹⁴⁵ Cameron, *supra* note 143, at 47–49; Alain C. Cairns, *The Politics of Constitutional Renewal in Canada*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE*, 95, 99–101 (Keith G. Banting & Richard Simeon eds., 1985).

¹⁴⁶ Roger Gibbins, *Constitutional Politics*, in *CANADIAN POLITICS* 97 (James Bickerton & Alain G. Gagnon, eds., 5th ed. 2009); McROBERTS, *supra* note 141, at 101.

¹⁴⁷ PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BE A SOVEREIGN PEOPLE?* (1992); Gibbins, *supra* note 146, at 106–110; Sujit Choudhry, *Beyond the Flight from Constitutional Legalism: Rethinking the Politics of Social Policy Post-Charlottetown*, 12(3) *FORUM CONSTITUTIONNEL* 77 (2003).

the mid-1990s to talk seriously about, and even to make preparations for, secession from Canada.¹⁴⁸ In response, national leaders asked the Supreme Court of Canada (SCC) for an advisory opinion on the question of whether Quebec could secede unilaterally from the federation.

In the *Secession Reference*,¹⁴⁹ the SCC answered the question negatively. The court had no difficulty acknowledging the validity of Quebec's claims to cultural and linguistic distinctiveness. Canada's federalism, the court observed, is itself a response to political and cultural diversity;¹⁵⁰ federalism "recognizes the diversity of the component parts of Confederation," and "facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province."¹⁵¹

While thus conceding implicitly that Quebecers might have valid political reasons to think secession justifiable, the court emphatically rejected the contention that Quebec could act unilaterally on such impulses. Although Canada is a democracy, the court said, and democratic majorities may express themselves in a federation at the national and provincial levels, the Canadian Constitution does not establish a system of "simple majority rule" at any level;¹⁵² the wishes of majorities may be acted upon only consistent with broader principles of the rule of law and constitutional supremacy.¹⁵³

A unilateral attempt by a province to secede, the court ruled, would therefore amount to a unilateral attempt by that province to amend the national constitution, an unauthorized method of amendment.¹⁵⁴ Secession by Quebec could in principle be accomplished lawfully, but only if undertaken in accordance with the amendment procedures provided by the constitution. Those procedures, according to the court, require ongoing discussion and the consideration of dissenting voices;¹⁵⁵ they require, in short, negotiation among all constitutional stakeholders.¹⁵⁶ A serious, democratically persuasive demonstration by Quebec of popular provincial unhappiness with confederation might be sufficient to invoke obligations on the part of other constitutional stakeholders to meet Quebec at the bargaining table.¹⁵⁷ However, "Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties; that would not be negotiation at all."¹⁵⁸ In short, Quebec may be culturally and linguistically distinct, but that distinctiveness entitles it to nothing except respectful attention; distinctiveness carries with it no entitlement to authority, power, or status, either within the federation or

¹⁴⁸ Such talks followed the narrow defeat in 1995 of a Quebec referendum on secession. See 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 142–143 (5th ed. 2007).

¹⁴⁹ Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

¹⁵⁰ *Id.*, ¶ 43.

¹⁵¹ *Id.*, ¶¶ 58, 59.

¹⁵² *Id.*, ¶ 76.

¹⁵³ *Id.*, ¶¶ 77–78.

¹⁵⁴ *Id.*, ¶¶ 84, 86–88.

¹⁵⁵ *Id.*, ¶ 68.

¹⁵⁶ *Id.*, ¶¶ 86–96.

¹⁵⁷ *Id.*, ¶ 87.

¹⁵⁸ *Id.*, ¶ 91.

without it. If Quebec's distinctiveness is to carry any consequences, the SCC ruled, those consequences must be recognized in political negotiations carried out within the existing framework for effecting constitutional change. Until then, any actions by Quebec intended to precipitate secession would be unconstitutional.

2.6. Summary

Although the constitutional framework for allocating power differs in each of our sample states, and the political contexts in which that power has actually been exercised differ even more, the judicial analysis of subnational DIS claims displays a remarkable consistency from one constitutional court to another. By way of summary, we offer some observations about the key features of the rulings just reviewed.

1. All the cases deal with legal *formalization* of DIS claims, either in a document of subnational constitutional status or in a national law. Informal public beliefs about distinctive local identity and autonomy may well go much further than the formal legal claims made to courts in these cases, and indeed might well serve as a source of lively and contentious disputation in the arenas of politics and public political discourse. Questions of distinctiveness and sovereignty, however, do not get presented to constitutional courts until a threshold has been passed in which the claims are asserted with a degree of formality sufficient to produce legal consequences.
2. All the cases discussed here involve construction of the *national* constitution, and find inconsistency between it and the DIS claim; that is, the national constitution is invoked as a firm limit on the permissible range of subnational autonomy and independence.¹⁵⁹ In several of the cases (Canada, Spain, Italy), the DIS claim is viewed by the court as proposing or asserting an amendment to the national constitution without the use of proper, formal procedures of amendment and is inconsistent with the national constitution for that reason as well.
3. The courts in our sample do not generally distinguish between the secession context and mere internal jockeying for relative advantage within the state. Thus, DIS claims made for purposes of internal positioning within the federation (Italy, Spain, and in the unitary case, France) are received just as negatively as those deployed to support actual or threatened secession (US, Canada).
4. The courts make no distinction between DIS claims made solely and unilaterally by subnational units (Canada, US, Italy), and negotiated deals where the national executive and legislative branches have agreed to recognize the DIS claim as legitimate to some extent, such as through the enactment of a national statute embodying a bilaterally negotiated settlement (France, Spain).
5. The courts uniformly decline to exercise judicial restraint or to invoke available tools of judicial flexibility. For example, a court might treat the outcome of overtly

¹⁵⁹ The decisions thus seem to confirm a hypothesis advanced by Jacob Levy to the effect that one benefit of federalism is that it permits internal variation, but only within a certain range collectively deemed acceptable. Jacob Levy, "States of the Same Nature": *Bounded Variation in Subfederal Constitutionalism*, in *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW* 25 (James A. Gardner & Jim Rossi, eds. 2011).

political negotiations between the central state and its component units as presenting non-justiciable political questions beyond judicial competence. Or a court might treat decisions of subnational governments concerning the scope of their own authority as entitled presumptively to some degree of judicial deference, particularly where that judgment receives the endorsement of the national legislature and executive. Or again, a court might treat constitutional rules concerning the status of subnational units or the allocation of national and subnational competencies as ambiguous, requiring courts to uphold any interpretation of intergovernmental relations by other actors that is plausible and reasonable. In the decisions collected here, however, constitutional courts uniformly decline to invoke such tactics. Instead, their rulings tend to be harsh and categorical. Such rulings do not open doors, but decisively slam them shut.¹⁶⁰

6. Finally, judicial treatment of DIS claims in the four federal states (Spain, Italy, Canada, US) is no more generous, tolerant, or accommodating than it is in the unitary state in our sample (France). This suggests that the presence of a formally federal or quasi-federal structure does not mitigate judicial hostility to formal DIS claims.

3. The unique institutional role of constitutional courts

It remains, then, to explain two closely related questions raised by the rulings presented in the previous section. First, why do national constitutional courts display such consistent and unremitting hostility to DIS claims across such a wide range of circumstances? Second, why are national constitutional courts so much more hostile to DIS claims than other organs of national government such as the legislature and the executive? As shown above, non-judicial organs of national governments are sometimes willing to negotiate, to accommodate, and even to help implement subnationally asserted DIS claims at the national level. Courts are not.

We believe that the best explanation lies in the unique institutional position of national constitutional courts, and in the practices shaped by and incentives offered within that institutional position. We explore four possible arguments in support of this contention. First, consistent with conventional understandings of judicial review, constitutional courts may for institutional reasons be more likely to understand their role as enforcing the constitutional bargain than as putting them under an obligation

¹⁶⁰ It has been suggested to us by commentators from the western side of the Pond that this kind of rigidity is precisely what ought to be expected from courts in civil law states, and indeed that such rigidity is an integral aspect of the civil law method. Although we do not wish to deny stylistic and methodological differences between civil law and common law adjudication, we think the point greatly overstated. For example, as Anna Gamper points out, in Austria—the home of Kelsen himself—the constitutional court employs in federalism cases a “consistency principle” according to which the constitutionality of a federal or *Land* law is, in doubtful cases, presumed to be consistent with the federal constitution. See Anna Gamper, *Constitutional Courts, Constitutional Interpretation, and Subnational Constitutionalism*, 6(2) PERSPECTIVES ON FEDERALISM 24 (2014). She goes on to argue that the Spanish Constitutional Court also makes use of such presumptions, allowing it a similar kind of flexibility rather than rigidity of results. *Id.* at 9.

to make the constitutional bargain work in practice. Second, because constitutional courts tend not to be repeat players in intergovernmental conflicts, they may lack incentives to display greater tolerance of DIS claims intended by subnational units as moves in a long-term process of intergovernmental contestation.

Third, as organs of the national government, constitutional courts may have incentives to favor the exercise of power at the national level. They may also see national legislative and executive efforts to interpret or to seek accommodation within the constitutional structure as intruding on their own exclusive power of constitutional interpretation, and thus have incentives to assert their own power over conflicting assertions of national executive and legislative power. Finally, national constitutional courts may believe themselves to have a special role in the protection of national minorities, especially those that in a federation are weak on account of being geographically dispersed. Because it may exclude many constitutional stakeholders, informal bilateral negotiations between national and subnational officials may be looked upon by national constitutional courts with suspicion, causing courts to insist upon the use of formal—and more inclusive—processes of constitutional amendment.

3.1. Courts as constitutional enforcers

Certainly the most obvious—but, we believe, ultimately unilluminating—explanation of why constitutional courts might behave differently from other national government officials looks to the distinctive nature and function of judicial review in modern constitutional systems.¹⁶¹ That is, the main difference between constitutional courts and other governmental actors arises from the distinct methods by which each is charged to serve the public good. On this view,¹⁶² executive and legislative officials may be conceived as actors whose *raison d'être* is to use the tools of legitimate government power to promote the welfare of the citizenry as directly as possible—to adopt good laws and policies and then implement them through the exercise of public power. To ensure that the efforts of these actors are confined to measures that will in fact promote the general welfare, however—to protect, that is, against well-intentioned but dangerously overreaching uses of public power—constitutions impose constraints on the available scope and methods of executive and legislative power.¹⁶³

Courts, in contrast, may be understood differently. Although as constitutionally created institutions they too are designed to serve the public good, their principal

¹⁶¹ See, generally, ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* (1989) (analyzing judicial review as fundamentally concerned with enforcement of the constitution as law).

¹⁶² It makes no difference, on this account, whether a constitution is conceived, in the fashion of the Enlightenment, as a genuinely organic act of popular self-definition, see, e.g., U.S. CONST., Preamble (“We the People”), or, in the fashion of political scientists, as a merely instrumental “constitutional bargain” among actors who wish to establish an efficacious vehicle for combining their efforts to enhance their welfare. See, e.g., EDWARD SCHNEIER, *CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN* 217 (2006). Although the *reasons* for judicial review differ in each model, in each the *function* of judicial review is the same: to enforce the terms of the constitutional arrangement, however defined.

¹⁶³ E.g., GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* 196 (1994) (“constitutions are first and above all, instruments of government which limit, restrain and allow for the control of the exercise of political power”).

method is not to pursue it directly through the adoption of beneficial measures and policies, but to do so indirectly by faithfully enforcing constraints that the constitution happens to apply to other actors in the system.¹⁶⁴ Courts do not, in other words, need to think about what measures would promote the general good, nor should they.¹⁶⁵ Rather, they are required by their institutional role to presume that enforcement of constitutional constraints in and of itself serves the public good.

Although this view of the matter is not without force, it does not in the end explain the rather strikingly rigid formalism exhibited by constitutional courts engaged in judicial review of subnational DIS claims.¹⁶⁶ The fact that courts have functional obligations to engage in judicial review says nothing about the way in which judicial review is properly practiced. Judicial review may be strict or loose, independent or deferential, risk-taking or risk-averse, and so forth, and the particular approach to judicial review that a court adopts necessarily reflects a choice among the available approaches.¹⁶⁷ In the cases in our sample, however, courts adopted an approach to judicial review that was for the most part strict, risk-averse, and undeferential toward the choices made by other constitutional actors. With perhaps the notable exception of the Canadian decision, the rulings rest mainly on relatively rigid and uncompromising definitions of subnational roles, distinctiveness, and autonomy, and largely reject flexible readings of constitutional language establishing the status of subnational units in the constitutional framework. The concept of “a people,” for example, is not read flexibly to include the possibility that a national people might without contradiction include a component subnational people, but categorically to exclude such a possibility. The concept of subnational sovereignty is interpreted not to be capable of coexisting with national sovereignty in a complex system of decentralized authority, but as by definition incompatible with it. In short, the fact that constitutional courts, unlike other governmental actors, engage in judicial review does not go very far to explain the outcomes and reasoning of the decisions.

3.2. Lack of repeat play

Another possible explanation concerns the different perspectives that judicial and non-judicial officials might bring to the phenomenon of national-subnational disputes. As indicated earlier, one commonly accepted and very plausible view of federalism is that it institutionalizes a system of permanent intergovernmental contestation. In this system, national and subnational governments compete for popular allegiance not only by using their powers to advance the public good through direct, independent action, but also by using their powers to block or impede bad or contrary exercises of

¹⁶⁴ The great exemplar of this approach is probably *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁶⁵ In the United States, the democratically illegitimate substitution of judicial for legislative judgment is known pejoratively as “Lochnerism,” after *Lochner v. New York*, 198 U.S. 45 (1905), a case in which the US Supreme Court invalidated a law setting maximum hours for bakery workers on the ground that it was, essentially, unwise.

¹⁶⁶ The charge of formalism has been made explicitly by some critics of the various rulings. See, e.g., Palermo, *supra* note 16, at 247; Chessa, *supra* note 118; Mangia, *supra* note 118.

¹⁶⁷ EDWARD McWHINNEY, *JUDICIAL REVIEW* 212–216 (4th ed. 1969).

power by the other level. As a result, national and subnational governments engage in what might be considered an ongoing game of positioning, claiming, acting, and blocking for the purpose of advancing their policy goals as a means of competing for public approval and advancing the public good.¹⁶⁸

Because this game is primarily a game of action, it necessarily involves mainly the executive and legislative branches at each level.¹⁶⁹ It is these branches, rather than the judiciary, that have the institutional capacity and authority to generate and deploy public policies. As a result, executive and legislative officials at both levels are accustomed to competing with one another. These are the officials who actually take the actions of which intergovernmental competition consists—they are the ones who formulate and implement policies, make claims and counterclaims about the allocation of governmental authority, monitor and criticize actions of officials at the other level, and develop strategies to obstruct bad policy decisions taken by their counterparts.¹⁷⁰

A relationship of long-term competition is nonetheless a long-term relationship, and people who are bound to one another over the long term, and who then encounter each other repeatedly in similar circumstances, inevitably develop a kind of working relationship based on mutual knowledge, expectations, and understandings.¹⁷¹ As a result, the day-in and day-out complications associated with long-term competition may not bother them. On the contrary, they may come to expect it, and because the behavior of their opponents often becomes predictable, it may lose its capacity to surprise, much less to alarm.

For legislative and executive actors, then, a subnational government's assertion of a DIS claim need not be experienced as anxiety-producing. Instead, such claims may logically be understood as deployment of just another tool in the ongoing process of jockeying for advantageous position within the federation. Those who engage in permanent contestation must expect reverses and exchanges of power and fortune. Acceptance of a DIS claim need not precipitate the disintegration of the federation, for any advantage accruing to the subnational unit today may be overturned tomorrow by some different strategy. If the claim is denied today, the subnational unit may make up the lost ground tomorrow by different means. Thus, although national legislative and executive officials may be predisposed to resist DIS claims so as not to surrender ground, their status as repeat players who firmly expect to engage in additional rounds in the future may inoculate them against feeling that such claims mark any particularly great threat to the system over the long term.

National courts, on the other hand, are in a different position. They are not typically involved in routine or ongoing contestation with subnational officials. Ordinarily, they are not in a position even to observe regular competition occurring between subnational governments and their colleagues in the national legislative and executive branches. Instead, national constitutional courts become aware of and involved in

¹⁶⁸ GARDNER, *supra* note 7, ch. 2; BEDNAR, *supra* note 13, *passim*.

¹⁶⁹ GARDNER, *supra* note 7, at 87–99, 181.

¹⁷⁰ *Id.*; NUGENT, *supra* note 14, *passim*.

¹⁷¹ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974); ROGER B. MYERSON, *GAME THEORY* 309 (1991).

intergovernmental competition only when a case reaches them, and even then their involvement usually is confined to adjudicating that single case.

National courts in federal systems, then, tend to be, in the language of game theory, single-shot rather than repeat players.¹⁷² This experience, in turn, may give them a short-term rather than a long-term perspective concerning the significance of various strategies of contestation deployed by the different levels of government. In particular, their role may predispose them to construe DIS claims more literally, and consequently to treat them as more serious threats to the long-term survival of the state, than their counterparts in the national executive and legislative branches. Courts, in other words, may honestly fear such claims. That fear could thus help account for the hostility to DIS claims observed in the judicial opinions reviewed in Section 2, and the rigidity with which the courts construe constitutional provisions dealing with subnational identity and autonomy.

3.3. Lack of impartiality

A third possible explanation for judicial hostility to subnational DIS claims might be a lack of impartiality on the part of national constitutional courts toward the outcome of conflicts between national and subnational claims to power. This could manifest itself in either a general preference for the exercise of power at the national level or a more specific preference for the exercise of national judicial power over the exercise of power by other governmental actors at any level.

Since the middle of the twentieth century, government power at all levels has expanded considerably, largely due to an expansion of common understandings of the scope of the public sector as compared to the private sector.¹⁷³ However, the expansion of government power at the national and subnational levels has not been symmetrical: “the experience of most federations,” Cheryl Saunders observes, “suggests that central power is likely to expand, at the expense of the powers of the regions.”¹⁷⁴ Why this pattern has emerged is not entirely clear. One possibility is that solutions to various crises occurring during the twentieth century (a worldwide economic depression, two world wars, a global cold war, etc.) have required the exercise of substantial amounts of power at the national level,¹⁷⁵ and power once assumed by national governments is not then easily dislodged. Indeed, expansion of the scope of federal

¹⁷² Galanter, *supra* note 171, at 3 (using the term “one-shotters”).

¹⁷³ JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 286–287 (1965); Alain C. Cairns, *The Politics of Constitutional Renewal in Canada*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE* 97 (Keith G. Banting & Richard Simeon eds., 1985); SCHNEIER, *supra* note 162, at 52.

¹⁷⁴ Cheryl Saunders, *Constitutional Arrangements of Federal Systems*, 25 *PUBLICUS* 61, 71 (1995). See also Mikhail Filippov & Alga Shvetsova, *Federalism, Democracy, and Democratization*, in *FEDERAL DYNAMICS: CONTINUITY, CHANGE, AND THE VARIETIES OF FEDERALISM* 167, 169 (Arthur Benz & Jörg Broschek eds., 2013) (describing various “laws” of centralization in federal states).

¹⁷⁵ Arthur Benz, *Regionalization and Decentralization*, in *FEDERALISM AND THE ROLE OF THE STATE*, 127, 138 (Herman Bakvis & William M. Chandler eds., 1987).

power may hold great appeal to federal officials because it gives them greater leverage to deliver goods that help them get reelected.¹⁷⁶

This kind of reasoning does not of course apply directly to judges of national constitutional courts, who typically lack the capacity to generate “deliverables.” Nevertheless, nothing rules out the possibility that such judges might prefer, when faced with equally plausible choices, to direct powers to other national actors with whom they are allied politically or to whom they owe their appointments rather than to award such powers to subnational political actors to whom they have no strong ties. With the exception of the Supreme Court of Canada, which by law must include at least three judges from Quebec,¹⁷⁷ none of the constitutional courts examined here is constructed in a way that might encourage judicial responsiveness to subnational interests. To the contrary, judicial appointees are likely to be individuals favored by national political actors, from whose ranks the appointees may well be drawn. Nothing in such an arrangement by any means guarantees that constitutional court judges will be more responsive to national than subnational interests,¹⁷⁸ but nothing discourages such an outcome either.

Another way in which constitutional courts might come to prefer the exercise of national over subnational power arises from the nature of the power struggles in which national courts may from time to time participate. National constitutional courts, as discussed above, do not typically have any reason to engage in contestation with subnational governments. On the other hand, they may very well engage in power struggles with other actors in the *national* government, and in particular with actors in the national legislative and executive branches.¹⁷⁹ This may in turn cause a national court to react with hostility to deals negotiated between national and subnational governments if the court perceives such deals as encroaching on *its own* power—in particular, the court’s exclusive power to interpret the national constitution, its only power of any great consequence.

¹⁷⁶ ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 125–127 (2011).

¹⁷⁷ Supreme Court Act, R.S.C. 1985, c. S-26. This minimal statutory requirement is supplemented by a strong historical convention of appointing three judges from Ontario and two from the Western provinces and one from the Atlantic provinces so as to achieve balanced provincial representation on the court. The chief justiceship traditionally rotates between an Anglophone and a Francophone. See HOGG, *supra* note 148, at 243.

¹⁷⁸ The great counterexample is surely the UK Privy Council, which over the course of the late nineteenth and early twentieth centuries essentially inverted the design of the Canadian Constitution to convert it from one meant to create a highly centralized state into one that creates the world’s most decentralized federation. HOGG, *supra* note 148, at 125–126; PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BE A SOVEREIGN PEOPLE?* 40 (1992). Another, less dramatic, counterexample is the US Supreme Court since the 1990s, which has taken a series of modest steps to curb continued expansion of national power. *E.g.*, *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

¹⁷⁹ This is the Madisonian conception of horizontal separation of powers. According to Madison, power is divided horizontally, among legislative, executive, and judicial branches, so as to institutionalize a system of mutual struggle that keeps private liberty safe from excessive concentration of government power. See *THE FEDERALIST*, Nos. 47, 48, 51 (Madison). As Madison famously put the principle, “[a]mbition must be made to counteract ambition.” *Id.*, No. 51.

A court might take such a view if it comes to suspect that negotiations between national and subnational governments concerning the identity, status, or autonomy of subnational units amount to collusive attempts to amend the national constitution by informal and unauthorized means.¹⁸⁰ In that case, permitting the national legislative and executive branches to engage in negotiations that informally alter the structure or meaning of the constitution may appear to the court to amount to acquiescence in a usurpation by those branches of power that properly belongs uniquely to the constitutional court in its capacity as the sole and final interpreter and enforcer of constitutional meaning. Thus, national constitutional courts may resist subnational DIS claims not because they are afraid of ceding national power to subnational governments, but because they are afraid of ceding national *judicial* power to the national executive and legislative branches. In these instances, subnational units wishing to assert DIS claims—even those claims that might otherwise seem plausible or generate sympathy—may be caught up as innocent pawns in a completely unrelated power struggle waged on the national level between constitutional courts and other branches of the national government.

3.4. Protection of national minorities

A final possible explanation for the different reception of DIS claims by courts and national legislative and executive actors focuses on the special role that national constitutional courts may play in the protection of minorities. Several of the decisions, it will be recalled, treat DIS claims, whether made unilaterally by subnational units or bilaterally with the approval of the national government, as attempts to amend the national constitution outside of the formal processes provided in the constitution itself. By rejecting DIS claims on this basis, constitutional courts insist that all amendments to the constitution proceed exclusively according to constitutionally approved methods. We have already examined this response as a kind of judicial turf protection, but there is another, more benign possibility: courts may insist on the use of formal amendment procedures in their role as protectors of national minorities.¹⁸¹

This may seem paradoxical. A subnational population claiming a distinctive identity or additional autonomy rights is a national minority; to reject its DIS claims is thus not to protect the interests of a minority but to participate in crushing its most deeply held aspirations.¹⁸² Yet that view may be too simple. Nations contain many minorities of different kinds. In a federal state, every subnational population is by

¹⁸⁰ The idea of “informal” constitutional change—constitutional change that occurs without invocation of formal processes of amendment—is commonplace in the literature of constitutional design. See, e.g., STEFAN VOIGT, *EXPLAINING CONSTITUTIONAL CHANGE: A POSITIVE ECONOMICS APPROACH* (1999); WALTER F. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* 333 (2007); Arthur Benz, *Unsuccessful Reform and Successful Non-Reform—Constitutional Policy in Germany and Canada*, Universität Osnabrück, Fern Universität in Hagen Research Paper, No. 21–23, 2008, available at <https://verfassungswandel.files.wordpress.com/2009/02/paper-osnabruck-arthur-benz.pdf>.

¹⁸¹ The U.S. Supreme Court has sometimes claimed such a role for itself. See *Carolene Products*, 304 U.S. 144, 152 n.4 (1938); see also KRITIN HENRARD, *MINORITY PROTECTION IN POST-APARTHEID SOUTH AFRICA* 203–204 (2002).

¹⁸² WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* (1995).

definition a political minority. Moreover, not all minorities are geographically compact, and thus able to wield governmental power in virtue of controlling a regional government. Many minorities are geographically dispersed, and in a federal state are thus much weaker than those whose compactness allows them to control a government.¹⁸³

The most common reason why governmental actors might be tempted to resort to informal methods of constitutional change is the difficulty of proceeding by formal methods.¹⁸⁴ Yet formal constitutional change tends to be difficult for a good reason: it is the method that offers the most comprehensive and uniform protection for the interests of all stakeholders in the constitutional order.¹⁸⁵ The insistence by constitutional courts that constitutional amendments altering the status and autonomy of subnational governments proceed solely by way of formal mechanisms may thus reflect the courts' view of themselves as having a significant role in protecting the interests of those excluded from informal workarounds and negotiations, especially other minorities unrepresented in informal (and sometimes bilateral) negotiations.¹⁸⁶

This reasoning appears most clearly in the decision of the Supreme Court of Canada. In holding that multilateral negotiations must precede any attempt by Quebec to secede, the court explained that “[n]egotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.”¹⁸⁷ “After 131 years of Confederation,” the court continued, “economic, political and social institutions” are deeply entangled and secession would confront many of these interests with “potential dismemberment.” “There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights.”¹⁸⁸ A negotiated secession must, the court said, aim for “an agreement reconciling all relevant rights and obligations.”¹⁸⁹ If other national constitutional courts tend to share the view that one of their important functions is to protect the interests of constitutional stakeholders,

¹⁸³ Ronald L. Watts, *Federalism in Fragmented and Segmented Societies*, in *FEDERALISM AND CIVIL SOCIETIES: AN INTERNATIONAL SYMPOSIUM* 145, 150 (Jutta Kramer & Hans-Peter Schneider eds. 1999); KYMLICKA, *supra* note 182, at 29.

¹⁸⁴ Nathalie Behnke & Arthur Benz, *The Politics of Constitutional Change between Reform and Evolution*, 39 *PUBLIUS* 213 (2009); Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 195 (Tom Ginsburg ed., 2012).

¹⁸⁵ Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 *FORDHAM L. REV.* 535, 539–540 (1996).

¹⁸⁶ It is also possible that, from a systemic point of view, a system that simultaneously offers different approaches to DIS claims—here, one that responds to DIS claims with a mix of political flexibility and judicial intransigence—just might promote maintenance of a valuable equilibrium in a federal system. For example, judicial intransigence could establish firm parameters within which political negotiations may occur, thus influencing the likely outcomes of such negotiations and potentially confining them to results consistent with long-term stability. Cf. Christa Scholtz, *Federalism and Policy Change: An Analytic Narrative of Indigenous Land Rights Policy in Australia (1966–1971)*, 46 *CAN. J. POL. SCI.* 397 (2013).

¹⁸⁷ *Secession Reference*, [1998] 2 S.C.R. 217, ¶ 92.

¹⁸⁸ *Id.*, ¶ 96.

¹⁸⁹ *Id.*, ¶ 97.

and especially of weak minorities, they may well have a special reason to dislike signs of bilateralism in what they conceive to be a diverse and multilateral federal state.¹⁹⁰

At the same time, however, this is precisely where questions can arise about the suitability of the constitutional court to play that role effectively. First, there is a potential question, alluded to earlier, about the composition of the court: the members of the court might not be chosen in a way that makes them representative of, or even responsive to, an appropriately wide variety of interests. Second, there is a problem of judicial choice: which minorities get the benefit of the court's protection, and why? Should the court look with solicitude on the interests of the complaining subnational population? Or should the court feel a greater obligation to minorities scattered throughout the national population? Which minorities, in other words, should be privileged by the court, and why? A principled basis may not always be readily available for choosing one set of interests over another when those interests come into conflict.

4. Conclusion

We have argued here that subnational claims to a distinctive identity or sovereignty (DIS claims) are often received with some degree of tolerance by national legislative and executive actors, but are uniformly received with great hostility when asserted in national constitutional courts. In exploring possible institutional explanations for this disparate treatment, we are inclined to reject the view that judicial hostility is rooted simply in the nature and function of judicial review in modern constitutional systems. Three other explanations, we believe, hold greater promise.

First, the isolation of courts from the kind of intergovernmental contestation that occurs routinely in federal systems may predispose courts to react to DIS claims with greater alarm and anxiety than executive and legislative actors, who deal with subnational obstreperousness all the time. Second, the institutional position and composition of national courts may make them either insensitive to subnational claims or much more sensitive to perceived encroachments on judicial power by other branches of the national government, and this in turn might cause them to reject DIS claims not on their merits, but as a strategy of horizontal contestation for power within the national government. Finally, national constitutional courts might see themselves as having a special role in the protection of constitutional stakeholders, especially national minorities, and this might predispose them to prefer that DIS claims be made exclusively in the context of formal processes of constitutional amendment, in which all constitutional stakeholders are likely to enjoy maximum protection.

¹⁹⁰ The Spanish Constitutional Court was particularly disturbed by what it conceived to be the assertion by Catalonia of a bilateral relation with the central state. T.C.S. No. 31/2010, ¶ 13 (Spain) ("Obviously transferring this principle of bilateralism to the relationship between the Government of the Autonomous Community and the Spanish State would be constitutionally impossible, as it can relate with the other only in terms of integration, and not of otherness."). *See also id.*, ¶ 115–116, 120.