

12-1-2018

# The Theory and Practice of Contestatory Federalism

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# THE THEORY AND PRACTICE OF CONTESTATORY FEDERALISM

JAMES A. GARDNER\*

## ABSTRACT

*Madisonian theory holds that a federal division of power is necessary to the protection of liberty, but that federalism is a naturally unstable form of government organization that is in constant danger of collapsing into either unitarism or fragmentation. Despite its inherent instability, this condition may be permanently maintained, according to Madison, through a constitutional design that keeps the system in equipoise by institutionalizing a form of perpetual contestation between national and subnational governments. The*

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\* Bridget and Thomas Black SUNY Distinguished Professor, University at Buffalo School of Law, State University of New York. An earlier version of this paper was presented at the 2017 Annual Meeting of the American Political Science Association and at the University at Buffalo School of Law. I thank Jessica Bulman-Pozen, John Dinan, Munroe Eagles, Rachael Hinkle, John Kincaid, Larry Kramer, David Landau, Troy Smith, Matt Steilen, Rick Su, and audience members at both presentations for valuable comments. Field research in Canada was supported by a grant from Fulbright Canada during the fall of 2012, when I served as Fulbright Visiting Research Chair in the Theory and Practice of Constitutionalism and Federalism at McGill University. I thank Fulbright Canada for its support, and the members of the McGill Research Group on Constitutional Studies, most especially its director, Jacob Levy, for support and illuminating conversation during the period of my fellowship. Field research in Italy was supported by a grant from the European Academy's Institute for Comparative Federalism in Bolzano, Italy, during the spring of 2013, when I served as Federalism Scholar in Residence. I thank the Institute's director, Francesco Palermo, and its staff for many helpful conversations. All other field research was supported by a grant from the Baldy Center for Law and Social Policy. I thank its Director, Errol Meidinger, and its Assistant Director, Laura Wirth, for their support. I am also extremely grateful for peerless research assistance provided throughout this project by Amat Fatimah. And finally, I wish to thank all the many interlocutors who suffered through my field interviews. To preserve their privacy and encourage their candor, I have anonymized all references to these interviewees.

*theory, however, does not specify how that contestation actually occurs, and by what means.*

*This paper investigates Madison's hypothesis by documenting the methods actually deployed on the ground to influence or to thwart national policy making used by subnational units in nine federal or quasi-federal states: Argentina, Austria, Belgium, Canada, Germany, Italy, Spain, Switzerland, and the United States.*

*The study produces two notable findings. First, the evidence confirms Madison's prediction that subnational units in federal states will from time to time assert themselves against national power—ambition does appear to counteract, or at least to be deployed against, ambition. Second, the data show strikingly that subnational units in federal states have energetically developed a great variety of methods to attempt to shape, influence, or thwart national policies. Indeed, the evidence demonstrates that subnational units have not confined themselves to the use of tools of influence provided by their constitutions, but have in many cases creatively developed new tools of influence outside of the formal constitutional scheme. This phenomenon raises the possibility that Madison's institutional prescription for constitutional stabilization may have the perverse effect of creating the conditions for constitutional destabilization instead. This conclusion in turn throws doubt on the Madisonian premise that constitutions can, through careful engineering, be made to stabilize themselves at their initial design specifications.*

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## INTRODUCTION

In one of the most consequential phrases ever uttered in the field of constitutional law, James Madison declared: “[a]mbition must be made to counteract ambition.”<sup>1</sup> With this phrase—an adage that gave birth to the modern field of constitutional design<sup>2</sup>—Madison hypothesized that the inexorable pressure of human weakness would eventually preclude most government officials from complying with constitutionally prescribed limitations on their own power. From this premise, Madison went on to conclude that the only reliable way to stabilize constitutional divisions of authority over the long term was to structure power in a way that pits officials against one another.<sup>3</sup> Thus, he predicted, a careful allocation of powers to different officials, holding different positions and portfolios and answerable to different constituencies, could, if well executed, maintain a constitution in equilibrium at its design parameters through a well-crafted balance of perpetually opposed forces<sup>4</sup>—a system of so-called “checks and balances.”<sup>5</sup> Madison prescribed this solution in two dimensions: horizontally in the form of separation of powers, and vertically in the form of federalism.<sup>6</sup> I focus here on the latter, and the question I wish to take up is this: Was Madison correct? Can the countering of ambition by ambition stabilize the constitutional division of authority between national and subnational governments?

Like all attractive theories, Madison’s theory of contestatory federalism is neat and tidy, with a happy ending. At the time he

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1. THE FEDERALIST NO. 51 at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

2. See generally *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* (Bernard Grofman & Donald Wittman eds., 1989).

3. THE FEDERALIST NO. 51, *supra* note 1, at 357-59 (James Madison).

4. As the U.S. Supreme Court has said in the context of horizontal separation of powers, the Constitution establishes a “finely wrought and exhaustively considered” division of power that must not be disturbed. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

5. The Framers themselves did not use this term, but it was adopted some time ago by the courts. The earliest reference to the term in a Supreme Court case dealing with an issue implicating federalism appears to be *Amy v. Supervisors*, 78 U.S. (6 Wall.) 136, 138 (1870).

6. The combination of horizontal and vertical division of power institutionalized, for Madison, a “double security” for the liberty of the people. THE FEDERALIST NO. 51, *supra* note 1, at 357 (James Madison).

conceived it, however, it was almost entirely speculative; a federation structured in this way had never previously existed,<sup>7</sup> and Madison's account was based more on deduction from plausible first premises than on observation or experience. Today, more than two centuries later, a large majority of the world's free population lives in federal states.<sup>8</sup> Although the precise structures of these federations differ, they are clearly recognizable from Madison's account; indeed, in some contemporary accounts, U.S. federalism provides the template against which all other federal systems may be evaluated.<sup>9</sup> In light of this extensive experience, it is appropriate to inquire into the accuracy of Madison's speculative analysis. In this paper, I do so by asking three questions. First, was Madison correct that contestation between national and subnational governments occurs in federal states? Second, if he was, by what means and methods does such contestation occur? Third, does such contestation

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7. THOMAS O. HUEGLIN & ALAN FENNA, *COMPARATIVE FEDERALISM: A SYSTEMATIC INQUIRY* 84 (2d ed. 2015); FRANCECO PALERMO & KARL KÖSSLER, *COMPARATIVE FEDERALISM: CONSTITUTIONAL ARRANGEMENTS AND CASE LAW* 70-71 (2017); RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 3 (3d ed. 2008).

8. By my own back-of-the-envelope calculations, 79 percent of the world's free population lives in federal states. To perform this calculation, I used the list of federal states provided in WATTS, *supra* note 7, at 12 tbl.2; the list of states deemed "[f]ree" in FREEDOM HOUSE, *FREEDOM IN THE WORLD* 2017, 20-24 (2017), [https://freedomhouse.org/sites/default/files/FH\\_FIW\\_2017\\_Report\\_Final.pdf](https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf) [<https://perma.cc/3XA2-5ZLN>]; and country population figures available at *Worldometers*, <http://www.worldometers.info/world-population/population-by-country/> [<https://perma.cc/8E5E-8PF5>]. For similar claims, see HUEGLIN & FENNA, *supra* note 7, at 1, 69; WATTS, *supra* note 7, at 1; John Gerring, Strom C. Thacker & Carola Moreno, *Are Federal Systems Better than Unitary Systems?* 2 (paper presented at the American Political Science Association annual meeting, June 22, 2007), <http://www.bu.edu/sthacker/files/2012/01/Are-Federal-Systems-Better-than-Unitary-Systems.pdf> [<https://perma.cc/2PXH-M6HQ>]. Much, of course, will depend upon how one identifies "federal" states and how one calculates which states are "free."

9. S. RUFUS DAVIS, *THE FEDERAL PRINCIPLE* 121 (1978) ("It is the U.S. model which defines the conceptual starting-point" for designers of federal constitutions.); Thomas O. Hueglin, *Comparing Federalism: Variations or Distinct Models?*, in *FEDERAL DYNAMICS: CONTINUITY, CHANGE, AND THE VARIETIES OF FEDERALISM* 27, 28 (Arthur Benz & Jörg Broschek eds., 2013) (arguing that the dominant view of federalism focuses on the United States, and that "[e]verything else, according to this view, amounts to incomplete or quasi-federalism"); see also IVO D. DUCHACEK, *COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS* 202 (1970) ("[The U.S. system] has acquired the reputation of a model."); PALERMO & KÖSSLER, *supra* note 7, at 72 (identifying the United States as one of three archetypes of federal systems, along with Switzerland and Germany); ALFRED STEPAN, *ARGUING COMPARATIVE POLITICS* 192 (2001) (contending that the United States is the best known and "most widely ... emulated model" of a federal state).

in fact, as Madison predicted, stabilize the constitutionally prescribed allocation of power between the national and subnational levels?

These questions have received surprisingly little systematic attention. A few studies examine methods of intergovernmental conflict in single states, or at most in two states,<sup>10</sup> but no study does so on a broadly comparative basis. Moreover, the single-country studies generally confine themselves to descriptive accounts of methods of intergovernmental relations, rarely relating the use of those methods to the heart of Madison's theoretical project—the question of constitutional self-stabilization.<sup>11</sup>

The present study fills that gap. Based on more than fifty interviews with scholars and government officials in nine federal or quasi-federal<sup>12</sup> states—Argentina, Austria, Belgium, Canada,

10. Works examining methods of subnational contestation in the United States include JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* ch. 3 (2005); JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256 (2009); John Dinan, *Shaping Health Reform: State Government Influence in the Patient Protection and Affordable Care Act*, 41 *PUBLIUS* 395 (2011). Ardanaz, Leiras, and Tommasi address several methods of subnational contestation in Argentina. See Martín Ardanaz, Marcelo Leiras & Mariano Tommasi, *The Politics of Federalism in Argentina and its Implications for Governance and Accountability*, 53 *WORLD DEV.* 26, 27-30 (2014). Wright and Gardner have published studies on methods of intergovernmental contestation in Canada. See James A. Gardner, *Canadian Federalism in Design and Practice: The Mechanics of a Permanently Provisional Constitution*, 9 *PERSP. ON FEDERALISM* 1 (2017); Wade K. Wright, *The Political Safeguards of Canadian Federalism: The Intergovernmental Safeguards*, 36 *NAT'L J. CONST. L.* 1 (2016). The only comparative study of which I am aware that focuses expressly on techniques of subnational contestation is a two-country study of the United States and Spain. See James A. Gardner & Antoni Abad I Ninet, *Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain*, 59 *AM. J. COMP. L.* 491 (2011). A recent volume contains a comprehensive multi-country study of intergovernmental relations in twelve federal states and the European Union (EU), but it consists of a series of single-country studies and is not meant to be synthetic. See *INTERGOVERNMENTAL RELATIONS IN FEDERAL SYSTEMS: COMPARATIVE STRUCTURES AND DYNAMICS* (Johanne Poirier et al. eds., 2015).

11. One of the few exceptions among the single-country studies is NUGENT, *supra* note 10, at 4-10.

12. One of the recurring issues in the field of comparative federalism is defining what counts as a federation. Different scholars sometimes use very different classification systems. Compare, e.g., DANIEL J. ELAZAR, *FEDERALISM* (1995), with WATTS, *supra* note 7, at 12-13. I am inclined to agree with Palermo and Kössler that the search for an authoritative definition of federalism is a waste of time. See PALERMO & KÖSSLER, *supra* note 7, at 38. Accordingly, I have included in this study states, such as Italy or Spain, that are not inevitably viewed as



Germany, Italy, Spain, Switzerland, and the United States<sup>13</sup>—as well as extensive research in primary and secondary source materials from each state, this Article examines the tools, methods, and mechanisms that subnational units actually deploy to influence national political agendas, shape national policy making, and resist or undermine unwanted exercises of national power.<sup>14</sup> The Article then goes on to examine whether the dynamic thus created succeeds in stabilizing the allocation of power between the national and subnational levels at the design parameters contemplated by the federal constitution.

The Article proceeds in three parts. Part I sets out the Madisonian theory of contestatory federalism. It describes Madison's account of how liberty may be preserved by dividing governmental authority among different power centers, highlights Madison's lack of attention to how his theory of mutual checking and contestation might be operationalized in practice, and probes some of the potential weaknesses in Madison's conception of constitutional self-stabilization.

Part II reports the results of my field research by providing a thorough inventory, along with illustrative examples, of methods of subnational contestation actually used in the federal states under study. This compilation produces two notable findings. First, it

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fulfilling some definition of federalism, and thus I am willing to call them "quasi-federal." Again, however, I do not believe there is much significance to the terminology. All nine states are decentralized to some extent; in all, subnational units enjoy some degree of autonomy, and such autonomy is either constitutionalized or the outcome of constitutionally prescribed procedures. That is sufficient for my purposes.

13. The interviews are actually with individuals from the first eight of these states. As a specialist in U.S. constitutional law with thirty years' experience, I have drawn primarily on my own experience and prior work in analyzing federalism in the United States.

14. I focus here almost exclusively on the means by which subnational units in federations attempt to get their way rather than on how national governments do so. I maintain this focus for two reasons. First, this seems like the more interesting question. National governments in federations seem to have all the advantages: greater size, a greater population, far more resources, and so forth. Thus, the interesting question is not how national governments get their way—that they should get their way seems logical—but how subnational units can ever do so given the seeming disparities of power and resources. Second, generally speaking, the way that national governments exercise their power is usually pretty straightforward: they just do it. In contrast, subnational units often have to think tactically and creatively to accomplish their ends. To the extent that national governments do not simply do what they want—for example, they voluntarily engage in extensive consultation, as in Germany and Switzerland, *see infra* notes 287-88 and accompanying text, or negotiation, as in Canada. *See infra* notes 212-13 and accompanying text. That behavior will be exposed by consideration of how conflicts are resolved from the subnational point of view.

confirms Madison's prediction that checking and contestation will occur in federal states. In fact, the study shows not only that subnational units in all nine federal states push back against national power from time to time, but that in some states they do so regularly and with considerable effectiveness. Second, it demonstrates that subnational units in the federal states studied here have from time to time resorted with great creativity to an enormous variety of methods to attempt to shape, influence, or thwart national policies. These tools of influence range from openly defiant methods, such as threatening secession or refusing to obey national laws or orders of national courts; to surreptitious undermining of national policies through uncooperative implementation of national law; to coordinated subnational occupation of policy space left vacant by national governments; to politically oriented mobilization of popular opinion; to more cooperative and routinized methods such as lobbying, negotiation, and ministerial consultation. Intergovernmental contestation not only occurs, but is occasionally waged with great vigor and creativity.

Part III takes up the question of constitutional stabilization by analyzing the extent to which the tools of contestation identified in Part II are among those affirmatively provided, or at least contemplated, by the constitutions of the federations in which the tools are used. Although constitutions authorize many of the tools that subnational units deploy, the evidence shows that several widely used tools are clearly unauthorized, and many others press so hard against the boundaries of what might be constitutionally contemplated as to raise significant doubts about their constitutionality. These findings suggest that Madison may have seriously underestimated the strength of the incentives facing government officials, who seem willing not only to innovate within the bounds of constitutional authority to get their way, but also to go outside those bounds when the tools of contestation offered by the constitutional plan do not provide the desired degree of efficacy.

All this raises the intriguing possibility that Madison's theory of contestatory federalism may be far more potent than he anticipated. Madison argued that a contestatory system of federally divided power would stabilize the constitutional allocation of authority through

a process of dynamic self-equilibration.<sup>15</sup> That may occur. On the other hand, it appears that on some occasions government officials wish so strongly to prevail in their struggles against one another that they seek advantage wherever they can find it, including by resort to extraconstitutional methods. In these situations, the constitutionally induced struggle that Madison believed would stabilize the constitutional allocation of power may actually *destabilize* it, as government officials attempt through informal or surreptitious means to alter or bend the constitution to achieve their own goals.<sup>16</sup> This phenomenon in turn raises important questions about the binding effect of constitutions on official behavior and the capacity of constitutions to stabilize themselves at their initial design specifications, or indeed at any particular point of constitutional evolution.<sup>17</sup>

## I. THE THEORY OF CONTESTATORY FEDERALISM

Theories of federalism are inherently theories of balance or equilibrium.<sup>18</sup> Federalism divides official power among two levels of government, each of which is granted some measure of autonomy.<sup>19</sup> Different polities may choose to divide power in this way for

15. See *supra* notes 1-5 and accompanying text.

16. The theory of practice-driven informal constitutional change predicts this. For an overview of that theory and how it operates, see generally James A. Gardner, *Practice-Driven Changes to Constitutional Structures of Governance*, 69 ARK. L. REV. 335 (2016).

17. For a more detailed application of this analytic approach to the Canadian Constitution, see Gardner, *Canadian Federalism*, *supra* note 10.

18. PRESTON KING, *FEDERALISM AND FEDERATION* 62 (1982); Arthur Benz & César Colino, *Constitutional Change in Federations—A Framework for Analysis*, 21 REGIONAL & FED. STUD. 381, 387 (2011); César Colino, *Varieties of Federalism and Propensities for Change*, in *FEDERAL DYNAMICS*, *supra* note 9, at 57; Kathleen Thelen & Sebastian Karcher, *Resilience and Change in Federal Institutions: The Case of the German Federal Council*, in *FEDERAL DYNAMICS*, *supra* note 9, at 119. In the United States, federalism is of course understood as part of the constitutional system of “checks and balances” that also includes horizontal separation of powers. See *supra* notes 4-5 and accompanying text.

19. See, e.g., DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 5 (1987) (describing federalism as a “ombination of self-rule and shared rule”); WILLIAM H. RIKER, *FEDERALISM* 11 (1964) (defining federalism to include the principle of “some guarantee ... of the autonomy of each government in its own sphere”); K. C. WHEARE, *FEDERAL GOVERNMENT* 10-11 (3d ed. 1953) (defining the federal principle as “the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent”).

different reasons,<sup>20</sup> but in no case is the division undertaken in the expectation that it will be temporary. Like all constitutions, federal constitutions arrive with a presumption of endurance,<sup>21</sup> and it is clear from their choice that the polities that create federal states are not indifferent as to whether the state remains federal, collapses into unitarism, or splinters into fragments. In some cases, perhaps many, the promise of authority and autonomy to constituent units characteristic of federalism is considered to be an indispensable term of the “federal bargain” that makes formation of the state possible in the first instance.<sup>22</sup> Whatever the good to which any particular federal system aspires, it is by definition a good available only so long as power is, and remains, appropriately divided.

Nevertheless, it is far from self-evident that a division of governmental power on a federal model will in fact endure. History suggests that the choice of a federal form of organization entails considerable risk: according to one count, “twenty-seven of the forty-four federations formed in the last two hundred years... have failed either by breaking apart” or by collapsing into unitarism.<sup>23</sup> Consequently, a critical question facing federal theory concerns the means by which a division of authority and autonomy that is recognizably federal may be sustained indefinitely.

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20. For example, some polities may adopt federalism for the protection of individual liberty, see THE FEDERALIST NO. 10 (James Madison), while others may do so to accommodate ethnonational diversity within the state. See HUEGLIN & FENNA, *supra* note 7, at 1-4; PALERMO & KÖSSLER, *supra* note 7, at 34-35.

21. See, e.g., U.S. CONST. pmb. (“We the People of the United States, in Order to ... secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution.”); Pmb., CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (“[S]ecure the blessings of liberty to ourselves, to our posterity, and to all men of the world who wish to dwell on argentine soil.”).

22. RIKER, *supra* note 19, at 12; Benz & Colino, *supra* note 18, at 383; Miknaïl Filippov & Olga Shvetsova, *Federalism, Democracy, and Democratization*, in FEDERAL DYNAMICS, *supra* note 9, at 168, 170; Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, in THE OXFORD HANDBOOK OF LAW AND POLITICS, 142, 143-44 (Keith E. Whittington et al. eds., 2008).

23. JONATHAN LEMCO, POLITICAL STABILITY IN FEDERAL GOVERNMENTS 1 (1991). These include, for example, Austria-Hungary, the Central African Federation, Ethiopia, the Mali Federation, Uganda, and the United Arab Republic. *Id.* at 77. Since Lemco published his study, the Soviet Union, Yugoslavia, and Czechoslovakia have also fragmented.

*A. The Madisonian Theory of Perpetual Contestation*

The most elaborately worked out account of how a federal division of authority may endure, and one of the most influential, is James Madison's. Madison's theory begins with political psychology: human beings, Madison argues, strive to be virtuous, but few have the strength to resist temptation, and those able to do so initially are generally unable to sustain the effort for very long.<sup>24</sup> Among those who hold official power, the capitulation to temptation generally appears in the form of "ambition," and specifically the ambition among officials to augment their own power.<sup>25</sup> Thus, writes Madison, we may expect in every political system that virtually all who hold power will eventually seek more of it.<sup>26</sup> In a system in which power is divided, this will inevitably mean seeking to appropriate and accumulate powers held by others.<sup>27</sup> Such accumulation of power is dangerous, he argues, because it creates the conditions in which liberty may be lost to tyranny.<sup>28</sup>

This premise led Madison to seek institutional solutions to what he deemed an irremediable flaw in human character.<sup>29</sup> One solution that Madison immediately rejected is the solution of constitutional limits, or what we think of today as "constitutionalism."<sup>30</sup> A constitution, according to the Enlightenment theory of political legitimacy inherited by the American Founders, is a set of commands from the

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24. Hence, for Madison, centralization of power is "the very definition of tyranny"—no one can long resist its temptations. THE FEDERALIST NO. 47, *supra* note 1, at 336 (James Madison).

25. THE FEDERALIST NOS. 48, 51, *supra* note 1, at 344, 356 (James Madison).

26. *Id.* at 344-45, 347, 356-58.

27. As Madison argued, "power is of an encroaching nature." THE FEDERALIST NO. 48, *supra* note 1, at 343 (James Madison).

28. THE FEDERALIST NO. 10, *supra* note 1, at 130-36 (James Madison).

29. *Id.*; see also Robert E. Goodin, *Institutions and Their Design*, in THE THEORY OF INSTITUTIONAL DESIGN 1, 41 (Robert E. Goodin ed., 1996) (arguing that institutions should be designed in light of "the admixture of motives that moves most people, at least in most societies relevantly similar to our own," and that "[c]lassic models of separation of powers," including "checks and balances between branches of government ... constitute one style of reaction").

30. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM 12-13 (1996) (stating that American constitutionalism is based on the idea of a constitution as "a single law that had a special status as a paramount or fundamental law"; "[t]he idea of conducting government under law is the core of American constitutionalism"). The link between federalism and constitutionalism is made explicitly by KING, *supra* note 18, at 67-68.

sovereign people.<sup>31</sup> Consequently, an initial constitutional division of power might sustain itself through the force of habitual obedience on the part of government officials. Madison dismissed this solution out of hand, deriding it as reliance on “parchment barriers.”<sup>32</sup>

Madison’s solution was not to resist, but to exploit human nature: if the ambition that afflicts office holders drives them to ignore constitutionally established boundaries of authority, then those boundaries may nonetheless survive if “[a]mbition [is] made to counteract ambition” in a system of mutual checks and balances.<sup>33</sup> In such a system, each power center must be provided with means of “self-defence” adequate to fight off incursions by other power centers.<sup>34</sup> By so doing, Madison contends, “the interior structure of the government [is contrived such] that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”<sup>35</sup> What Madison envisions, then, is a constitutional system of divided powers that maintains itself at its own design specifications through the construction of a dynamic equilibrium—an equilibrium maintained by a perpetual contest for power among multiple power centers, none of which is able fully or permanently to subdue the others.<sup>36</sup>

### *B. The Problem of Methods of Contestation*

Suppose Madison was right in principle: In a constitutional system of divided power, human nature furnishes power holders with incentives to engage in a kind of perpetual contest with other power holders. Still, it is not at all clear how such a system might operate in practice. By what means will such contestation occur, and with what tools? Here, unfortunately, Madison’s account runs out. There

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31. This is the theory set out most prominently in JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (1690), especially in sections 4, 87, 89, 95-99, 132, and 134-142, and largely echoed in concise form in *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776).

32. *THE FEDERALIST* NO. 48, *supra* note 1, at 343 (James Madison).

33. *THE FEDERALIST* NO. 51, *supra* note 1, at 356 (James Madison).

34. *Id.*

35. *Id.* at 355.

36. See ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 3 (2011); Peter C. Ordeshook, *Some Rules of Constitutional Design*, in *LIBERALISM AND THE ECONOMIC ORDER* 198, 204-05 (Ellen Frankel Paul et al. eds., 1993); Thomas Schwartz, *Publius and Public Choice*, in *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM*, *supra* note 2, at 31, 35.

are, nevertheless, strong indications in *The Federalist* that both Madison and Hamilton believed that states would respond to incursions by the national government principally by resorting to the two tactics of revolutionary resistance with which the Founders were most familiar: remonstrance, or protest; and if that failed, resort to arms.<sup>37</sup> The first major instance in which American states openly and officially opposed a national policy—the Virginia and Kentucky Resolutions of 1798 and 1799, respectively<sup>38</sup>—was indeed a classic example of official remonstrance. Later, of course, some states engaged in armed resistance to the national government during the U.S. Civil War.

For the most part, however, American states have not used the toolkit of revolutionary opposition contemplated by the founders; by the mid-twentieth century, observers noted that intergovernmental relations in the United States—and in federal states elsewhere—were characterized as much as or more by cooperation than by open conflict.<sup>39</sup> The emergence of intergovernmental cooperation appeared to pose an unusually potent threat to the Madisonian theory of self-equilibration, which relies on conflict to maintain the constitutionally prescribed balance of power.<sup>40</sup> Cooperation, in contrast, opens up the prospect of collusive alteration of constitutional boundaries.<sup>41</sup>

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37. See THE FEDERALIST NO. 28 (Alexander Hamilton), NO. 46 (James Madison). To be sure, it was not anticipated that state resistance to national power would be seen as necessary often, if ever. Madison argued that the primary form of restraint on Congress would be self-imposed due to the predominantly local attachments of the members. THE FEDERALIST NO. 46, *supra* note 1, at 331-33, 35-36 (James Madison). Resistance would be a distinctly inferior auxiliary protection for the states. Nevertheless, as Kramer observes, “[s]tate legislatures will control the federal government ... by outside agitation.” Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1515 (1994).

38. Gen. Assemb. Res. of Dec. 3, 1799 (Ky. 1799), <http://avalon.law.yale.edu/18th-century/kenres.asp> [<https://perma.cc/3XB7-Y76M>]; Sen. Res. of Dec. 24, 1798 (Va. 1798), [http://avalon.law.yale.edu/18th\\_century/virres.asp](http://avalon.law.yale.edu/18th_century/virres.asp) [<https://perma.cc/LJX5-NLU6>].

39. See, e.g., DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 79-85 (1966); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 4-7 (1966).

40. See *supra* notes 1-5 and accompanying text.

41. A few scholars have argued that we should not be worried about such collusion, and that governments in federal systems should be permitted to engage in Coasean swapping of authority. See, e.g., ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN ch. 7 (2011); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1599-1606, 1610 (2014). This strikes me as a poor idea given that, unlike in the cases of two-party liability

In light of this experience, some theorists, such as Albert Dicey and Kenneth Wheare, argued, contrary to Madison, that constitutional allocations of power could be maintained and intergovernmental disputes resolved in practice only through the intervention of a disinterested umpire in the form of a constitutional court.<sup>42</sup> In an influential 1954 article, Herbert Wechsler rejected this view and strongly endorsed the pure Madisonian model in his theory of “political safeguards” of federalism.<sup>43</sup> According to Wechsler, judicial intervention was unnecessary to preserve the constitutional balance of power between the state and national governments because the Constitution furnishes states with tools adequate to protect and advance their interests in the arena of national policy making.<sup>44</sup> Wechsler disagreed with Madison, however, as to which tools these were; in Wechsler’s view, the primary tool available to states to accomplish their goals was their representation in the Senate.<sup>45</sup>

Nearly a half-century later, Larry Kramer argued forcefully that Wechsler was right, but for the wrong reasons.<sup>46</sup> Wechsler was correct, Kramer maintained, that states have adequate tools with which to protect themselves and to advance their interests as against the national government, and that judicial intervention to enforce the constitutional allocation of power between the national

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rules described by Coase, the federal arrangement has a third-party beneficiary: the people, whose liberty the federal balance of power is meant to protect. *See id.* at 1604.

42. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 87-88 (8th ed. 1915); WHEARE, *supra* note 19, at 60-61. For similar views, see EDWARD McWHINNEY, COMPARATIVE FEDERALISM: STATES’ RIGHTS AND NATIONAL POWER 21-35 (2d ed. 1965); WATTS, *supra* note 7, at 6; Carl Friedrich, *The Political Theory of Federalism*, in FEDERALISM AND SUPREME COURTS AND THE INTEGRATION OF LEGAL SYSTEMS 17, 18 (Edward McWhinney & Pierre Pescatore eds., 1973).

43. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544-47 (1954); *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 171-259 (1980).

44. Wechsler, *supra* note 43, at 558-60. This idea, initially stated briefly by Wechsler, was later developed at much greater length by Jesse Choper. CHOPER, *supra* note 43, at 171-259.

45. Wechsler, *supra* note 43, at 546-47. Wechsler also believed that state influence in the selection of Representatives and the President provided further avenues of influence over national policy and actions. *Id.* at 547-58.

46. *See* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (“Wechsler’s core insight is still valid: The structure of American politics does offer states considerable protection from federal overreaching, but it does so in ways quite different from those identified by Wechsler.”).



and subnational levels was both unnecessary and largely ineffective.<sup>47</sup> But those tools, Kramer went on, did not include the formal institutional role of states in Congress identified by Wechsler; rather, Kramer explained, states had come to exert influence in the arena of national policy making primarily through the agency of political parties.<sup>48</sup>

On this view, strong, consolidated, and national parties cross lines of jurisdiction established by the Constitution to create a network that orients and unifies policy commitments at all levels of government.<sup>49</sup> Party members at each level within this network labor for the success of party members and programs at all levels.<sup>50</sup> This system of “mutual dependency” within national party networks best explains, argues Kramer, how state officials influence their national counterparts, and how they remain able to do so even in the face of a huge expansion of national power accomplished over the course of the twentieth century.<sup>51</sup>

What is especially striking about Kramer’s account is his conclusion that American states have pursued decidedly Madisonian aspirations—self-defense, influence, even expansion of their own powers—through the use of a tool—political parties—that lies entirely outside the constitutional plan.<sup>52</sup> Indeed, the rise of political parties was not only unforeseen by the founders, but a prospect that they openly reviled.<sup>53</sup> At the same time, contemporary analysts of federalism, especially political scientists, have noted the development of many other mediating structures and practices in federal states through which subnational influence may be exerted on national policy making. An entire subfield devoted to intergovernmental relations has documented numerous ways in which subnational

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47. *See id.* at 234-52.

48. *See id.* at 276-78.

49. *See id.* at 278.

50. *Id.* at 279.

51. *Id.* To be sure, Kramer does not view party channels as the *only* method by which states can influence national policy; he also describes mechanisms of administration, structure, and culture. *See Kramer, supra* note 37, at 1542-1559.

52. *See Kramer, supra* note 46, at 276, 285-86.

53. RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* 9 (1969); *see also* George Washington, Farewell Address, *in* DOCUMENTS OF AMERICAN HISTORY 169, 172 (Henry Steele Commager ed., 8th ed. 1968).

officials and even lower-level state bureaucrats have assumed roles in the formulation and administration of national policy.<sup>54</sup>

Although these accounts do useful work, there is nevertheless a distinct lack of close or systematic attention paid to the mechanisms and tools that governments in federal states actually employ to seek influence and advantage, and to defend themselves against incursion by other governments in the course of intrafederal competition. The theorists discussed above suggest several different avenues by which subnational units might project influence to the national level: public protest and armed resistance (Madison),<sup>55</sup> litigation in a constitutional court (Dicey, Wheare),<sup>56</sup> representation in a second national legislative chamber (Wechsler),<sup>57</sup> and the exploitation of political party channels (Kramer).<sup>58</sup> But are these the methods in fact used by subnational units in federal states and, if so, are they the only methods? Do subnational units typically deploy a single strategy to influence national policy, or do they use multiple strategies, and are these strategies the same in all federal states? These questions are taken up in Part II.

### *C. The Problem of Constitutional Stabilization*

A second question raised by Madison's theory of contestatory federalism is whether it actually works. As shown in detail below, contestation occurs, across a wide range of issues, and makes use of a great variety of tools of influence. But does this contestation in fact stabilize the constitutional allocation of powers, as Madison hypothesized? There are reasons for doubt.

As explained above, the Madisonian model contends that basic constitutional allocations of power cannot be stabilized merely

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54. The American Political Science Association has an entire section dedicated to the study of federalism titled Federalism and Intergovernmental Relations. See *Federalism & Intergovernmental Relations (Section 1)*, AM. POL. SCI. ASS'N (2018), <https://www.apsanet.org/section1> [<https://perma.cc/9LKZ-AMXB>]. For an overview of recent developments in the field, see generally, for example, Greg Goelzhauser & Shanna Rose, *The State of American Federalism 2016-2017: Policy Reversals and Partisan Perspectives on Intergovernmental Relations*, 47 PUBLIUS 285 (2017).

55. See *supra* note 37 and accompanying text.

56. See *supra* note 42 and accompanying text.

57. See *supra* note 45 and accompanying text.

58. See *supra* note 48 and accompanying text.

through official obedience to constitutional boundaries.<sup>59</sup> Instead, it predicts that constitutional stabilization may be achieved by providing officials embedded within one level of government the tools necessary to struggle successfully with their counterparts at the other level.<sup>60</sup> Thus, a successful, sustainable federalism would seem to require careful calibration of the tools and levers of powers to be made available to each level of government to ensure (1) that the battle is fought to a draw, and (2) that the predicted stalemate settles in at the desired equilibrium point.

But if a contestatory system, by pitting ambition against ambition, provides actors with incentives to struggle against—and equally importantly, to prevail over—their constitutional opponents, is there any reason to suppose that those actors will limit themselves in the heat of battle to the portfolio of powers, tools, and techniques furnished by the constitution? Would they not have the incentive to cheat—or less pejoratively, to “innovate”—by developing and deploying new and different methods of influence that might offer a greater chance of success than the methods to which the constitution would otherwise confine them? The root problem of constitutional design on this account is, after all, the unreliability of voluntary obedience by government officials to the constitution’s “parchment barriers.”<sup>61</sup> The model of contestatory governance offers itself as a solution to this problem. But if constitutional actors cannot be relied upon to observe constitutional limitations on their powers in the first instance, there seems to be little reason to presume that they will observe constitutional limitations on the means and methods of intergovernmental contestation in the course of struggling for ascendancy with other constitutional actors.

As the great twentieth-century political scientist Elmer Schattschneider famously observed, actors engaged in political struggle have constant, powerful incentives to manipulate the dimensions of the contest, and the fora in which it is fought, in ways that will increase their likelihood of success.<sup>62</sup> Or, as Daryl Levinson has more

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59. THE FEDERALIST NO. 51, *supra* note 1, at 357-59 (James Madison).

60. *See id.*

61. THE FEDERALIST NO. 48, *supra* note 1, at 343 (James Madison).

62. E. E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE* 8 (1960) (“It may be said ... that men of affairs do in fact make an effort to control the scope of conflict though they usually explain what they do on some other grounds.”).

recently put the point, if “[c]onstitutional stability depends on the willingness of the losers to limit their competitive efforts to the ordinary processes” provided by the constitution, why would we not expect constitutional actors engaged in political struggle to “carry the battle beyond the bounds of ordinary politics to the constitutional level”?<sup>63</sup> Why, that is, would they not attempt to alter or evade constitutional limits to improve their prospects of victory?<sup>64</sup> Just because a constitution succeeds in creating a struggle does not necessarily mean that the constitution will succeed in dictating the means by which that struggle is conducted.<sup>65</sup>

If this is correct, then contestatory constitutional systems may suffer from an inherent defect.<sup>66</sup> Such systems, intended to stabilize constitutions against immediate defections from the design plan, may well incentivize other kinds of defections further down the road that could lead in the long run to permanent alteration of the constitutional design.<sup>67</sup> A system designed to address the problem of disobedience at one point may thus encourage it at another, and with potentially comparable consequences.<sup>68</sup>

Much contemporary scholarship on federalism suggests that this concern is more than merely theoretical.<sup>69</sup> With notable consistency, federalism scholars tend to describe federal systems not as static, or as held in place by carefully equilibrated forces, but as in a state of constant motion. “[F]ederal systems,” it is said, “are highly dynamic,”<sup>70</sup> with “the various parts of the system ... in continuous interaction.”<sup>71</sup> As a result, “[f]ederal relations are fluctuating relations in the very nature of things.”<sup>72</sup> “[F]ederal systems,” in other words,

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63. Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 705 (2011).

64. *See id.*

65. *Cf. id.*

66. *See* Goodin, *supra* note 29, at 40-41 (describing the potential defect of a separation of powers).

67. *See* DAVIS, *supra* note 9, at 146-47.

68. *See id.*

69. *See, e.g.*, CARL J. FRIEDRICH, *TRENDS OF FEDERALISM IN THEORY AND PRACTICE* 7 (1968).

70. Arthur Benz, *German Dogmatism and Canadian Pragmatism? Stability and Constitutional Change in Federal Systems*, INSTITUT FÜR POLITIKWISSENSCHAFT, polis Nr. 65/2008, at 1; *see also* Benz & Colino, *supra* note 18, at 381.

71. M. J. C. VILE, *THE STRUCTURE OF AMERICAN FEDERALISM* 3 (1961).

72. FRIEDRICH, *supra* note 69, at 7.

“are permanently in motion,”<sup>73</sup> “undergoing a perpetual process of evolution and adaptation.”<sup>74</sup> Most importantly, what moves in federal systems, according to Judith Resnik, is the most basic, defining feature of any federal regime: “competencies are always in motion, and in more than one direction.”<sup>75</sup>

Observers who take this view typically trace the dynamism and instability of the federal allocation of power to its contestatory design features. Intergovernmental contestation places great pressure on the stability of federal regimes<sup>76</sup>: “the incentive to deviate from the division of authority,” argues Jenna Bednar, “is inescapably built in to the federal structure.”<sup>77</sup> Because the system contemplates that national and subnational actors will compete against each other, “[t]he constitutional allocation of competences ... is particularly prone to entrepreneurial redefinition.”<sup>78</sup> Constitutional actors, in other words, have an incentive to “try to shift the balance [of constitutional authority] incrementally in a direction favourable to them,” thereby inducing a form of “authority migration.”<sup>79</sup> When government officials become adept players of this game, “assignments of

73. Arthur Benz & Jörg Broschek, *Federal Dynamics: Introduction*, in *FEDERAL DYNAMICS*, *supra* note 9, at 2.

74. Eugénie Brouillet, *Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?*, 54 SUP. CT. L. REV. 601, 606 (2011).

75. Judith Resnik, *Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations*, in *FEDERALISM AND SUBSIDIARITY* 363, 368 (James E. Fleming & Jacob T. Levy eds., 2014); *see also* DAVIS, *supra* note 9, at 146-47 (“However power is divided in a political system ... the fact of association inevitably generates both intended and unintended relations.... [It is impossible] to insulate ... a ‘division of power’ against unintended interactions.”).

76. Nathalie Behnke & Arthur Benz, *The Politics of Constitutional Change Between Reform and Evolution*, 39 PUBLIUS 213, 213 (2009).

77. JENNA BEDNAR, *THE ROBUST FEDERATION* 63 (2009).

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

79. Benz & Colino, *supra* note 18, at 381; *see also* WILLIAM S. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* 11-12 (1956) (“[I]n 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.”); Ralph J. K. Chapman, *Structure, Process and the Federal Factor: Complexity and Entanglement in Federations*, in *COMPARATIVE FEDERALISM AND FEDERATION* 69, 71 (Michael Burgess & Alain-G. Gagnon eds., 1993) (“The Actors are continuously involved in mutual transfers creating thereby an additional set of structures and processes, extra-constitutional and, in many cases, extra-parliamentary.”).

powers and competences have to be continuously renegotiated.”<sup>80</sup> The end result, as Edward McWhinney wrote more than a half-century ago, is that in all federal states there is a “contrast between the constitution as originally written and the actual working constitution.”<sup>81</sup> This contrast can be severe.<sup>82</sup>

In the end, then, the struggle summoned into being by the Madisonian model of federalism for the purpose of achieving self-stabilization might produce instead conditions conducive to self-*destabilization*.<sup>83</sup> If so, then the very idea of constitutional stability—indeed, of the capacity of constitutions to constrain government action—may require serious rethinking.<sup>84</sup>

To help answer these questions, I turn now to a close, empirical examination of how intergovernmental contestation is actually practiced by subnational units in the modern federal state.

## II. AN INVENTORY OF METHODS OF SUBNATIONAL CONTESTATION

Theorists commonly distinguish between two different models of federalism. In one model, described variously as “dual,” “coordinate,” or “legislative federalism,”<sup>85</sup> and of which the United States is said to be the paradigm, “discrete policy areas are assigned to the respective levels of government, with each level then being sovereign within its own policy fields.”<sup>86</sup> In the other model, sometimes called “integrated” or “administrative” federalism, and exemplified by Germany, both levels of government share duties across all or nearly all policy fields.<sup>87</sup> However, the national government provides “overarching policy guidance for the federation, while the

80. Benz, *supra* note 70, at 1.

81. McWHINNEY, *supra* note 42, at 12.

82. See Gerald Baier, *The Courts, the Constitution, and Dispute Resolution*, in CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY 79, 79 (Herman Bakvis & Grace Skogstad eds., 3d ed. 2012) (“Canada’s federal system features a rather large gap between the jurisdictional map of the written constitution and the actual activities of its governments.”); Jan Erk, “*Uncodified Workings and Unworkable Codes*”: *Canadian Federalism and Public Policy*, 39 COMP. POL. STUD. 441, 456 (2006) (“The written constitution of the Canadian federation is of limited use in explaining how the federal system works.”).

83. VERMEULE, *supra* note 36, at 102.

84. *See id.*

85. HUEGLIN & FENNA, *supra* note 7, at 136.

86. *Id.*

87. *Id.* at 136-37.

subnational governments are assigned the implementation and administration” of policies established at the national level.<sup>88</sup> Both kinds of federalism confer (or in principle may confer) on subnational units considerable authority and capacity for autonomous decision making, but they differ significantly in the relation of subnational to national power and in the kinds of discretion that subnational units in the two systems are free to exercise.<sup>89</sup>

Although this dual classification oversimplifies and to a great extent exaggerates the differences among federal systems,<sup>90</sup> the distinction it draws between subnational independence and integration is a useful one, not only to help orient thinking about the structure of federal systems but also for the purpose of contemplating subnational power and the ways in which it may be exercised. To the extent that subnational units may in principle pursue their interests and influence the exercise of national power in more ways than one, the mechanisms of potential influence may usefully be considered to lie along a spectrum extending from more defiant to more conciliatory, from more aggressive to more diplomatic, and from more independent of the national government to more integrated with or internal to its activities.<sup>91</sup>

In this Part, I develop and lay out an inventory of tactics to which subnational units in federal states might resort. The inventory consists of a simple collection of all tactics that my research showed subnational units in the states under study to have in fact deployed at one time or another. These tactics are arrayed along the spectrum described above, from most defiant and independent, to most cooperative and integrated. What we will see tends to validate a proposition recently stated by Moisés Naím about the way in which what he calls “micropowers” manage to get their way against much more

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88. *Id.*

89. *See id.*

90. PALERMO & KÖSSLER, *supra* note 7, at 38-47.

91. Compare Raphael Minder & Patrick Kingsley, *Spain Dismisses Catalonia Government After Region Declares Independence*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/europe/spain-catalonia-puigdemont.html> [<https://perma.cc/Y3E4-S7ME>] (reporting on the nonviolent dissolution of the Catalan parliament following Catalonia’s referendum), with WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816-1836*, at 248, 250, 255, 263, 267, 275 (1966) (describing the near-violent resistance of South Carolina to the implementation of a tariff by the federal government).

powerful opponents: “[t]hey wear down, impede, undermine, sabotage, and outflank the mega-players in ways that the latter, for all their vast resources, find themselves ill-equipped and ill-prepared to resist.”<sup>92</sup>

In this regard, I note that there is no internal contradiction in saying that subnational governments may engage in “conflict” or “contestation” through cooperative or collaborative means. According to Madison, the key variable is the pursuit of ambition, and ambitions may be pursued by almost any means that circumstances happen to afford.<sup>93</sup> Thus, it may be useful to think about these tactics as simply different means by which subnational units attempt to achieve their goals in relation to national policy. In any case, as Morton Grodzins long ago argued, even cooperative federalism is often best understood as a form of “[a]ntagonistic ... cooperation” in which subnational units are constantly angling to achieve their own goals;<sup>94</sup> it is, in Peter Leslie’s words, a form of “policy-making by thrust and riposte.”<sup>95</sup>

The full inventory of subnational tactics is summarized in Table 1. The Sections following describe the tactics more fully and provide illustrative examples.

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92. MOISÉS NAÍM, *THE END OF POWER: FROM BOARDROOMS TO BATTLEFIELDS AND CHURCHES TO STATES, WHY BEING IN CHARGE ISN'T WHAT IT USED TO BE* 52 (2013).



93. THE FEDERALIST NO. 51, *supra* note 1, at 356 (James Madison).

94. GRODZINS, *supra* note 39, at 389; *see also* Ivo D. Duchacek, *Antagonistic Cooperation: Territorial and Ethnic Communities*, 7 *FEDERALISM & ETHNICITY* 3, 27-28 (1977); Roland Lhotta & Julia von Blumenthal, *Intergovernmental Relations in the Federal Republic of Germany: Complex Co-Operation and Party Politics*, in *INTERGOVERNMENTAL RELATIONS IN FEDERAL SYSTEMS*, *supra* note 10, at 206, 211 (adding the term “consent-seeking competition”); Bishwapriya Sanyal, *Antagonistic Cooperation: A Case Study of Nongovernmental Organizations, Government and Donors’ Relationships in Income-Generating Projects in Bangladesh*, 19 *WORLD DEV.* 1367, 1374 (1991).

95. PETER M. LESLIE, *FEDERAL STATE, NATIONAL ECONOMY* 66 (1987).



Table 1: Methods of Subnational Contestation

<p><b>More defiant</b></p>  <p><b>More neutral, independent</b></p>  <p><b>More cooperative, integrated</b></p>	Secession	Actual secession, threatened secession, talk of secession
	Violent resistance	Actual violence, threats of violence
	Defiance	Strong defiance: refusal to comply, attempts to undermine; weak defiance: half-hearted enforcement, uncooperative implementation
	Invocation of third-party coercive processes	Actual or threatened litigation in national constitutional court; appeals to supranational authorities
	Withholding cooperation	Refusal of national requests for assistance
	Independent use of assigned powers	Unilateral exercise of autonomous power; subnational cooperation and harmonization of policy; reverse preemption; power entrepreneurialism
	Negotiation and bargaining	Demands for greater autonomy; clientelism; multilateral or bilateral negotiation; negotiation over constitutional terms
	Influence in federal domestic policy making	
	Direct participation in federal lawmaking	Subnational assent required; introduce measures directly into national parliament; invocation of national direct democratic processes
	Indirect influence in federal legislatures	Control or influence over second chamber; formal lobbying
	Political influence through parties	Exploitation of boundary-crossing party connections
	Mobilization of popular opinion	Public relations; public shaming or condemnation
	Influence on legislation through executive	Intergovernmental consultation; ministerial level contacts; executive federalism
	Influence on federal administration	Intergovernmental consultation; ministerial level contacts; executive federalism
	Participation in foreign policy	Required or customary consultation; subnational authority to make or conduct its own policy in limited areas; separate representation in international or supranational bodies

## A. *More Defiant or Uncooperative*

### 1. *Secession*

At the most extreme end of defiance and uncooperativeness lies a bundle of techniques associated with secession. Secession is, of course, a tactic that has the capacity to destroy the state entirely, or greatly to weaken it, whether through withdrawal of population and resources if successful, or through military conflict if unsuccessful.<sup>96</sup> History provides few instances of actual secession; among the federal states in the sample under consideration here, actual secession was accomplished only once, in the United States, and then only temporarily.<sup>97</sup> However, a serious attempt at secession was made recently by the Spanish Autonomous Community of Catalonia, which in October 2017 issued a declaration of independence from Spain.<sup>98</sup> This declaration prompted the Spanish government to suspend Catalonia's autonomy and assume direct control of its government.<sup>99</sup> At this writing, the Catalan attempt to secede from Spain remains unsuccessful.

A much more common, if less dire, tactic to which subnational units may resort is the threat of secession. Like the use of threats as a negotiating tactic in other situations,<sup>100</sup> this tactic exploits

96. See sources cited *supra* note 91.

97. Outside the sample, instances of successful secession include the secession of Slovakia from Czechoslovakia, see Stephen Engelberg, *Czechoslovakia Breaks in Two, to Wide Regret*, N.Y. TIMES (Jan. 1, 1993), <https://www.nytimes.com/1993/01/01/world/czechoslovakia-breaks-in-two-to-wide-regret.html> [<https://perma.cc/A5JS-CJX4>], the secession of several former Soviet Socialist Republics from the former Soviet Union following its collapse, see Francis X. Clines, *Secession Decreed by Soviet Georgia*, N.Y. TIMES (Apr. 10, 1991), <https://www.nytimes.com/1991/04/10/world/secession-decreed-by-soviet-georgia.html> [<https://perma.cc/SF6T-MH36>], and perhaps the breakup of Yugoslavia, see Stephen Engelberg, *Breakup of Yugoslavia Leaves Slovenia Secure, Croatia Shaky*, N.Y. TIMES (Jan. 16, 1992), <https://www.nytimes.com/1992/01/16/world/breakup-of-yugoslavia-leaves-slovenia-secure-croatia-shaky.html> [<https://perma.cc/7P2G-U8FL>].

98. Initially, the declaration was simultaneously declared and suspended, pending dialogue with the Spanish government. Raphael Minder & Patrick Kingsley, *In Catalonia, A Declaration of Independence From Spain (Sort of)*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/world/europe/spain-catalonia-independence-carles-puigdemont.html> [<https://perma.cc/M6WS-4BED>]. When dialogue did not ensue, the Catalan parliament, the *Generalitat*, affirmed the declaration. Minder & Kingsley, *supra* note 91.

99. Minder & Kingsley, *supra* note 91.

100. In legal negotiations, the use of threats and other aggressive tactics is designed “to

legitimate and understandable fears of actual secession so as to extract—or perhaps, one might say, if the threat is sufficiently credible, to extort—benefits or concessions from the central state.<sup>101</sup> Among the states in my sample, this tactic has been most often and most successfully employed by the Canadian province of Quebec, which has twice held provincial referenda on the question of secession.<sup>102</sup> Among other states in the sample, credible threats of secession have issued from the Spanish Autonomous Community of the Basque Country.<sup>103</sup>

It is also useful to distinguish an additional variation: the tactic of talk of secession. Loose talk of secession is often heard in the United States in places such as Texas or, less frequently, in California,<sup>104</sup> and in Germany it is heard from time to time in Bavaria (sometimes referred to as the Texas or Quebec of Germany).<sup>105</sup> Such talk often merely expresses frustration over persistent disagreement with the central state.<sup>106</sup> Nevertheless, it can be significant, particularly when it is meant to signal to the central government an awareness of secession as a potential tool of resistance, along with a potential willingness to escalate mere mention of the tool to a more explicit threat if demands remain unmet.<sup>107</sup>

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create high levels of tension and pressure on the opponent.” GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 49 (1983). When used effectively, such tactics can extract additional benefits for the party using them compared to more cooperative approaches, though it is imperative that they be used successfully; incompetent use of aggressive tactics can lead to worse outcomes. *See id.* at 49-50.

101. *See infra* notes 102-03 and accompanying text.

102. *See, e.g.*, KENNETH MCROBERTS, *MISCONCEIVING CANADA: THE STRUGGLE FOR NATIONAL UNITY* 148-49 (1997); Alan C. Cairns, *The Politics of Constitutional Renewal in Canada*, in *REDESIGNING THE STATE: THE POLITICS OF CONSTITUTIONAL CHANGE* 95, 112-13 (Keith G. Banting & Richard Simeon eds., 1985).

103. For an account, see Gardner & Abadi Ninct, *supra* note 10, at 523-26.

104. Lis Wiehl, *Opinion: Secessionist Movements Not Far-Fetched in Today's U.S.*, ATLANTA J.-CONST. (July 7, 2017, 3:00 PM), <https://www.myajc.com/news/opinion/opinion-secessionist-movements-not-far-fetched-today/S5oiQYG5oIMoPCU6yyScdI/> [<https://perma.cc/4LVJ-BFUX>].

105. Simon Shen, *Is Bavaria Likely to Break Off From Germany?*, EJINSIGHT (Aug. 3, 2017, 11:25 AM), <http://www.ejinsight.com/2017080-is-bavaria-likely-to-break-off-from-germany/> [<https://perma.cc/YQ39-UZZH>]; Interview with subject 27, German federal government official (June 22, 2015); Interview with subject 30, German legal and political scholar (June 25, 2015).

106. *See* Wiehl, *supra* note 104.

107. *See, e.g.*, Minder & Kingsley, *supra* note 98.

## 2. *Violent Resistance*

Violent resistance by subnational units differs from secession in that force is invoked not to resist or obstruct all exercises of national power indiscriminately—the terms and conditions of federation itself are not denied—but rather to target narrowly some particular exercise of national power toward which the subnational unit feels extraordinary antipathy, and that presumably it has been unable to obstruct or mitigate by other, less drastic means.

Contrary to Madison's prediction,<sup>108</sup> in the states under study there are no episodes of actual violence. I exclude here the extreme violence associated with the United States Civil War, which I have categorized as an act of secession, rather than merely an act of violent opposition to national policy. However, the United States and Argentina offer several instances in which violent resistance has been credibly threatened.<sup>109</sup> The most dramatic example occurred in the United States during the Nullification Crisis of 1832.<sup>110</sup> The state of South Carolina protested a national protectionist tariff by deploying armed forces to prevent collection of the federal tax in the port of Charleston.<sup>111</sup> The United States responded by mobilizing for military intervention, but actual armed conflict was avoided when South Carolina forces stood down.<sup>112</sup> In 1957, armed conflict over desegregation was narrowly avoided when Arkansas Governor Orval Faubus withdrew National Guard troops he had deployed to resist court-ordered desegregation of Central High School in Little Rock, the state capital.<sup>113</sup> In 1988, Idaho Governor Cecil Andrus deployed state police to seize at the state border a railway shipment of radioactive waste generated at a federal nuclear facility

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108. See *supra* note 37 and accompanying text.

109. See Kent Eaton, *Menem and the Governors: Intergovernmental Relations in the 1990s*, in ARGENTINE DEMOCRACY 88, 95 (Steven Levitsky & Maria Victoria Murillo eds., 2005) (discussing a threat made by a governor in Argentina to rebel against the federal government); FREEHLING, *supra* note 91 (discussing the pre-Civil War discontent in South Carolina regarding the federal government's implementation of protective tariffs).

110. FREEHLING, *supra* note 91, at 248, 250, 255, 263, 267, 275.

111. *Id.* at 131, 262-63.

112. *Id.* at 267, 290-91.

113. See TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 222-24 (1988).

in Colorado.<sup>114</sup> Andrus had the shipment seized pursuant to a state-declared policy of refusing to accept additional nuclear waste from out of state.<sup>115</sup>

In Argentina, an example of threatened violence occurred in the 1980s. Carlos Menem, then governor of the province of La Rioja (and later elected President in 1989), sought to organize provincial resistance to a nationwide taxation policy that disadvantaged the provinces relative to the national government.<sup>116</sup> In so doing, he called upon leaders of interior provinces to declare a state of rebellion, cut energy supplies to the capital, and block provincial ports until taxing authority was returned to the subnational level.<sup>117</sup> The threat was never made good because cooperation from other governors was not forthcoming.<sup>118</sup>

In most federations, resort to violence appears to be viewed as an inappropriate, and indeed a politically illegitimate method of resistance to national power. This is the case, for example, in Austria,<sup>119</sup> and also in Spain, where subnational officials declined to urge violent resistance even in the face of Spanish revocation of Catalonia's longstanding subnational autonomy.<sup>120</sup>

### 3. *Defiance*

Defiance, as I use the term here, is the nonviolent refusal of subnational governments to accept specific exercises of power by the central government. Defiance can take many forms, but it is useful to distinguish between strong and weak forms of defiance.

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114. See Fox Butterfield, *Idaho Firm on Barring Atomic Waste*, N.Y. TIMES (Oct. 23, 1988), <https://www.nytimes.com/1988/10/23/us/idaho-firm-on-barring-atomic-waste.html> [<https://perma.cc/85VA-SKHD>].

115. See *id.*

116. See Eaton, *supra* note 109, at 95.

117. See *id.*

118. See *id.*

119. Interview with subject 16, Austrian legal scholar (Jan. 21, 2015).

120. Interview with subject 50, Spanish legal scholar (July 2012).

*a. Strong Defiance*

What I will call strong defiance consists of the open, nonviolent refusal by a subnational government to accede to some policy or action of the national government. A subnational government may defy national power by passive refusal to comply with disliked national policies, or by taking more elaborate, affirmative steps to undermine the operation or success of the national policy or action at issue within its borders.<sup>121</sup>

The states under study furnish many examples of strong defiance. In the United States, southern states engaged in a lengthy period of open defiance of national enforcement of the political rights of African-Americans, including outright disregard of the Fifteenth Amendment,<sup>122</sup> which prohibits states from denying the right to vote on account of race.<sup>123</sup> Some U.S. states repeatedly defy national constitutional protection of the right to abortion by enacting highly restrictive laws.<sup>124</sup> In Argentina during the 1990s, the government of Santa Cruz province refused repeatedly to comply with orders of the Argentine Supreme Court requiring reinstatement of a provincial Attorney General who had been removed from office after embarking on investigations into the activities of provincial government officials.<sup>125</sup> In another incident, provincial courts in San

121. See *supra* Table 1.

122. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

123. For example, decades after ratification of the Fifteenth Amendment, states devised such exclusionary techniques as “grandfather clauses,” *Guinn v. United States*, 238 U.S. 347, 354, 356-57, 367-68 (1915) (voiding a grandfather clause adopted by Oklahoma), and white primaries, *Terry v. Adams*, 345 U.S. 461, 462 (1953); *Smith v. Allwright*, 321 U.S. 649, 651 (1944).

124. See *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (discussing ban on “partial birth” abortions); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 750 (1986) (detailing regulation of abortion procedures); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 422 (1983) (requiring abortions to be performed in a hospital); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 58 (1976) (requiring spousal consent requirement for abortion).

125. See Antonio María Hernández, *El incumplimiento de sentencias de la Corte Suprema de Justicia por la provincia de Santa Cruz y la posibilidad de la intervencion federal* (2012), <https://www.ancmyp.org/ar/user/FILES/05Hernández.pdf> [<https://perma.cc/T436-5LDL>]; *El procurador de Santa Cruz y el contrato secreto con Chevron, fallos de la Corte que aún no se cumplieron*, LA NACION (Arg.) (Dec. 1, 2015, 7:43 AM), <https://www.lanacion.com.ar/1850315->

Luis province refused to enforce a national law regulating methods of determining the surnames of newborns.<sup>126</sup> In 2017, the Catalan government defied a series of court orders designed to prevent a referendum on independence from Spain.<sup>127</sup>

Subnational units engage from time to time in strong defiance even in states, such as Germany and Switzerland, that have a reputation for amicable intergovernmental relations,<sup>128</sup> and in which, my interlocutors assured me, such tactics would never be used. For example, the German *Land* of Bavaria in 1983 enacted a law requiring the display of a crucifix in every public school classroom.<sup>129</sup> Upon challenge, the Constitutional Court ruled the law unconstitutional, but Bavaria has since refused to comply with the order.<sup>130</sup> In Switzerland, the canton of Appenzell refused for nearly two decades to implement a 1971 national law mandating female suffrage until forced to do so by the federal courts.<sup>131</sup> Similarly, the canton of Nidwalden has refused repeatedly to comply with a national law requiring cantons to share in the storage of nuclear waste.<sup>132</sup>

### *b. Weak Defiance*

Weak defiance, as I use the term here, refers to actions intended to thwart, undermine, or diminish the force or success of national policies to which the subnational unit objects, but which do not rise

fallos-corte-cristina [<https://perma.cc/Z6TE-VPUE>].

126. Interview with subject 44, Argentine political scholar (Aug. 10, 2015); Interview with subject 45, Argentine legal and political scholar (Aug. 10, 2015).

127. See Raphael Minder, *Spanish Court Moves to Pre-empt Catalan Independence Declaration*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/world/europe/spain-catalonia-independence.html> [<https://perma.cc/32Q3-DYXM>].

128. See *infra* notes 287-88 and accompanying text.

129. See PALERMO & KÖSSLER, *supra* note 7, at 334.

130. See *id.*

131. See Bundesgericht [BGer] [Federal Supreme Court] Nov. 27, 1990, 116 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] IA 359 (Switz.).

132. See PALERMO & KÖSSLER, *supra* note 7, at 390. Another example of defiance in a state that is routinely said to be characterized by punctilious observance of the law comes from Austria, where the governor of Carinthia refused to execute a federal law dealing with bilingual road signs. See Peter Bussjäger, *Intergovernmental Relations in Austria: Co-operative Federalism as Counterweight to Centralized Federalism*, in INTERGOVERNMENTAL RELATIONS IN FEDERAL SYSTEMS, *supra* note 10, at 81, 102.

to the level of open refusal. Use of the tactic exploits the margin of discretion afforded to subnational units in the implementation of national policies. The tactic can be invoked by cultivating a public appearance of compliance and cooperation with a disliked national policy, but then implementing or following it so half-heartedly, or even downright uncooperatively, as to undermine the policy's force and effect within the jurisdiction.<sup>133</sup>

A good example from the United States is Montana's "compliance" with a 1975 national law establishing a national speed limit of 55 miles per hour as part of an energy policy designed to conserve oil.<sup>134</sup> While most states responded with full compliance, including routine police enforcement, Montana complied in an extremely half-hearted way.<sup>135</sup> Instead of enforcing violations of the 55-mile-per-hour speed limit as ordinary traffic infractions, it issued five-dollar "environmental" citations to drivers traveling above 55 miles per hour, but below what Montana police considered an unsafe speed.<sup>136</sup> Violations were not charged against drivers' insurance records.<sup>137</sup> This kind of "enforcement" signaled state opposition to the national policy, invited the public to disregard the national speed limit with near impunity within the borders of the state, and undermined the efficacy of the policy. Other examples from the United States include uncooperative implementation of national welfare laws and bending of national policy to state ends under the Clean Air Act.<sup>138</sup> Uncooperative implementation also occurs in Switzerland in circumstances where "the cantons use the federal policy as an instrument to promote their own, deviating objectives."<sup>139</sup>

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133. For an account of such uncooperativeness in the United States, see generally Bulman-Pozen & Gerken, *supra* note 10.

134. See 23 U.S.C. § 154 (1976) (repealed 1995).

135. See Tom Kenworthy, *New Life in the Fast Lane: Wide-Open Throttles in Wide Open Spaces*, WASH. POST (Dec. 9, 1995), [https://www.washingtonpost.com/archive/politics/1995/12/09/new-life-in-the-fast-lane-wid-open-throttles-in-wide-open-spaces/6e8be54f-a3ba-44b5-beb2-aff0eb739ac2/noredirect=on&utm\\_term=.ec715f173c49](https://www.washingtonpost.com/archive/politics/1995/12/09/new-life-in-the-fast-lane-wid-open-throttles-in-wide-open-spaces/6e8be54f-a3ba-44b5-beb2-aff0eb739ac2/noredirect=on&utm_term=.ec715f173c49) [<https://perma.cc/2MGR-TFM9>].

136. According to news accounts, the "conventional wisdom" was that no serious infractions would be charged for daytime driving below about 85 miles per hour in good weather conditions. See *id.*

137. See *id.*

138. Bulman-Pozen & Gerken, *supra* note 10, at 1276-78.

139. Wolf Linder & Adrian Vatter, *Institutions and Outcomes of Swiss Federalism: The Role of the Cantons in Swiss Politics*, 24 W. EUROPEAN POL. 95, 108 (2001).



Some federations, including Austria, Belgium, Germany, Italy, Spain, and Switzerland, adhere to a constitutional principle of “federal loyalty.”<sup>140</sup> According to this principle, subnational units charged with implementing national law must discharge that obligation in good faith, and courts will review subnational actions for compliance with this requirement.<sup>141</sup> Such a principle, where it exists, is typically understood to reduce the latitude otherwise available to subnational units to engage in weak defiance through uncooperative or bad-faith implementation of national measures.<sup>142</sup>

Nevertheless, this principle does not entirely prevent subnational units from using even their limited discretion to undermine the efficacy of national policies with which they disagree. For example, a 1999 German law designed to smooth the path to German citizenship established standards for naturalization, including passage of a test.<sup>143</sup> The *Land* of Baden-Württemberg exercised its discretion in designing the test to impose additional, tough procedural requirements that have greatly slowed the pace of naturalization in that jurisdiction, thus undermining to some extent the law’s intent.<sup>144</sup>

#### 4. *Invocation of Third-Party Coercive Processes*

As Dicey and Wheare observed, another tactic of open conflict that may be available to subnational units in some federal states involves subnational invocation of the power of third-party institutions to coerce the national government into pursuing policies more in accordance with subnational wishes.<sup>145</sup> These third parties are generally of two types: national constitutional courts and supranational bodies.<sup>146</sup>

Probably by far the most common form in which this tactic is invoked is through litigation in a national constitutional court. In all the federations under study except Switzerland, a so-called

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140. PALERMO & KÖSSLER, *supra* note 7, at 249-53; Erika Arban, *Exploring the Principle of (Federal) Solidarity*, 22 REV. CONST. STUD. 241, 242 (2017).

141. *See* Arban, *supra* note 140, at 248-50.

142. *See id.*

143. *See* Palermo & Kössler, *supra* note 7, at 414.

144. *See id.* at 414-15.

145. *See supra* note 42 and accompanying text.

146. *See infra* notes 147-54 and accompanying text.

“apex” court has the authority to review the validity of national laws and actions.<sup>147</sup> In these circumstances, a subnational government opposed to some national law or policy has the opportunity to challenge that law or policy in court.<sup>148</sup> Subnational litigation against national governments has achieved some significant successes in many federations—perhaps most.<sup>149</sup> As in other cases, subnational units also generally have the less dramatic option of merely threatening to go to court.<sup>150</sup> Such threats are, naturally, even more common than actual litigation.<sup>151</sup>

In addition, where federations are subject to the jurisdiction of supranational authorities, subnational units may also have the option of invoking coercive processes offered by those authorities. In Spain, for instance, the Basque Country has sued the Spanish State in the European Court of Human Rights (ECHR) on two occasions in an attempt to reverse disliked policies of the Spanish government. One suit sought to overturn a Spanish law that banned a Basque political party, and the other sought invalidation of a decision of the Spanish Constitutional Court holding that the Basque government lacked authority to put a referendum to Basque voters.<sup>152</sup> In another instance of appeal to EU institutions, the Autonomous Communities of Madrid and Andalusia in 2007 initiated proceedings with the European Parliament’s Committee on Petitions to urge an investigation of coastal and urban development policies in Valencia.<sup>153</sup> After a wide-ranging investigation, the Committee issued a report harshly critical of development policies applied in the region.<sup>154</sup>

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147. In Switzerland, the Federal Supreme Court has the authority to review the validity only of cantonal laws. See CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 189 (Switz.).

148. See *id.*

149. See Richard Simeon, *Adaptability and Change in Federations*, 53 INT’L SOC. SCI. J. 145, 148 (2002).

150. See Dinan, *supra* note 10, at 405.

151. See *id.*; Interview with subject 17, Austrian government official (Jan. 21, 2015).

152. *Batasuna v. Spain*, 50 Eur. Ct. H.R. (2009); *Etxebarria v. Spain*, 50 Eur. Ct. H.R. (2009).

153. *Report of the Committee on Petitions on the Fact-Finding Visit to Madrid, Valencia, Andalusia*, at 6 (Mar. 28, 2007), <http://www.europarl.europa.eu/document/activities/cont/200801/20080131ATT20224/20080131ATT20224EN.pdf> [<https://perma.cc/53YH-W3S4>].

154. See *id.* at 2-3.

5. *Withholding Cooperation Needed or Requested by the National Government*

A milder tactic, though one still lying toward the defiant end of the scale,<sup>155</sup> consists of refusing to cooperate with the national government when requested to do so for purposes of effectuating some national policy. The tactic is available—and may be potent—where the constitution divides power among the levels of government in such a way that the national government lacks power unilaterally to adopt and implement some desired policy.<sup>156</sup> In those circumstances, the policy can be adopted only through the cooperative exercise of power at both levels; subnational governments, in other words, hold a veto over the implementation of the policy.<sup>157</sup> This tactic differs from weak defiance in that in those cases the national government has the constitutional authority to adopt and impose a policy, and subnational resistance can be mounted only through a kind of *post hoc* foot-dragging.<sup>158</sup>

Withholding of cooperation is a common tactic in some federal states. To give a very recent example, an overwhelming majority of U.S. states refused a request by a newly established national commission on voter fraud to turn over comprehensive information on voters held by state election officials.<sup>159</sup> The commission had no independent source of access to this information, and was unable to perform its work without state cooperation.<sup>160</sup> In Canada, the province of Quebec has refused on many occasions to work cooperatively with the national government to develop and implement nationwide programs which, on account of awkward constitutional allocations of authority, can be created only through national-provincial coordination. For example, Quebec refused to join otherwise

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155. *See supra* Table 1.

156. In the United States, for example, power is divided intricately between the state governments and national government, which is divided further between the branches. *See supra* notes 4-6, 85-86 and accompanying text.

157. *See supra* notes 85-86, 89 and accompanying text.

158. *See supra* Part II.A.3.b.

159. *See* Mark Berman & John Wagner, *Almost Every State Resists Trump's Voter Fraud Commission*, CHI. TRIB. (July 5, 2017, 6:22 PM) <http://www.chicagotribune.com/news/nation-world/politics/ct-most-states-resist-voter-fraud-commission-20170705-story.html> [<https://perma.cc/7X4U-NQYW>].

160. *See id.*

comprehensive nationwide agreements on the provision of pensions and social welfare, and instead operates parallel programs of its own design.<sup>161</sup>

### *B. More Neutral and Independent*

We turn now to a family of tactics lying toward the center of the spectrum bounded by defiance at one end and cooperation at the other.<sup>162</sup> Here, the tactics of subnational influence are (1) invoked primarily where the national government has *not* acted, (2) not deployed to oppose or to advance any national policy, and (3) involve the largely independent exercise of subnational power, either by individual subnational units or by some or all units acting in concert.

#### *1. Individual Exercise of Autonomous Power*

Perhaps the most direct way in which a subnational unit in a federal state can advance its own interests and policy preferences is simply by using its own independent powers to pursue them directly. In such cases, the subnational unit need not persuade the central state to act or refrain from acting, need not obtain its permission, and need not negotiate with or consult it. Instead, subnational units can pursue their goals directly, through the use of powers allocated to them by the national constitution. For example, in Canada, most law governing property, the family, contract, and tort is provincial law.<sup>163</sup> In the United States, the law of tort, contract, property, family relations, criminality, and even elections is made by states.<sup>164</sup> In Belgium, the three subnational

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161. See McROBERTS, *supra* note 102, at 41; Margot Young, *The Social Union Framework Agreement: Hollowing Out the State*, 10 CONST. F. 120, 120 (1999); Harvey Lazar, *The Social Union Framework Agreement: Lost Opportunity or New Beginning?* 1 (Sch. of Policy Studies, Working Paper No. 3, Aug. 2000).

162. See *supra* Table 1.

163. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), art. 92(13); 1 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 615-18 (2d ed. 1985).

164. See U.S. CONST. amend. X; Richard Y. Schauffler et al., *Examining the Work of State Courts*, CT. STAT. PROJECT (2012); *supra* notes 159-60 and accompanying text; see also *infra* note 204 and accompanying text.

regions exercise exclusive power in the field of environmental policy, and use that authority regularly.<sup>165</sup>

## 2. *Subnational Cooperation and Harmonization*

In many circumstances, subnational units may wish to cooperate among themselves to develop and implement uniform policies for mutual benefit. If the national government takes no action, it is often possible for subnational units to advance their interests through mutual cooperation and collaboration undertaken in complete independence from the central state. Where all subnational units participate, it is possible, through a process of policy harmonization, for subnational units essentially to make national policy in the absence of national action.<sup>166</sup>

Subnational cooperation and policy harmonization is common in federal states, and can take several different forms. At its most formal, such cooperation can utilize processes leading to the promulgation of a legally binding treaty or concordat among signatory subnational units. Authority to enter into such agreements is available in Austria, Argentina, Italy, and Switzerland.<sup>167</sup> In the United States, states may enter into such compacts only with the approval of Congress.<sup>168</sup> Subnational participation in these concordats may in some cases be comprehensive, in which all units join, or it may be partial, in which fewer than all units join the agreement.<sup>169</sup>

At the other end of the scale are virtually ubiquitous processes by which subnational units cooperate and harmonize policy informally.

165. Interview with subject 34, Belgian political scholar (June 29, 2015). It must be noted that this discretion is bounded by EU law, which contains extensive regulatory restrictions applicable in all member states.

166. See Daniel Halberstam & Mathias Reimann, *Federalism and Legal Unification: Comparing Methods, Results, and Explanations Across 20 Systems*, in *FEDERALISM AND LEGAL UNIFICATION: A COMPARATIVE EMPIRICAL INVESTIGATION OF TWENTY SYSTEMS* 3, 10-12 (Daniel Halberstam & Mathias Reimann eds., 2014).

167. Art. 125, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); BUNDES-VERFASSUNGSGESTZ [B-VG] [CONSTITUTION] as amended 2009, art. 15a (Austria); see Art. 117 Costituzione [Cost.] (It.); CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 48 (Switz.).

168. U.S. CONST. art. I, § 10, cl.1.

169. Interview with subject 8, Swiss legal and political scholar (Jan. 15, 2015); Interview with subject 9, Swiss legal and political scholar (Jan. 15, 2015).

One of the most common forms of informal subnational cooperation is the practice of holding ministerial conferences, either on a nationwide or a regional basis. In Austria, for example, *Länder* governors meet several times a year in the *Landeshauptmännerkonferenz* (LHK) to pursue common interests and develop shared policies.<sup>170</sup> In Switzerland, a nationwide *Conference des Cantons* meets four to five times each year to coordinate policy projects, but there are also regional conferences of ministers, as well as regular single-issue conferences in which cantonal ministry officials for energy, health, or finance meet to coordinate cantonal action on issues of common interest.<sup>171</sup> In Canada, such conferences are so frequent and occur at so many levels of governmental interaction that, by one count, government representatives of one province attended eighty-nine interprovincial meetings in a single year.<sup>172</sup>

### 3. Reverse Preemption

A somewhat more aggressive variation of the cooperative behavior just described is sometimes known as “reverse preemption.”<sup>173</sup> In areas of concurrent jurisdiction between the two levels of government, lawmaking by the national government typically “preempts”—displaces or invalidates—conflicting subnational laws, and in some cases regulatory activity at the national level can come so fully to occupy the field of activity as to preclude entirely any subnational role.<sup>174</sup> Reverse preemption refers to the opposite phenomenon, where subnational lawmaking occupies and squeezes out the national government from an area of concurrent jurisdiction.<sup>175</sup> The

170. Anna M. Gamper & Bernhard A. Koch, *Federalism and Legal Unification in Austria*, in *FEDERALISM AND LEGAL UNIFICATION*, *supra* note 166, at 103, 112.

171. Interview with subject 6, Swiss subnational government official (Jan. 14, 2015).

172. See John Warhurst, *Managing Intergovernmental Relations*, in *FEDERALISM AND THE ROLE OF THE STATE* 259, 263 (Herman Bakvis & William M. Chandler eds., 1987).

173. See *infra* note 175.

174. See, e.g., *Arizona v. United States*, 567 U.S. 387, 401 (2012) (“Where Congress occupies an entire field ... even complementary state regulation is impermissible. Field pre-emption reflects a congressional decision to foreclose any state regulation in the area.”).

175. The term has previously been used in slightly different contexts. Compare Ann E. Carlson & Andrew Mayer, *Reverse Preemption*, 40 *ECOLOGY L.Q.* 583, 584 (2013), with Anita Bernstein, *Implied Reverse Preemption*, 74 *BROOK. L. REV.* 669, 673 (2009). Nugent refers to it as “preempting federal preemption.” NUGENT, *supra* note 10, at 77.

mechanism, however, is different. Preemption in the formal legal sense occurs only in favor of national governments, but the direction of preemption can be reversed as a practical matter if subnational governments become first movers in a vacant policy space. In some circumstances, subnational units may act quickly enough to fill the policy space with policies that, either on account of their merit or simply because they grow familiar to a regulated populace, become as a matter of practical politics difficult for a national government to reverse or displace.<sup>176</sup> It is a strategy, in other words, that exploits the power of first movers to set the policy agenda and the terms of debate.

Knowing this, subnational units sometimes seek deliberately to achieve this entrenchment effect by coordinating their activities, cooperatively harmonizing policy preferences, and implementing those preferences by law before the national government takes action. In the United States, for example, state-by-state adoption of the Uniform Commercial Code, developed by the American Law Institute, a private law reform organization, created nationwide consistency in commercial law,<sup>177</sup> obviating the need for federal intervention to create uniformity in an important area of interstate commerce.<sup>178</sup> In Switzerland, the cantons are presently attempting to harmonize educational policies on school start dates, graduation requirements, and programs of study, including language instruction policies, so as to fend off national uniform legislation.<sup>179</sup> In Austria, harmonization of policy initiatives concerning uses of public funds by *Land* governors succeeded in inducing the national government to drop plans for a uniform national law.<sup>180</sup>

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176. The advantage of the first mover is thus related to well-known principles of path dependency and policy diffusion. See, e.g., James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 51-66 (2014) (explaining the process in the context of public policy and constitutional law); Dennis C. Mueller, *First-Mover Advantages and Path Dependence*, 15 INT'L J. INDUS. ORG. 827, 843-46 (1997) (explaining the process in the context of market competition).

177. See *Uniform Commercial Code (UCC) Research Guide*, DUKE U. SCH. L. 1 (Dec. 2016), <https://law.duke.edu/sites/default/files/lib/ucc.pdf> [https://perma.cc/6XMY-EA5W].

178. For an analysis of how the courts also often create uniform law apart from the federal government, see Halberstam & Reimann, *supra* note 166, at 12-13.

179. Interview with subject 13, Swiss government official (Jan. 16, 2015); Interview with subject 7, Swiss legal and political scholar (Jan. 14, 2015).

180. Bussjäger, *supra* note 132, at 88.

Reverse preemption differs from the harmonized development of subnational policies mainly in its scale. Horizontal harmonization may occur in policy fields where there is some national activity, where subnational units are content to share the policy space, or where fewer than all subnational units can agree on substantive policy. Reverse preemption is designed to exclude the national government entirely from a policy space by joint enactment of a uniform policy of broad scope.

#### 4. *Power Entrepreneurialism*

An even more aggressive tactic consists of the deliberate attempt by a subnational unit to expand unilaterally the scope of its powers by simply exercising power that it does not have, or in conditions of constitutional uncertainty as to whether or not the power exists. The motivation for this strategy is the hope that use of a contested power will result eventually in recognition of the legitimacy of the subnational claim to possession of the power. By using the power, especially without objection by the national government, the subnational unit in essence manufactures evidence that the power legitimately belongs to it.

A good example of this tactic is Quebec's deliberate strategy to gain a greater role in Canadian foreign policy. In 1965, Quebec claimed, on the basis of the Canadian Constitution's requirement of provincial cooperation in treaty implementation, that provinces could have their own foreign policies, and it took the first step in this direction by signing an educational agreement with France.<sup>181</sup> Federal officials quickly "rejected Québec's claims for diplomatic independence on the grounds that national sovereignty is indivis[i]ble in international law."<sup>182</sup> Nevertheless, the national government at the same time invited the provinces to take a more active role in formulating foreign policy in areas related to their constitutional authority.<sup>183</sup> Despite some missteps,<sup>184</sup> Quebec's entrepreneurialism

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181. Stephen Clarkson, *Vive le Québec Libre! or Putting the Leader Back In*, in *FEDERALISM AND POLITICAL COMMUNITY: ESSAYS IN HONOUR OF DONALD SMILEY* 55, 60 (David P. Shugarman & Reg Whitaker eds., 1989).

182. *Id.* at 63.

183. Gregory S. Mahler, *Québec and Foreign Policy: Overseas Options for a Province in a Federal System*, 17 *QUE. STUD.* 59, 61-62 (1994) (noting that provincial authority in particular



eventually yielded a settlement in which foreign policy in some areas was thereafter conducted on a cooperative basis,<sup>185</sup> and the federal government agreed to permit Quebec to become directly and officially involved on its own account in some international organizations.<sup>186</sup>

### *C. More Cooperative and Integrated*

This Part surveys subnational tactics for influencing national policy that proceed from a stance of cooperation and partnership. Conflict, to be sure, may nonetheless arise even in the pursuit of these tactics, but resort to these tools suggests a belief at the subnational level, and perhaps at the national level as well, that conflicts may be resolved through cooperative means such as discussion, persuasion, and negotiation, even in circumstances where bargaining power between the levels of government may be unequal.

#### *1. Negotiation and Bargaining*

Negotiation of many kinds occurs frequently in federal states, and in some states is a strongly preferred method of conducting intergovernmental relations.<sup>187</sup> The category of national-subnational "negotiation," however, is extremely broad. Many factors relevant to the process can vary in proceedings that are all properly described as "negotiation." For example, negotiations may be recurring or ad hoc, involving repeat or one-time players. They may occur in formal, high-visibility settings where the stakes are high and outcomes have binding legal force, or they may take place in informal settings, without public knowledge or observation, where the stakes are low and little turns on the success or failure of any particular encounter. The bargaining power of the parties may range considerably from

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areas, specifically using the example of education, invites direct agreement between individual provinces and foreign governments).

184. *See id.* (noting conflict with Ottawa regarding Québec's involvement in independent international relations).

185. Clarkson, *supra* note 181, at 66-67.

186. Mahler, *supra* note 183, at 68.

187. This is notably true, for example, in Canada. *See* RICHARD SIMEON, FEDERAL-PROVINCIAL DIPLOMACY: THE MAKING OF RECENT POLICY IN CANADA 66-68, 228-33 (1972).

context to context, often depending on constitutional endowments of authority, which typically differ from subject to subject.<sup>188</sup> Negotiations may be bilateral or multilateral, potentially altering the dynamics.

Notwithstanding this variation, it is possible to identify two broad tactics that subnational units pursue in negotiations with their national governments: demands for policies and demands for power. In the first instance, subnational units attempt to influence the content of policies pursued by the national government.<sup>189</sup> In the second, subnational units aim for a bigger prize, one that, if they are successful, will make future bargaining with the national government on the same topic unnecessary, as authority to make policy in the area in question will in the future belong directly to the subnational unit.<sup>190</sup>

Although negotiation as a tactic presupposes a baseline level of cooperation and good relations, negotiations can nevertheless be conducted in contexts in which relations lie across a spectrum from conflictual to harmonious. The sections below describe several commonly recurring negotiating situations arrayed from most conflictual to most harmonious.

#### *a. Demands for More Power or Autonomy*

We tend to think of federal constitutions as allocating power among the levels of government with finality. That is not always the case, however; some federal constitutions instead define a range of allocations of power and create processes that can be invoked to alter allocations within the permitted range.<sup>191</sup> Typically, the national government plays an important role in processes that might alter the initial constitutional balance of power by expanding the powers of subnational units.

In these circumstances, an opening exists for subnational governments to approach the national government not to demand that the

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188. For a discussion of varying constitutional grants of authority, see *infra* notes 212-15 and accompanying text.

189. See *infra* Part II.C.1.c.

190. See *infra* Part II.C.1.c.

191. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 39, 41-44, 46, 51-52, Dec. 29, 1978 (Spain); Arts. 115-17, 119, 128-29, 131 Costituzione [Cost.] (It.).

central state pursue any particular policy, but rather to demand that it invoke constitutional processes to expand the autonomous power of the subnational unit.<sup>192</sup> Although such negotiations may be conducted amicably, I characterize them as proceeding from a position of relative conflict because a subnational demand to expand its authority seems most likely to rest upon some antecedent dissatisfaction with either limits on its role in the federation, or with the performance of the national state in the policy field that the subnational unit seeks authority to enter on its own account.

Perhaps the preeminent example of such a process occurs in Spain. Under the Spanish Constitution, subnational units called Autonomous Communities may seek recognition from the central government, and along with recognition, approval of what amounts to a subnational constitution known as a Statute of Autonomy.<sup>193</sup> The Statute of Autonomy may attribute to the Autonomous Community any of a set of subnational powers listed in the Spanish Constitution as available for devolution.<sup>194</sup> Thus, in Spain, subnational units may gain a greater measure of autonomy and self-governance simply by directly asking for it.<sup>195</sup>

In principle, the Spanish Constitution holds out to the Autonomies the possibility of assuming a fair amount of power.<sup>196</sup> Granting such requests lies, however, within the unilateral discretion of the *Cortes Generales*, the Spanish national parliament, and it therefore need not grant Autonomous Communities all or even any of the autonomous powers they seek.<sup>197</sup> Parliament has in most cases exercised its discretion beneficently,<sup>198</sup> but of course that willingness is voluntary and not legally required.<sup>199</sup> Recently, Spain for the first

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192. See *infra* notes 193-203 and accompanying text.

193. C.E., B.O.E. n. 145-47, Dec. 29, 1978 (Spain).

194. *Id.* at n. 148-50.

195. Gardner & Abad I Ninet, *supra* note 10, at 507.

196. See C.E., B.O.E. n. 148-50, Dec. 29, 1978 (Spain).

197. See *id.* at n. 150.

198. Gardner & Abad I Ninet, *supra* note 10, at 507.

199. In the past, some have disagreed, arguing that such powers cannot be revoked as a matter of practical politics, making the devolution tantamount to irreversible. See, e.g., Hueglin, *supra* note 9, at 39; Carles Viver, *Spain's Constitution and Statutes of Autonomy: Explaining the Evolution of Political Decentralization*, in CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES 218, 224 (Michael Burgess & G. Alan Tarr eds., 2012). Recent events in Spain seem to provide conclusive evidence against this conclusion. See *supra* notes 97-99.

time reversed a decision concerning subnational autonomy by revoking Catalonia's status as an autonomous subnational unit of the state.<sup>200</sup>

Requests for additional autonomy are also made from time to time in Italy. There, bilateral regional commissions have been established to create avenues of communication between the central government and each of the five "special" regions of Italy that, in an asymmetric feature of the national constitution, possess a heightened level of autonomy.<sup>201</sup> At the request of these special regions, the bilateral commissions have from time to time recommended to the central government that additional powers and autonomy be devolved to a region so requesting.<sup>202</sup> These recommendations are typically followed,<sup>203</sup> resulting in the accumulation by subnational units of additional competencies.

### *b. Political Extortion*

Not every bargain involves exchanging goods of the same kind. In one form of asymmetrical dealmaking, subnational units in federal states exploit their ability to influence political competition within the jurisdiction so as to extract favorable policy concessions from elected national officials whose political fortunes may be influenced by subnational action.

This dynamic is commonplace in the United States. A quirk of the U.S. constitutional structure allocates to states the authority to regulate not only state elections but federal ones as well.<sup>204</sup> A state's ability to exercise these powers—particularly the power to draw federal election districts—in ways detrimental to incumbent federal legislators, requires members of Congress to maintain cordial relations with state officials, and of course one way to do so is to be attentive to and supportive of state policy preferences in Con-

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200. See *supra* note 98.

201. Art. 116 Costituzione [Cost.] (It.).

202. Jens Woelk, *What It Means to be Special in Relations with the Central State: Institutions and Procedures*, in *TOLERANCE THROUGH LAW: SELF-GOVERNANCE AND GROUP RIGHTS IN SOUTH TYROL* 121, 121-42 (Jens Woelk et al. eds., 2008).

203. *Id.*; Interview with subject 19, Italian legal and political scholar (Feb. 10, 2015), Interview with subject 20, Italian political scholar (Feb. 10, 2015).

204. U.S. CONST. art. I, § 4, cl. 1.

gress.<sup>205</sup> These kinds of transactions are also common and deeply entrenched in Argentina. There, candidates for the national legislature are selected by local party bosses, and it is typically the provincial governor who dominates the local party apparatus.<sup>206</sup> Governors thus exercise significant agency in who runs for national office, including whether incumbents stand for reelection and what resources are placed at their disposal.<sup>207</sup> In addition, the provincial legislature determines the date of national elections, affording in many cases significant influence over the outcomes.<sup>208</sup> In these circumstances, national legislators must in general attend closely to the wishes of provincial governors.

In its most extreme form, the exchange of political favors for policy concessions can rise to the level of clientelism, a condition said, among the states studied here, to characterize intergovernmental relations in Argentina. The budgets of most Argentine provinces are

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205. Congressional redistricting is said to be “the one time when the members of Congress must come ‘hat in hand’ to ask the state legislature for favors.” Kirsten Nussbaumer, *The Election Law Connection and U.S. Federalism*, 43 *PUBLIUS* 392, 399 (2013) (quoting Texas election lawyer Steve Bickerstaff). The historical record is replete with examples of aspiring or incumbent members of Congress who have failed to heed this rule and subsequently found themselves drawn out of safe districts and into treacherous ones. In the very first congressional election, in 1788, Patrick Henry, Virginia’s leading Antifederalist and Governor from 1784 to 1786, is reputed to have engineered a districting plan that placed James Madison into a heavily Antifederalist district, though the most thorough study of this incident casts doubt on the veracity of the inherited story. See ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 31-41 (1907). More recently, figures ranging from William McKinley, to Abner Mikva, to Barack Obama have been deliberately gerrymandered into tough districts when they failed to please state officials in charge of the districting process. See KARL ROVE, *THE TRIUMPH OF WILLIAM MCKINLEY* 54, 63, 80 (2015); Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 *U. ILL. L. REV.* 683, 691; Ryan Lizza, *Making It: How Chicago Shaped Obama*, *NEW YORKER* (July 21, 2008), <https://www.newyorker.com/magazine/2008/07/21/making-it> [<https://perma.cc/35ZC-K922>]. Mikva reports that he himself was gerrymandered out of a safe seat because he was “a very discrete and insular minority—a non-Daley Democrat in Chicago.” Mikva, *supra*, at 691; see also Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 *UTAH L. REV.* 859, 893 (arguing that state control over redistricting “incentivizes its congressional delegation to consider the states’ interests when the delegation votes on federal policy”).

206. Mark P. Jones & Wonjae Hwang, *Provincial Party Bosses: Keystone of the Argentine Congress*, in *ARGENTINE DEMOCRACY* *supra* note 109, at 115, 123, 125.

207. See Marcelo Leiras, *Las contradicciones aparentes del federalismo argentino y sus consecuencias políticas y sociales*, in *¿CUÁNTO IMPORTAN LAS INSTITUCIONES? GOBIERNO, ESTADO Y ACTORES EN LA POLÍTICA ARGENTINA* 209 209 (Carlos H. Acuña ed., 2013).

208. Ardanaz et al., *supra* note 10, at 28-29; Leiras, *supra* note 207.

heavily dependent on fiscal transfers from the central government.<sup>209</sup> At the same time, provincial governors often maintain their own power by distributing material goods and patronage to their constituents.<sup>210</sup> This results in a dynamic where governors extract fiscal concessions from the central government in exchange for providing political and electoral support to members of the incumbent or dominant party, in turn putting governors in a position to shore up their own popularity at home by distributing to voters the resources thus extracted.<sup>211</sup>

### *c. The Partnership Model*

In this very common context, which most closely approximates the ideal model of intergovernmental negotiations, national and subnational officials sit down together in good faith and a spirit of cooperation to negotiate over the substance of collective policy.

At their most complex, intergovernmental negotiations may take the form of comprehensive multilateral negotiation, in which all subnational units and the national government negotiate together over policies of nationwide scope. In Canada, these types of proceedings occur frequently.<sup>212</sup> On some occasions, all fourteen heads of state (the Prime Minister and the Premiers of all ten provinces and all three territories) meet together.<sup>213</sup> This most typically occurs within the formal confines of the institutionalized and routinized First Ministers Conference (FMC), but also on a more ad hoc basis in the form of First Ministers Meetings called to deal with occasional crises, or, from time to time, in quiet, behind-the-scenes

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209. Carlos Gervasoni, *A Rentier Theory of Subnational Regimes: Fiscal Federalism, Democracy, and Authoritarianism in the Argentine Provinces*, 62 *WORLD POL.* 302, 311 (2010).

210. Jones & Hwang, *supra* note 206, at 123-25; Iván Llamazares, *Patterns in Contingencies: The Interlocking of Formal and Informal Political Institutions in Contemporary Argentina*, 83 *SOC. FORCES* 1671, 1675 (2005).

211. Ardanaz et al., *supra* note 10, at 29. According to González, “districts loyal to the president receive on average almost 60 percent more infrastructure funds than the opposition.” Lucas González, *Presidential Popularity and the Politics of Distributing Federal Funds in Argentina*, 46 *PUBLIUS* 199, 201 (2016).

212. Martin Papillon & Richard Simeon, *The Weakest Link? First Ministers’ Conferences in Canadian Intergovernmental Relations*, in *CANADA: THE STATE OF THE FEDERATION*, 2002 113, 118-21 (J. Peter Meekison et al. eds., 2004).

213. *See id.*

meetings out of the public eye.<sup>214</sup> Not all such negotiations involve the Prime Minister and Premiers directly; many Canadian intergovernmental negotiations are handled by ministers or bureaucrats with specific portfolios acting as representatives of their governments.<sup>215</sup>

Comprehensive intergovernmental negotiations have produced some of the most significant and transformative policy programs in Canadian history. One such program is the Agreement on Internal Trade (AIT), a deal struck between the federal and provincial governments in 1994 that prohibits the erection of internal trade barriers, guarantees nondiscrimination in economic opportunities on the basis of origin or residency, and commits all governments to the liberalization of trade.<sup>216</sup> Another is the Social Union Framework Agreement (SUFA), a deal struck in 1999 that established a collaborative framework among the federal government and all of the provinces (except Quebec, which did not join the agreement) to develop and structure social programs on a basis of equality, respect for human rights, and geographical uniformity of access to social programs and services.<sup>217</sup> In addition, SUFA committed the governments to the elimination of barriers to mobility arising from residency requirements for social programs, and various other measures.<sup>218</sup>

Negotiations also can be conducted on a bilateral basis, in which the national government negotiates with a single subnational unit, or in some cases with more than one but less than all. Like multilateral negotiations, bilateral negotiations also can be conducted on a

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214. *See id.*

215. Simeon's analogy to international diplomacy, *see* SIMEON, *supra* note 187, at 66-68, 228-33, has great traction here: just as in the international realm, Canadian intergovernmental relations may be carried on by heads of state, or by progressively lower-level officials, depending upon the degree of interest and involvement governments wish to convey, consistent with diplomatic conventions.

216. *See generally* Agreement on Internal Trade, pmbl., July 1, 1995, [https://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/h\\_il00034.html](https://www.ic.gc.ca/eic/site/ait-aci.nsf/eng/h_il00034.html) [<https://perma.cc/9CQT-LFZ5>] [hereinafter Agreement on Internal Trade]. These negotiations are described in depth in G. BRUCE DOERN & MARK MACDONALD, *FREE-TRADE FEDERALISM: NEGOTIATING THE CANADIAN AGREEMENT ON INTERNAL TRADE* (1999).

217. *See* A Framework to Improve the Social Union for Canadians, Feb. 4, 1999, <http://www.scics.ca/en/product-produit/agreement-to-improve-the-social-union-for-canadians/> [<https://perma.cc/6T4J-2JU8>]. *See generally* Young, *supra* note 161; Lazar, *supra* note 161.

218. *See supra* note 217.

formal or informal basis. On the more formal side, for example, Article 15a of the Austrian Constitution authorizes “[t]he Federation and the *Länder* [to] conclude agreements among themselves about matters within their respective sphere of competence.”<sup>219</sup> Less formally, in Italy, the Standing Conference of the State and Region is a consultative council of national and regional ministers that advises the national government about matters of regional concern.<sup>220</sup> In Canada, the national government will sometimes cut side deals with individual provinces to secure their agreement to a broader programmatic framework.<sup>221</sup> For example, in order to induce agreement to the AIT by British Columbia, Alberta, Quebec, and Newfoundland, the national government agreed during negotiations to provisions creating narrow (and frankly protectionist) exclusions for British Columbia and Alberta’s export of logs, Quebec’s export approval measures relating to unprocessed fish, and Newfoundland’s requirement for in-province fish processing.<sup>222</sup> In Germany, it is so common for the national government to offer beneficial side deals to induce recalcitrant *Länder* to support national programs that a term has developed to describe it: “going shopping” in the *Bundesrat*.<sup>223</sup>

For the most part, subnational units engage in negotiation with national governments because they hope to influence national policy making in directions of their liking.<sup>224</sup> However, intergovernmental negotiations may on occasion have a different aim: to alter the constitutional framework itself.<sup>225</sup> In Austria, for example, the constitution can be altered by a two-thirds vote of parliament, without any requirement of subsequent popular ratification.<sup>226</sup> On many

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219. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION], BGBl No. 127/2009 as amended BGBl I No. 164/2013, art. 15 ¶ 1 (Austria).

220. Woelk, *supra* note 202, at ¶ 1, 126-27.

221. *See, e.g.*, Agreement on Internal Trade, *supra* note 216, at annex 1102.3.

222. *See id.*

223. Interview with subject 28, German legal and political scholar (June 24, 2015); Interview with subject 29, German legal and political scholar (June 24, 2015).

224. *See supra* Part II.C.1.

225. *See supra* Parts II.C.1, II.C.1.a.

226. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] 1920 BGBl No. 127/2009, as amended BGBl I No. 164/2013, art. 44, ¶ 1 (Austria). Popular ratification is required only for a “total revision.” *See id.* art. 44, ¶ 3. However, if one-third of the members of either chamber of the national legislature so demand, other amendments may be presented to the people. *See id.*



occasions, Austrian officials at the national and subnational levels have reached agreements leading to changes in the allocation of power between the two levels.<sup>227</sup> Interestingly, most of these alterations—about one hundred—have resulted in transfers of power to the national level,<sup>228</sup> although some pushback by the *Länder* has on occasion produced enhancements to subnational power.<sup>229</sup>

In Canada, the practice of “executive federalism” is capable of producing changes to the constitutional allocation of power through much less formal means. Executive federalism<sup>230</sup> is a process of policy making in which major decisions about national policy are made not in the deliberations of a broadly representative national legislature, but through intergovernmental negotiations among the chief executives of the national and subnational governments.<sup>231</sup> Because the Canadian constitutional amending formula does not require popular participation,<sup>232</sup> Canadian intergovernmental negotiations can extend not merely to policy within the constitutional framework, but to the terms of the basic constitutional framework itself: “[f]ederal-provincial relations are often attempts to get around constitutional strictures, and in doing so they may result in de facto constitutional changes.”<sup>233</sup>

227. See Anna Gamper, *The Austrian Constitutional Convention: Continuing the Path to Reform the Federal State?*, 2 REVISTA D'ESTUDIS AUTONÒMICS I FEDERALS 9, 15-18 (2006) (Spain).

228. Interview with subject 14, Austrian legal and political scholar (Jan. 20, 2015); Interview with subject 15, Austrian legal and political scholar (Jan. 20, 2015).

229. See Peter Bussjäger, *Between Europeanization, Unitarism and Autonomy: Remarks on the Current Situation of Federalism in Austria*, 10 REVISTA D'ESTUDIS AUTONÒMICS I FEDERALS 11, 19-21 (2010) (Spain); Gamper, *supra* note 227, at 12-14.

230. The term is credited to Donald V. Smiley. See generally DONALD V. SMILEY, *THE FEDERAL CONDITION IN CANADA* 83-84 (1987).

231. As one commentator has put it, “[i]n Canada, intergovernmental relations have become the substitute for engagement through Parliament.” DAVID E. SMITH, *FEDERALISM AND THE CONSTITUTION OF CANADA* 93 (2010); see also PETER H. RUSSELL, *CONSTITUTIONAL ODYSSEY: CAN CANADIANS BECOME A SOVEREIGN PEOPLE?* 81 (3d ed. 2004) (“By the mid 1960s meetings of federal and provincial ministers and their expert advisers on virtually all topics became so numerous that they were supplanting legislatures as the primary arena of Canadian policy making.”).

232. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), art. 38 §§ 1-2.

233. SIMEON, *supra* note 187, at 41. Gibbins takes a somewhat different view of the same phenomenon: “[I]t is important to note the capacity of intergovernmental relations to rewrite the federal script in Canada without the necessity of constitutional change.” Roger Gibbins, *Constitutional Politics*, in CANADIAN POLITICS 97, 112 (James Bickerton & Alain-G. Gagnon eds., 5th ed. 2009).

At the limit, Canadian provincial initiatives, especially at the insistence of Quebec, have precipitated rounds of metaconstitutional politics, in which the Prime Minister and Premiers have agreed to rewrite the Canadian Constitution in comprehensive and far-reaching ways.<sup>234</sup> In 1987, an agreement—the Meech Lake Accord—was concluded in principle.<sup>235</sup> That agreement would, among other things, have recognized Quebec as a “distinct society,” given it a greater and asymmetrical role in immigration, provided each province with the power to veto constitutional amendments, and placed limits on the federal spending power.<sup>236</sup> After an agreement had been reached but before it could be implemented, unexpected changes in political leadership in Newfoundland and Manitoba eliminated the unanimity necessary to formalize the agreed constitutional amendments.<sup>237</sup> A similar process of metaconstitutional negotiation was completed in 1992, this time with the sustained unanimous support of provincial leaders, resulting in the Charlottetown Accord.<sup>238</sup> In an unusual move, however, the Accord provided for popular participation in the form of a national referendum, sending the outcome of intergovernmental constitutional negotiations to a rare, narrow defeat.<sup>239</sup>

## 2. Influence in National Domestic Policy-Making Processes

Another avenue of subnational influence is available when subnational units have opportunities to be heard within the processes by which the national government makes internal decisions on matters of substantive policy.<sup>240</sup> In these instances, subnational interests and preferences are presented to the national government not in the

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234. See HOGG, *supra* note 163, at 70-71.

235. See Jeffrey J. Cole, *Canadian Discord over the Charlottetown Accord: The Constitutional War to Win Quebec*, 11 DICK. J. INT'L L. 627, 634, 639-43 (1993).

236. HOGG, *supra* note 163, at 70-73; see also Cole, *supra* note 235, at 639-42.

237. See Cole, *supra* note 235, at 642 n.125.

238. See *id.* at 642-43. For a thorough, contemporaneous postmortem of the Meech Lake Accord, see generally K.E. SWINTON & C. J. ROGERSON, *COMPETING CONSTITUTIONAL VISIONS: THE MEECH LAKE ACCORD* (1988).

239. For an account of the defeat of the Charlottetown referendum, see, for example, Michael Lusztig, *Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail*, 27 CANADIAN J. POL. SCI. 747, 761-70 (1994).

240. See *infra* Part II.C.2.a.

context of external demands, to which the national government may or may not attend, but internally, as considerations integrated into the national decision making process at its source.<sup>241</sup>

*a. Direct Subnational Participation in National Lawmaking*

Subnational influence within the national government takes many forms. One of the strongest is direct or formal subnational participation in the processes of federal lawmaking. In some cases, for example, subnational agreement is required for certain national laws to take effect. In Argentina, federal enactment of a fiscal revenue-sharing law requires approval of all the provinces.<sup>242</sup> In Switzerland, cantons have the authority to introduce measures directly into the federal parliament,<sup>243</sup> which they do between ten and twenty times each year.<sup>244</sup> In Austria, *Länder* may exercise a suspensive veto over procurement measures of the federal government that touch upon subnational competencies.<sup>245</sup>

Another mechanism capable of integrating subnational units more directly into national lawmaking processes is the availability of instruments of direct democracy at the national level.<sup>246</sup> For example, Swiss cantons have the authority under the Swiss Constitution to force a national referendum on national laws.<sup>247</sup> This has proven to be a potent tool of subnational influence, to the point where the constant threat of a referendum has caused the Swiss national legislature to exercise considerable self-restraint in legislation; essentially, the parliament has developed a habit of securing

241. See *infra* Part II.C.2.a.

242. Art. 2, § 75, cl.2, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). This requirement, along with certain structural pathologies relating to provincial incentives, have precluded enactment of such a law since this provision was inserted into the constitution in 1994. See Alfredo M. Vitolo, *The Argentine Federal Legislative System*, in FEDERALISM AND LEGAL UNIFICATION, *supra* note 166, at 71, 80-81; Interview with subject 42, Argentine legal scholar (Aug. 9, 2015).

243. CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 160, para. 1 (Switz).

244. Interview with subject 8, Swiss scholar and political scholar (Jan. 15, 2015).

245. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2009, as amended BGBl I No. 164/2013, arts. 14b, 42a (Austria).

246. See, e.g., CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 141 (Switz.).

247. See *id.*

cantonal agreement in advance of enacting legislation so as to defuse the possibility of a subsequent referendum challenge.<sup>248</sup>

*b. Indirect or Informal Influence in National Legislatures*

Subnational influence in national legislative processes can also be indirect.<sup>249</sup>

*i. Through a Second Chamber*

As Herbert Wechsler observed in his influential 1954 article,<sup>250</sup> one of the most common avenues for this kind of influence is through a senate or second chamber.<sup>251</sup> In some ways, this is the prototypical avenue for subnational influence in federations, and it is considered by some theorists to be one of the defining features of a true federation.<sup>252</sup> I have categorized this form of subnational influence as indirect because second chambers in modern federal states do not provide representation in the national legislature to subnational units directly in their capacity as autonomous governments. In no case, for example, is the action of a senator or a senate delegation considered to be an official action of a subnational government.<sup>253</sup> Rather, the actions of senators are considered to be actions of national officials who have connections—in some cases, to be sure, very strong connections—to subnational governments.<sup>254</sup>

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248. Interview with subject 6, Swiss subnational government official (Jan. 14, 2015); Interview with subject 8, Swiss legal and political scholar (Jan. 15, 2015).

249. See *infra* Part II.C.2.b.(i)-(iv).

250. Wechsler, *supra* note 43.

251. See *id.* at 546-52.

252. See DAVIS, *supra* note 9, at 142; INTER-PARLIAMENTARY UNION, PARLIAMENTS: A COMPARATIVE STUDY ON THE STRUCTURE AND FUNCTIONING OF REPRESENTATIVE INSTITUTIONS IN FORTY-ONE COUNTRIES 3-4 (1962); WATTS, *supra* note 7, at 8-9. Typically for the field, alas, this assertion is emphatically denied by others. See, e.g., KING, *supra* note 18, at 94-95. Duchacek notes that bicameralism is “intimately associated with federalism,” but in the end lists it only as one of ten “yardsticks” of federalism, suggesting that it is not essential. DUCHACEK, *supra* note 9, at 207-08, 244-52.

253. Historically, that kind of relationship would be more typical of a confederation, in which the representatives are merely emissaries of a different government which they primarily serve. Cf. ARTICLES OF CONFEDERATION of 1781 art. V (state delegations cast a single vote as a unit, presumably representing the positions of their governments as ambassadors do).

254. See, e.g., Hirokazu Kikuchi & Germán Lodola, *The Effects of Gubernatorial Influence*

Their actions may thus reflect the influence of subnational governments, but they are not the actions of those governments.<sup>255</sup>

The degree of influence that subnational governments exercise over federal senators can vary significantly. The strongest kind of influence undoubtedly is exercised when the subnational government has the authority unilaterally to appoint senators.<sup>256</sup> In the present sample, this is the case in Germany and Austria, in which *Länder* governments directly appoint members of the *Bundesrat*.<sup>257</sup> Influence, however, can also be exercised through less formal means. Subnational officials may be able to exercise informal influence on national senators through personal connections, by exploiting senators' sense of subnational loyalty, or through influence they may be able to exert in the processes of senatorial elections within the subnational unit.<sup>258</sup>

The degree of subnational influence that may be exercised within the national legislature via influence over members of the second chamber will also vary with the degree of formal power possessed by that chamber in the processes of national lawmaking.<sup>259</sup> A senate that possesses the authority to veto outright national legislation proposed by the lower house offers the greatest prospect for indirect subnational influence. This is the case in the United States, for example, where agreement of the U.S. Senate is needed for every piece of federal legislation,<sup>260</sup> and it is also the case in Germany for certain categories of legislation that strongly affect the interests of

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and *Political Careerism on Senatorial Voting Behavior: The Argentine Case*, 6 J. POL. LATIN AM. 73, 73-78 (2014).

255. See *id.*

256. See, e.g., BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2009 as amended BGBl I No. 164/2013, art. 35 (Austria).

257. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2009 as amended BGBl I No. 164/2013, art. 35 (Austria); GRUNDGESETZ [GG] [BASIC LAW], art. 51 § 1, (Ger.), translation at [https://www.gesetze-im-internet.de/englisch\\_gg/englisch\\_gg.html#p0249](https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0249) [<https://perma.cc/Q8T8-92P2>].

258. See Kikuchi & Lodola, *supra* note 254, at 75-78. Regarding subnational influence on the election of national legislators in the United States and Argentina, see *id.*; *supra* Part II.C.1.b. This appears to be relatively common in federal states. See Kikuchi & Lodola, *supra* note 254, at 75-78. For discussion of this dynamic in a state outside this study, see Joy Langston, *Governors and "Their" Deputies: New Legislative Principals in Mexico*, 35 LEGIS. STUD. Q. 235 (2010); Guillermo Rosas & Joy Langston, *Gubernatorial Effects on the Voting Behavior of National Legislators*, 73 J. POL. 477 (2011).

259. See Rosas & Langston, *supra* note 258, at 479-82.

260. U.S. CONST. art. I, § 7.

the *Länder*.<sup>261</sup> A national senate that exercises only a suspensive veto, as in Austria,<sup>262</sup> will inject less subnational influence into national policy-making decisions regardless of how strongly subnational officials may be able to influence the senators (and in Austria, that influence is quite weak).<sup>263</sup>

A Senate also will serve as a stronger or weaker vector of subnational influence depending upon the extent of negotiations and logrolling that by law or by custom occurs between the two chambers.<sup>264</sup> For example, even though approval of the German *Bundesrat* is not required for many kinds of legislation, a strong and longstanding custom of interchamber negotiations projects the power of the *Bundesrat*—and by implication the influence of the *Länder*—even further than the formal constitutional structure contemplates.<sup>265</sup>

## ii. Formal Lobbying

Subnational units in many federal states also attempt to influence the legislature through formal processes of lobbying little different from those employed by other interest groups.<sup>266</sup> In these situations, employees of subnational units might register as lobbyists and attempt to meet with legislators to inform them about and persuade them to support subnational interests and policy preferences.<sup>267</sup> In the United States, for example, governors lobby Congress through organizations such as the National Governors Association, the Democratic Governors Association, and the Republican Governors Association.<sup>268</sup>

To some extent, resorting to lobbying is a sign of a *lack* of subnational influence within the national legislature, since presumably

261. See GRUNDGESETZ [GG] [BASIC LAW], arts. 84, 85, 87, § 2, 87c, 87d, 91a, 91b, § 1, 96, § 5, (Ger.).

262. See BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2009, as amended BGBl I No. 164/2013, art. 42 (Austria).

263. Interview with subject 17, Austrian subnational government official (Jan. 21, 2015).

264. See Langston, *supra* note 258, at 236-48.

265. Interview with subject 27, German national government official (June 23, 2015).

266. See, e.g., Jennifer M. Jensen, *Governors and Partisan Polarization in the Federal Arena*, 47 *PUBLICUS* 314, 314-16, 319-20 (2017).

267. See *id.*

268. See *id.*; see also NUGENT, *supra* note 10, ch. 4.

subnational governments would otherwise exploit exclusive, back-channel avenues of communication and influence before resorting to a medium of influence in which they must compete on an equal footing with other supplicants for the time and attention of national legislators. The ubiquity of state lobbying offices and organizations in the United States,<sup>269</sup> for example, may be testament to the effectiveness of the Seventeenth Amendment<sup>270</sup> at weakening state control over U.S. Senators.

*iii. Influence Through Political Parties*

As noted earlier in the discussion of the work of Larry Kramer, political parties are one of the most significant and most ubiquitous vehicles in federal states for the transmission of subnational influence into the national legislature.<sup>271</sup> Party connections can from time to time enable officials of subnational governments to call upon co-partisans in the national legislature to support measures and positions favored by the subnational government. For example, in the United States, governors are frequently in touch with members of their states' congressional delegations,<sup>272</sup> and expect to have at least some meaningful influence with members of the delegation who belong to the same political party.<sup>273</sup>

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269. Jensen, *supra* note 266, at 328-329.

270. U.S. CONST. amend. XVII.

271. See *supra* notes 46-58 and accompanying text.

272. DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING 91-96 (1974) (describing gubernatorial lobbying of the state's congressional delegation); Dinan, *supra* note 10, at 402-04. As Jensen observes, "[g]overnors are powerful people. They can pick up the phone and call senators [and] representatives." JENNIFER M. JENSEN, THE GOVERNORS' LOBBYISTS: FEDERAL-STATE RELATIONS OFFICES AND GOVERNORS ASSOCIATIONS IN WASHINGTON 3 (2016). Routinized contacts may include monthly staff meetings of the state's Washington office and chiefs of staff of all members of the state's congressional delegation. See *id.* at 104-05. For more general discussion of the lobbying role and efforts of state leaders, see ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM 1-3 (1995); HAIDER, *supra*, at 91-96; NUGENT, *supra* note 10, at 118, 119 tbl.5; John Dinan, *State Government Influence in the National Policy Process: Lessons from the 104th Congress*, 27 *PUBLIUS* 129 (1997).

273. As Kramer observes, "Democrats give other Democrats consideration they deny to Republicans—just because they *are* Democrats. Republicans do the same." Kramer, *supra* note 37, at 1539. "[P]arty connection establishes a bond that encourages government officials to pay attention to each other's needs and interests." *Id.* at 1542; see also JENSEN, *supra* note

In addition, party ties can provide a vector for informal subnational influence when subnational officials hold leadership positions, whether formal or informal, in subnational party organizations. For example, in Argentina and the United States, state governors typically act as heads of the state-level affiliates of the national political parties to which they belong.<sup>274</sup> This gives them considerable influence in deciding how party resources will be deployed, including how and in whose favor ground-level get-out-the-vote efforts will be conducted.<sup>275</sup> This in turn allows them to command the attention, and in many cases the loyalty, of candidates for the national legislature.<sup>276</sup>

These tactics are available, however, only where political parties are sufficiently well-integrated to support appeals that cross jurisdictional boundaries. Where party systems are highly fragmented, parties may not operate equally effectively—or at all—at different levels and so will be unable to successfully broker efforts at official coordination.<sup>277</sup> For example, in Canada there is little functional overlap between parties operating at the provincial level and those operating at the national level, even when they share the same name.<sup>278</sup> As a result, Canadian parties do not offer paths of political influence that cross constitutional lines of authority.<sup>279</sup> In contrast,

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272, at 106 (describing difficulties of cross-party appeals).

274. See Ardanaz et al., *supra* note 10, at 27-29; Leiras, *supra* note 207.

275. Leiras, *supra* note 207, at 230-31.

276. See Ardanaz et al., *supra* note 10, at 27-29.

277. See Richard Simeon & Beryl A. Radin, *Reflections on Comparing Federalisms: Canada and the United States*, 40 *PUBLIUS* 357, 363 (2010) (noting that the complexities of the American system as compared to the Canadian system prohibit the former from single-table discussion).

278. R. Kenneth Carty & Steven B. Wolinetz, *Political Parties and the Canadian Federation's Coalition Politics*, in *CANADA: THE STATE OF THE FEDERATION*, 2002, *supra* note 212, at 57, 58; see also Herman Bakvis & A. Brian Tanguay, *Federalism, Political Parties, and the Burden of National Unity: Still Making Federalism Do the Heavy Lifting?*, in *CANADIAN FEDERALISM*, *supra* note 82, at 112, 112; William M. Chandler, *Federalism and Political Parties*, in *FEDERALISM AND THE ROLE OF THE STATE*, *supra* note 172, at 149, 149, 151-54; Gibbins, *supra* note 233, at 24-27; Simeon & Radin, *supra* note 277, at 363; A. Brian Tanguay, *Political Parties and Canadian Democracy: Making Federalism Do the Heavy Lifting*, in *CANADIAN FEDERALISM: PERFORMANCE, EFFECTIVENESS, AND LEGITIMACY*, *supra* note 82, at 296, 302-03. *But see* Anna Lennox Esselment, *Fighting Elections: Cross-Level Political Party Integration in Ontario*, 43 *CAN. J. POL. SCI.* 871, 877-80 (2010).

279. SIMEON, *supra* note 187, at 31-35. Chhibber and Kollman attribute this to the strong decentralization of power in the system, that is, because the provinces have such significant responsibility, voters have incentives to vote their policy preferences at the provincial level;



parties in Austria are so thoroughly nationalized that they have a tendency to induce a very strong convergence of national and subnational commitments.<sup>280</sup> In practice, the dominance of the national parties is so strong that it actually inhibits the effective transmission of subnational policy preferences through the parties.<sup>281</sup> For the most part, coordination runs the other way, with *Länder* governments falling into line with national policy commitments, and *Land* governors using their authority to implement policies set at the national level.<sup>282</sup> In the United States, vertically integrated parties can serve as conduits for conveying subnational influence into the Congress, but they also frequently serve as vectors for the communication of national party commitments to the state level.<sup>283</sup>

#### *iv. Mobilization of Popular Opinion*

Subnational units may also be able to exercise a form of informal influence on national legislative policy through mobilization of popular opinion. Where subnational officials command sufficient public loyalty, and where a custom exists of mass political action, it is possible for subnational officials to whip up popular support for subnational interests and policy preferences that national election officials may have difficulty resisting. In Catalonia, for example, it is sometimes possible for government officials, often working in conjunction with their political parties, to put a million people in the street to protest actions taken or contemplated by the Spanish government.<sup>284</sup>

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whereas in more centralized systems they have incentives to vote their national preferences in subnational elections. See generally PRADEEP CHHIBBER & KEN KOLLMAN, *THE FORMATION OF NATIONAL PARTY SYSTEMS: FEDERALISM AND PARTY COMPETITION IN CANADA, GREAT BRITAIN, INDIA, AND THE UNITED STATES* (2004).

280. Interview with subject 14, Austrian legal and political scholar (Jan. 20, 2015); Interview with subject 15, Austrian legal and political scholar (Jan. 20, 2015); Interview with subject 16, Austrian legal scholar (Jan. 21, 2015).

281. Interview with subject 14, Austrian legal and political scholar (Jan. 20, 2015); Interview with subject 15, Austrian legal and political scholar (Jan. 20, 2015); Interview with subject 16, Austrian legal scholar (Jan. 21, 2015).

282. Interview with subject 14, Austrian legal and political scholar (Jan. 20, 2015); Interview with subject 15, Austrian legal and political scholar (Jan. 20, 2015); Interview with subject 16, Austrian legal scholar (Jan. 21, 2015).

283. See James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 1-2 (2013).

284. Or at least the one million figure is sometimes claimed. A recent analysis suggests

In the United States, governors and state legislatures have become adept at mobilizing press coverage, and on occasion have used their skills to stage theatrical events shaming or condemning nationally elected officials.<sup>285</sup>

*c. Influence on Legislative Outcomes Through the Executive Branch*

Because the national executive also participates in the national legislative process,<sup>286</sup> it too can sometimes serve as a vector for subnational influence on legislative outcomes. One of the most common avenues to influence national legislation running through the national executive is the practice of intergovernmental consultation. In this process, national officials engaged in the development of policy proposals reach out to subnational units either to provide notice of and information about the contemplated proposal, thereby furnishing the subnational unit with an opportunity to respond and react; or to solicit from counterparts at the subnational level their views to allow them to help shape the policy before development gets too far along. In some cases, such consultation is required by law. Under the Swiss Constitution, for example, the national executive must consult cantonal authorities “when preparing important legislation.”<sup>287</sup> In other cases, as in Austria and Germany,

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that no demonstration in Spain has ever produced one million attendees, although a 2013 demonstration in Barcelona may have come close, with nearly 800,000 participants. See Álex Grijelmo, *Nunca hubo un millón*, EL PAÍS (Spain) (Oct. 3, 2017, 12:10 AM), [https://elpais.com/elpais/2017/09/29/opinion/1506674781\\_614116.html](https://elpais.com/elpais/2017/09/29/opinion/1506674781_614116.html) [<https://perma.cc/E3Y2-XU2B>].

285. See Bulman-Pozen & Gerken, *supra* note 10, at 1278-80; John Dinan, *How States Talk Back to Washington and Strengthen American Federalism*, POLY ANALYSIS, Dec. 3, 2013, at 5. For example, in 1994, state and local interest groups cooperated to mount “National Unfunded Mandates Day,” an event designed to publicize subnational officials’ displeasure with national policies that imposed regulatory burdens without providing funding to pay for state and local compliance. See NUGENT, *supra* note 10, at 74. Somewhat more formally, state legislatures have sometimes enacted laws or resolutions denouncing federal legislation they find objectionable. See *id.* at 64-66. These laws are not generally intended to have legal effect; they are intended to influence public opinion by expressing state disapproval in a highly visible way. See *id.* Targets of this form of state ire have included the USA Patriot Act, the REAL ID Act, the No Child Left Behind Act, and the Affordable Care Act. See *id.*; John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 ALB. L. REV. 1637, 1660-63, 1668 (2011).

286. See, e.g., *supra* notes 230-35 and accompanying text.

287. See CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 147

consultation is simply an informal courtesy that professionals at the different levels extend toward one another.<sup>288</sup> In principle, this process is different from negotiation. Parties to a negotiation expect a process of mutual concession leading to agreement;<sup>289</sup> parties who are consulted expect only to be heard.

Another forum in which subnational units often have the opportunity to influence the content of national legislation is through the practice of ministerial-level contacts. In this practice, ministers and lower-level officials meet to discuss issues of common concern on the legislative agenda, to trade relevant information, and sometimes to work collaboratively to develop mutually acceptable policy solutions to shared problems. These meetings can be formal or informal, routine or ad hoc, and among higher or lower ranking executive officials. For example, a 1989 study in Germany found 330 federal-*Land* commissions then in existence.<sup>290</sup> In its most extreme form, subnational units can work through the national executive to exert influence on national lawmaking through the process, where it exists, of executive federalism. As the Canadian examples described earlier illustrate, processes of executive federalism can produce significant pieces of landmark legislation through a process of consultation and negotiation among executive branch officials at the national and subnational levels.<sup>291</sup>

#### *d. Influence on National Administration*

All the tools mentioned above that can be used by subnational units to influence national legislation through the executive branch—intergovernmental consultation, ministerial-level contacts, and executive federalism—can also be used to influence administration by the national government of national policies enacted into law. Consequently, if a subnational unit is unsuccessful at shaping

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(Switz.).

288. See Anna Gamper, *Republic of Austria*, in 3 A GLOBAL DIALOGUE ON FEDERALISM: LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES 71, 72 (Kayt Le Roy et al. eds., 2006); Interview with subject 27, German federal government official (June 23, 2015).

289. See, e.g., *supra* notes 212-17 and accompanying text.

290. See ARTHUR GUNLICKS, *THE LÄNDER AND GERMAN FEDERALISM* 67 (2003).

291. See *supra* notes 230-35 and accompanying text.

national policy to its liking, it can still attempt to bend policy outcomes in the directions it favors by using its influence in the executive branch to target implementation and administration of the disfavored policies. For example, in Italy, regional presidents may meet with national ministers to influence administrative decisions taken in that region.<sup>292</sup> In the United States, subnational influence on national executive branch officials sometimes helps shape national administrative policy, as has been the case, for example, in the implementation of national health care programs.<sup>293</sup>

### 3. *Participation in Foreign Policy*

One last way in which subnational units may influence national policy is by participating in the formulation of foreign policy. This kind of influence seems to demonstrate the greatest possible extent of subnational integration into national policy making, as historically the formulation and execution of foreign policy has long been treated as the exclusive province of national governments.<sup>294</sup> Today, however, it is increasingly common for subnational units in federal states to participate in the development and implementation of foreign policy, and even to conduct their own foreign relations on a limited scale.<sup>295</sup>

In Switzerland, for example, the national government must by law consult the cantons on foreign policy decisions that affect their powers or interests, and where subnational powers are affected, “the Cantons shall participate in international negotiations in an appropriate manner.”<sup>296</sup> Belgian subnational units (regions and

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292. Interview with subject 19, Italian legal and political scholar (Feb. 10, 2015); Interview with subject 20, Italian political scholar (Feb. 10, 2015).

293. See Shanna Rose & Cynthia J. Bowling, *The State of American Federalism 2014-15: Pathways to Policy in an Era of Party Polarization*, 45 *PUBLIUS* 351, 358-62 (2015).

294. Duchacek lists exclusive control over foreign affairs as one of ten “yardsticks” of federalism. See DUCHACEK, *supra* note 9, at 208.

295. MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* 35-36 (2016); Daniel Abebe & Azizz Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 *VAND. L. REV.* 723, 769-71 (2013); David Crikemans, *Regional Sub-State Diplomacy from a Comparative Perspective: Quebec, Scotland, Bavaria, Catalonia, Wallonia and Flanders*, 5 *HAGUE J. DIPL.* 37, 37-38 (2010).

296. See CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 55, para. 3 (Switz.).

communities) have authority to make treaties with foreign states concerning matters within their competence.<sup>297</sup> Consistent with European policy on regional affairs, Austrian *Länder*, Spanish *comunidades autónomas*, and Italian *regioni* participate in the formation of national policy relating to the (EU), and subnational units in many EU member federations maintain lobbying offices in Brussels.<sup>298</sup> Austrian *Länder* have authority to make treaties with neighboring states, though that power has never been used.<sup>299</sup> American states and Canadian provinces often maintain relations with foreign states to promote trade. More recently, American governors seem to have been bypassing national diplomatic channels to deal directly with foreign leaders on issues of climate change and international trade.<sup>300</sup>

#### D. Summary

Perhaps the most notable finding of the foregoing account is that it provides broad confirmation of Madison's prediction that subnational units in federal states will from time to time assert themselves against national power.<sup>301</sup> Indeed, the evidence shows that in some federal states, subnational units assert themselves regularly and with considerable effectiveness.<sup>302</sup> In addition, the evidence reveals that all the tools of subnational influence identified by the theorists discussed in Part I—public protest, litigation, influence through a senate, and exploitation of political party channels<sup>303</sup>—have been used at one time or another by at least some subnational units in some federal states, and that some of those tools are used

297. 2012 CONST. art. 167, § 3 (Belg.).

298. See Stephen Weatherill, *The Challenge of the Regional Dimension in the European Union*, in *THE ROLE OF REGIONS AND SUB-NATIONAL ACTORS IN EUROPE* 1, 14-15 (Stephen Weatherill & Ulf Bernitz eds., 2005).

299. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2009, as amended by BGBl No. 164/2013, art. 16 (Austria).

300. See Alexander Burns, *Going Around Trump, Governors Embark on Their Own Diplomatic Missions*, N.Y. TIMES (July 15, 2017), [https://www.nytimes.com/2017/07/15/us/trump-governors-diplomatic-missions.html?rref=collection%2Fbyline%2Falexander-burns&action=click&contentCollection=undefined&region=stream&module=stream\\_unit&version=search&contentPlacement=1&pgtype=collection](https://www.nytimes.com/2017/07/15/us/trump-governors-diplomatic-missions.html?rref=collection%2Fbyline%2Falexander-burns&action=click&contentCollection=undefined&region=stream&module=stream_unit&version=search&contentPlacement=1&pgtype=collection) [https://perma.cc/5X9G-4GXV].

301. See *supra* notes 1-5, 37 and accompanying text.

302. See *supra* Part II.A-C.

303. See *supra* Part I.B.

quite widely, and often to good effect. More importantly, however, the data show that subnational units do not confine themselves to the small universe of tools of influence identified by federal theorists. In fact—and strikingly so—subnational units in the federal states studied here have from time to time resorted to an enormous variety of methods to attempt to shape, influence, or thwart national policies. These tools of influence cover a broad range, from open defiance, to surreptitious undermining, to coordinated occupation of vacant policy space, to cooperative tactics such as negotiation and consultation.<sup>304</sup>

Viewed as a whole, these techniques reveal a good measure of creativity on the part of subnational officials in devising methods by which to exert influence on national governments. Subnational officials have attempted to exploit virtually every conceivable opening by which to influence national policy-making processes.<sup>305</sup> Not all methods are used in every state, and some methods that are effective in some states are less effective when attempted in others.<sup>306</sup> However, the basic Madisonian hypothesis seems amply confirmed: subnational units in federal states do attempt to gain advantage by influencing national policy;<sup>307</sup> they assert their own authority in areas where they possess autonomous control of policy,<sup>308</sup> and they push back against periodic national incursions into subnational policy space.<sup>309</sup>

### III. CONTESTATION AND THE PROBLEM OF CONSTITUTIONAL SELF-STABILIZATION

The findings presented in Part II raise a critical question about Madisonian federal theory: how do the routes of subnational influence identified above come into existence? The orthodox answer would seem to be that they are, indeed must be, provided by the constitutional plan.<sup>310</sup> On this view, designers consider the particular

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304. *See supra* Table 1.

305. *See supra* Part II.A.-C.

306. *See, e.g., supra* notes 277-83 and accompanying text.

307. *See supra* note 39 and accompanying text.

308. *See supra* Part II.B.1.

309. *See supra* Part II.A.

310. *See supra* notes 44-45 and accompanying text.

balance they wish to achieve between national and subnational power, identify methods by which subnational units may influence national policy making, and create constitutional mechanisms to effectuate the plan<sup>311</sup>—what the United States Supreme Court has called a “finely wrought and exhaustively considered” division of powers.<sup>312</sup> That account is clearly accurate in many cases. For example, where a second legislative chamber is involved, its existence and characteristics are indisputably a matter of deliberate constitutional design.<sup>313</sup> But in many other cases identified in Part II, these routes to subnational influence appear to have been essentially conceived, manufactured, and deployed unilaterally by the subnational units that now use them.<sup>314</sup> Certainly no federal constitution contemplates, for instance, that subnational units will influence national policy making through open and outright defiance of national law or the orders of a national court—indeed, some federal constitutions clearly forbid subnational defiance,<sup>315</sup> or have been authoritatively so construed.<sup>316</sup>

It seems to follow, then, that subnational units have developed at least some, and perhaps many, methods of influence through an improvisatory process of creative invention; they have developed new methods when they felt they needed them—when they felt existing methods did not offer them the degree of influence they desired. Yet, by developing new methods by which to exert influence in the national policy-making arena, subnational units are in effect altering the balance of power and influence contemplated by the initial constitutional plan.<sup>317</sup> They are, in effect, changing the constitutional design itself.<sup>318</sup>

To put the problem a bit more vividly, we might ask whether intergovernmental struggle in federations is more like a boxing match, in which both participants move freely around the (constitu-

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311. *See supra* notes 44-45 and accompanying text.

312. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

313. *See, e.g.*, U.S. CONST. art. I.

314. *See supra* Part II.B.4.

315. *See, e.g.*, BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2009, as amended by BGBl No. 164/2013, art. 22 (Austria); *see also* CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 44 (Switz.).

316. *See PALERMO & KÖSSLER, supra* note 7, at 249-53.

317. *See Gardner, supra* note 16, at 336-37, 344-47.

318. *See id.*

tionally established) ring and stay there, or a bar brawl in an old Wild West film where the combatants start in the (constitutionally defined) bar, eventually crash through the window and out onto the front porch, break through the porch rail, and end up in the street. The evidence presented here is far from conclusive, but it is suggestive, and I believe it suggests the latter: the capacity of federal constitutions to constrain the behavior of officials who are engaged in a process of mutual struggle is limited.<sup>319</sup> Because the goal of officials engaged in struggle is to do so *successfully*, officials have strong incentives to develop new, innovative, and, if necessary, extraconstitutional methods of attack and defense when they find the tools afforded them by the formal constitutional structure insufficiently efficacious.<sup>320</sup> In this sense, the evidence presented here provides support for the contention of many contemporary theorists of federalism, alluded to earlier,<sup>321</sup> that “federal systems are permanently in motion,”<sup>322</sup> and indeed that “*competencies* are always in motion, and in more than one direction.”<sup>323</sup>

#### A. *Subnational Tactics and the Processes of Constitutional Innovation*

It is perhaps most useful to conceive of the subnational tactics identified in Part II as lying along a spectrum of constitutionality. At one end are methods of contestation clearly approved by the relevant federal constitution; at the other extreme are methods clearly disapproved; and in between, very likely an extensive field of ambiguity in which the constitutionality of particular tactics cannot be easily determined.<sup>324</sup> However, my purpose here is less to

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319. See *supra* Part II.D.

320. See *supra* notes 69-82 and accompanying text.

321. See *supra* notes 69-82 and accompanying text.

322. See Benz & Broschek, *Federal Dynamics: Introduction*, in FEDERAL DYNAMICS, *supra* note 9, at 1, 2.

323. Resnik, *supra* note 75, at 368 (emphasis added). Poirier and Saunders refer to this as “constitutional (re)engineering” and distortion of the “distribution of competences.” See Johanne Poirier & Cheryl Saunders, *Conclusion: Comparative Experiences of Intergovernmental Relations in Federal Systems*, in INTERGOVERNMENTAL RELATIONS IN FEDERAL SYSTEMS, *supra* note 10, at 440, 490-91.

324. See *supra* Table 1. Here, judgments as to the constitutionality of any tactic will depend greatly upon the specific conventions of constitutional interpretation and deference to official



characterize the constitutionality of these practices than to demonstrate a persistent pattern of behavior: subnational officials have repeatedly created new opportunities to exert influence on national policy making by exploiting existing institutions and practices that may not have been intended by the constitutional scheme to serve as avenues of subnational influence, but with some imagination can nevertheless be made to do so.<sup>325</sup> In some cases, to be sure, creatively repurposing existing institutions and practices may press hard against or even overstep constitutional boundaries.<sup>326</sup> The more important point, however, is the scope and persistence of the process of repurposing itself, and its long-term impact on the constitutional structure of federalism.

### *1. Influence by Constitutional Design*

Perhaps the most obvious route of subnational influence resulting from deliberate constitutional design is the type of influence subnational units wield through the institution of a second legislative chamber, or senate. Consider, for example, the very different structures of the German *Bundesrat*, the Austrian *Bundesrat*, and the Spanish *Senado*.

The article of the German Basic Law establishing the *Bundesrat* opens with a strong declaration of constitutional intent: “[t]he *Länder*,” it provides, “shall participate through the *Bundesrat* in the legislation and administration of the Federation.”<sup>327</sup> To effectuate this principle, the Basic Law provides that members of the *Bundesrat* are to be “members of the *Land* governments,” appointed and recalled by those governments.<sup>328</sup> This ensures that the *Bundesrat* is populated not by individuals who are merely sympathetic or responsive to *Land* interests, but by members of the *Land*

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discretion that prevail in the state in question. For example, whether the federal state is a civil law or common law jurisdiction may influence the constitutional treatment of tactical innovation by government officials. See Thomas Fleiner, *Discrepancies Between Civil Law and Common Law Federations*, in 19 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 386, 406-07 (Frauke Lachenmann et al. eds., 2015).

325. See *supra* Part III.A.

326. See *supra* Part III.A.2.

327. GRUNDGESETZ [GG] [BASIC LAW], art. 50 (Ger.).

328. *Id.* art. 51(1).

government itself, familiar with and fully committed to the advancement of *Land* policy.<sup>329</sup> In practice, for example, a *Bundesrat* delegation typically includes the two top executive officials of the *Land*, the Prime Minister and Deputy Prime Minister.<sup>330</sup>

The Basic Law expressly authorizes the *Bundesrat* to pursue *Länder* interests at the national level by two formal mechanisms. First, for any kind of law, the *Bundesrat* may exercise a suspensive veto that delays adoption of the law by referring it for consideration to a Joint Committee of the *Bundestag* and *Bundesrat*.<sup>331</sup> Following this period of delay, the *Bundestag* may reenact the law without further input from the *Bundesrat*.<sup>332</sup> However, in many cases bills enacted by the *Bundestag* may not become law without the affirmative consent of the *Bundesrat*.<sup>333</sup> In these instances, the *Bundesrat* exercises an absolute veto over national laws, giving the *Länder* a degree of indirect control over national legislative policy unmatched by subnational units in any other federation.

In Austria, as in Germany, the members of the *Bundesrat* are elected by the *Land* legislatures (*Diets*).<sup>334</sup> However, the Austrian *Bundesrat* is considerably weaker than its German counterpart because it may, with very few exceptions, exercise only a suspensive veto,<sup>335</sup> giving it the power only to delay rather than to obstruct federal legislation. Thus, although the members of the Austrian *Bundesrat* are in principle as closely tied to the *Länder* as in Germany, the Austrian Constitution by design provides them with less influence in the federal legislative process than is the case under the German Constitution.

329. *See id.*

330. Interview with subject 24, German legal and political scholar (June 22, 2015).

331. GRUNDGESETZ [GG] [BASIC LAW], art. 53a, 77 (Ger.).

332. *Id.* art. 77, § 4.

333. *See, e.g., id.* arts. 87, § 3, 87b, 87c, 87d, 91a, § 2, 91b, § 1, 96, § 5, 104a, §§ 4-6. In a significant 2006 reform, the constitution was amended to reduce the number of matters on which *Bundesrat* approval was required. *See* Arthur B. Gunlicks, *Legislative Competences, Budgetary Constraints, and the Reform of Federalism in Germany from the Top Down and the Bottom Up*, in CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS, *supra* note 199, at 61, 70-75; Ed Turner & Carolyn Rowe, *Party Servants, Ideologues or Regional Representatives? The German Länder and the Reform of Federalism*, 36 W. EUROPEAN POL. 382, 389-90 (2013).

334. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2009, as amended by BGBl No. 164/2013, art. 35 (Austria).

335. *Id.* art. 42.

In Spain, the power of subnational units to exercise influence through the Spanish second chamber, the *Senado*, is even more attenuated. The Spanish Constitution defines the *Senado* as “the Chamber of territorial representation.”<sup>336</sup> The territories represented, however, are not the principal subnational units, known as *comunidades autónomas*, or Autonomous Communities; they are instead “provinces,” which in Spain are subunits of Autonomous Communities.<sup>337</sup> In the United States, this arrangement would correspond roughly to one in which the U.S. Constitution guaranteed senatorial representation to counties rather than states. The Spanish Constitution does go on to authorize each Autonomous Community to designate one senator, plus an additional senator for each million inhabitants it contains.<sup>338</sup> However, the structure of these constitutional rules ensures that senators who directly represent the Autonomous Communities as Communities are far outnumbered by those representing individual provinces.<sup>339</sup> The result is that the principal subnational units in Spain have extremely limited representation in the *Senado*, making it a much less effective conduit for the exercise of subnational voice in the national legislative process than is the case in Germany or Austria.

Different as they are, what these structures of subnational influence have in common is that they were deliberately *chosen* by constitutional designers. When German or Austrian *Länder* or Spanish *comunidades autónomas* attempt to make use of their second chambers as conduits for influencing national legislation, they are not merely working within constitutional bounds, but making use of institutions expressly designed for that purpose.<sup>340</sup> The efficacy of the channel may differ from state to state, but there can be no doubt that use of these channels is specifically contemplated and authorized by the relevant constitutions.

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336. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 69, Dec. 29, 1978 (Spain).

337. *Id.* n. 143, § 1.

338. *Id.* n. 69, § 5.

339. Fifty-eight out of the *Senado*'s 208 senators represent Autonomous Communities in their entirety rather than the smaller provinces of which they are composed. María Jesús García Morales & Xavier Arbós Marín, *Intergovernmental Relations in Spain: An Essential but Underestimated Element of the State of Autonomies*, in INTERGOVERNMENTAL RELATIONS IN FEDERAL SYSTEMS, *supra* note 10, at 350, 355.

340. That is, the constitutional design evinces an intention that the second chamber represent subnational interests, at least to some degree.

The same might be said of several other mechanisms of subnational influence. For example, when subnational units pursue their policy preferences by exercising independent powers allocated to them by constitutional grant, they are making use of avenues of influence and power projection that clearly fall within the bounds of what is contemplated by the constitutional scheme. Similarly, some federal constitutions expressly approve practices of intergovernmental negotiation and bargaining. For example, the Swiss Constitution instructs “[t]he Confederation ... [to] consult [the Cantons] if their interests are involved,”<sup>341</sup> and provides that “[d]isputes between ... Cantons and the Confederation, shall, to the extent possible, be resolved through negotiation or mediation.”<sup>342</sup> The Italian Constitution specifically authorizes bilateral negotiations between the central state and certain regions.<sup>343</sup> Likewise, litigation in a constitutional court, when permitted by the jurisdictional rules of the court, is by definition a constitutionally authorized means of subnational influence.<sup>344</sup> Thus, subnational units making use of these and other, similar avenues of influence are clearly acting within constitutional bounds by employing tools of influence deliberately provided to them by the constitutional plan.

## *2. Influence by Extraconstitutional Innovation*

It is equally clear, however, that some of the tools and methods of influence identified in Part II are deployed not only without affirmative constitutional authorization, but in violation of the constitution.<sup>345</sup> This is most clearly the case with the more defiant methods of subnational resistance described earlier.<sup>346</sup> For example, with few exceptions,<sup>347</sup> secession from a federal state is considered

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341. CONSTITUTION FÉDÉRALE [CST][CONSTITUTION] Apr. 18, 1999, RO 101, art. 45, para. 2 (Switz.).

342. *Id.* art. 44, para 3.

343. Art. 116 Costituzione [Cost.] (It.).

344. *See supra* notes 147-50 and accompanying text.

345. *See supra* Table 1.

346. *See supra* Part II.A.2.

347. In Ethiopia, for example, secession is specifically authorized. ETH. CONST. art. 39, § 1 (“Every Nation, nationality and people in Ethiopia has an unconditional right to self-determination, including the right to secession.”). According to one study, secession is also expressly authorized in the constitutions of Liechtenstein, Saint Kitts and Nevis, Sudan,

an unconstitutional act,<sup>348</sup> and to threaten secession, or to engage in signaling by talking of secession, is thus to threaten or promote consideration of a direct violation of constitutional limitations.

The same is true, almost by definition, of outright defiance of lawful exercises of national authority, whether by violent or passive means. Some constitutions state this expressly. For example, the Swiss Constitution provides: “[t]he Confederation and the Cantons shall collaborate, and shall support each other in the fulfillment of their tasks.”<sup>349</sup> The Austrian Constitution provides: “[a]ll authorities of the Federation, the Lander, [and] the municipalities ... are bound within the framework of their legal sphere of competence to render each other mutual assistance.”<sup>350</sup> In Belgium, Germany,

Uzbekistan, Slovakia, and South Africa. Rivka Weill, *Secession and the Prevalence of Militant Constitutionalism Worldwide*, 40 CARDOZO L. REV. (forthcoming 2018) (manuscript at 38), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3062925](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062925) [<https://perma.cc/8X5P-QXDS>].

348. See, e.g., *Texas v. White*, 74 U.S. (7 Wall.) 700, 725-26 (1868) (the United States is “an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the United States, she entered into an indissoluble relation.”); Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶¶ 149-55 (Can.) (holding that Canadian provinces may not constitutionally secede from the Commonwealth by unilateral action). A 1996 study found that eighty-two of eighty-nine constitutions examined prohibited secession “under any circumstances.” PATRICK J. MONAHAN ET AL., *COMING TO TERMS WITH PLAN B: TEN PRINCIPLES GOVERNING SECESSION* 7 (1996). A more recent study finds that 85 percent of all national constitutions prohibit secession, and that prohibition is sometimes accomplished indirectly through eternity clauses and bans on secessionist political parties. See Weill, *supra* note 347, at 5.

In Spain, recent events have shown that even to threaten secession, by holding a popular referendum to gauge public support for independence, is to act unconstitutionally. Rebecca Carranco & Jesus Garcıa, *La justicia desmonta la organizacion del referendum ilegal de Cataluna*, EL PAIS (Spain) (Sept. 21, 2017, 10:04 AM), [https://elpais.com/ccaal/2017/09/20/catalunya/1505885372\\_273143.html](https://elpais.com/ccaal/2017/09/20/catalunya/1505885372_273143.html) [<https://perma.cc/LSS7-AJNW>]. At this writing, the Spanish central government has treated Catalonia’s moves toward secession as a failure to fulfill its constitutional obligations sufficient to trigger the application of Article 155 of the Spanish Constitution, which allows the central government to “adopt measures necessary to enforce” compliance. CONSTITUCION ESPAOLA, B.O.E. n. 115, Dec. 29, 1978 (Spain); see also Raphael Minder, *In Catalonia Crisis, Shared Blame for ‘a Difficult and Undesirable Situation’*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/world/europe/catalonia-spain-carles-puigdemont-mariano-rajoy.html> [<https://perma.cc/22ZG-M4YV>]. As King argued, at the very least, “the structure of [federal] governments is heavily weighted against [secession].” KING, *supra* note 18, at 109.

349. CONSTITUTION FEDERALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 44, para. 1 (Switz.).

350. BUNDES-VERFASSUNGSGESTEZ [B-VG] [CONSTITUTION] BGBl No. 127/2009, as amended by BGBl No. 164/2013, art. 22 (Austria).

Italy, and Spain, a requirement of mutual cooperation between national and subnational governments has been judicially inferred from the constitutional scheme.<sup>351</sup> And of course subnational defiance of lawful national authority is inconsistent with the national supremacy clauses that are typical of federal constitutions.<sup>352</sup> In these cases, then, subnational units have found it necessary or desirable to attempt to advance their interests, or to resist unwanted exercises of national power, by resorting to tools and methods that are not only outside the contemplation of the federal constitution, but in direct violation of it. The contestants here have, so to speak, crashed through the window and out into the street.

### *3. Influence by Innovative Exploitation of Constitutional Uncertainty*

Many—perhaps most—of the practices adopted by subnational units to exert influence on national policy making do not fall neatly within or without clearly identifiable constitutional boundaries.<sup>353</sup> Yet this is understandable, and in a sense predictable, precisely because of the novelty and unexpectedness of many of these practices. Indeed, constitutional improvisation by definition will often pose difficult issues of constitutionality.<sup>354</sup>

Consider, for example, subnational exploitation of channels of influence created by political parties. With the exception of the United States Constitution, which notoriously fails to provide for or even to mention political parties,<sup>355</sup> the constitutions of all the states in this study contemplate to some degree a role for political parties

351. PALERMO & KÖSSLER, *supra* note 7, at 249-51; *see also* S.T.C., June 28, 2010 (B.J.C. No. 8045-2006) (Spain).

352. *See, e.g.*, GRUNDGESETZ [GG] [BASIC LAW], art. 31 (Ger.); U.S. CONST. art. VI, cl.2.

353. As Nugent writes, “[t]he checks used most frequently by states are not necessarily ones that the framers of the Constitution anticipated or wrote about.” NUGENT, *supra* note 10, at 5.

354. In an analogous situation, describing constitutional uncertainty in the distribution between executive and congressional power, Justice Jackson referred to such actions as occupying a “zone of twilight.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

355. The Framers feared and loathed political parties. In his Farewell Address, George Washington warned strongly against what he called “the baneful effects of the spirit of party.” Washington, *supra* note 53, at 172.

in the processes of democratic governance. In some cases, this role is substantial: the constitutions of Germany, Spain, and Switzerland, for example, all provide expressly that political parties “participate in the formation of the political will of the people.”<sup>356</sup> The constitutions of Austria and Argentina recognize a role for political parties in the formation of the national legislature through adoption of principles of proportional representation.<sup>357</sup> It is probably fair to conclude from these kinds of provisions that constitutional designers in these states contemplated that political parties would perform the kinds of functions we normally expect parties to perform: developing policy programs, organizing political thought in civil society, recruiting and supporting candidates, mobilizing voters, participating in the formation of governments, and so forth.<sup>358</sup> On the other hand, although it is now clear from experience that party apparatuses also can be used by government officials as jurisdiction-crossing back channels of political influence, there is no particular reason to think that designers intended them to be so used, or that designers even foresaw the practice as a possible adaptation of party structures intended primarily for other purposes.<sup>359</sup>

A similar story might be told of many of the techniques of influence developed over the years by subnational officials. It was certainly to be expected, for example, that the constitutional allocation of independent power to subnational units would provide them with opportunities to use those powers to satisfy policy preferences within their own borders. It was not necessarily to be anticipated, however, that subnational units would from time to time work together to develop policies jointly for the express purpose of establishing uniform national policies from below, through harmonized adoption at the subnational level, without involvement of the

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356. GRUNDGESETZ [GG] [BASIC LAW] art. 21 ¶ 1 (Ger.); see CONSTITUTION FÉDÉRALE [CST] [CONSTITUTION] Apr. 18, 1999, RO 101, art. 137 (Switz.); CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 6, Dec. 29, 1978 (Spain).

357. Art. 99, § 3, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] BGBl No. 127/2009, as amended by BGBl No. 164/2013, art. 35 (Austria).

358. See generally RUSSELL J. DALTON ET AL., POLITICAL PARTIES AND DEMOCRATIC LINKAGE: HOW PARTIES ORGANIZE DEMOCRACY (2011); NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2008).

359. See Kramer, *supra* note 46, at 268-270 (describing the Framers’ lack of anticipation of the rise and power of parties as a mediating political institution).

national government.<sup>360</sup> Similarly, it might have been expected that subnational units in European states would attempt to participate in the domestic processes by which national policy relating to the EU is formed when permitted to do so by their national constitutions.<sup>361</sup> It might not have been anticipated, however, that subnational units in these states would use this authority as the basis for establishing their own standing foreign policy apparatus, including permanent embassies in Brussels.<sup>362</sup>

If these examples show a willingness by subnational officials to use existing institutions creatively, for purposes other than those for which they were originally or primarily intended, they do not necessarily show subnational officials doing so in a way that pushes hard against constitutional boundaries. But that is not always the case. Consider again the institution of political parties. Let us suppose that no constitutional doubts are raised when subnational officials detour around constitutionally provided tools of voice and influence by exploiting party back channels to communicate with and exert influence upon national policy makers. But what of practices of subnational extortion and clientelism effectuated via the party system?

For example, as we have seen, in Argentina the official power of provincial governors is often augmented by their simultaneous possession of informal power as heads of provincial political parties.<sup>363</sup> Governors sometimes are able to use their power as head of the party to decide who gets to run for seats in the national legislature, a power that permits them to demand loyalty and to extract benefits and concessions from national legislators for the advantage of their provinces.<sup>364</sup> Governors thus pursue official goals through the use of

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360. See *supra* Part II.B.2.

361. See CONSTITUTION FÉDÉRALE [CST.][CONSTITUTION] Apr. 18, 1998, RO 101, art. 55 (Switz.) (requiring central government consultation of cantons on matters that affect their interests); BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 127/2007, as amended by BGBl No. 164/2013, art. 23d, ¶ 1 (Austria) (requiring central government consultation of *Länder* on matters arising in the European Union that affect their interests); Art. 117 Costituzione [Cost.] (It.). Such provisions are common among European states with regional governments following the EU's 1994 creation of the Committee of the Regions to increase EU attention to developments affecting regional governments.

362. See *supra* note 298 and accompanying text.

363. See *supra* notes 206-07, 210-11 and accompanying text.

364. See *supra* notes 204-05, 210-11 and accompanying text.



extraconstitutional power. This practice is certainly not contemplated by the Argentine Constitution, but does it cross a line into unconstitutionality? Strong voices in Argentina so contend.<sup>365</sup>

Or consider the similar practice in the United States of governors and state legislatures disciplining and accumulating political debts from members of Congress in virtue of their authority to draw safe or competitive federal election districts.<sup>366</sup> Again, this practice clearly is not contemplated by the U.S. Constitution, but does it cross any constitutional boundary? If not, it seems certainly to push hard against constitutional limits.<sup>367</sup> To quote Professor Schattschneider again,

The extralegal character of political parties is one of their most notable qualities.... It is profoundly characteristic that the fundamental party arrangements are unknown to the law.... It is precisely through this breach in the rule of law that the parties ... undertake to control the decisions of public authorities at the points at which the law cannot control them.<sup>368</sup>

Perhaps the most dramatic example of constitutional rewriting encountered in Part II is the Canadian practice of “executive

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365. For example, the prominent Argentine scholar Antonio Hernandez has been a strong and persistent critic of this practice, which he associates generally with “hyperpresidentialism,” a deformation of the constitutional plan. See Antonio Maria Hernández, *The Distribution of Competences and the Tendency towards Centralization in the Argentine Federation*, in *DECENTRALIZING AND RE-CENTRALIZING TRENDS IN THE DISTRIBUTION OF POWERS WITHIN FEDERAL COUNTRIES* 71, 83, 89 (2010) (describing gubernatorial control of members of congressional delegation as part of a chain of transactions ultimately controlled by presidents, which weakens constitutionally established institutions such as Congress and the provinces); Antonio M. Hernández, *Republic of Argentina*, in *3 LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES* 7, 31 (Katy Le Roy et al. eds., 2006) (giving a similar account and describing it as “a shortfall in constitutional compliance”). Calvo has similarly denounced clientelism as a breach of “a clear distribution of competences between the federal and provincial governments.” Ricardo Ramirez Calvo, *Sub-National Constitutionalism in Argentina: An Overview*, 4 *PERSP. ON FEDERALISM* 59, 74 (2012).

366. See *supra* notes 205-06 and accompanying text.

367. To the extent this practice takes the form of partisan gerrymandering, a majority of the Supreme Court has found that it is subject to constitutional limits, though the content of those limits remains indeterminate. See *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting) (noting that though the plurality found gerrymandering claims nonjusticiable, five members of the Court disagreed).

368. E. E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 11-12 (1942).

federalism,”<sup>369</sup> a process of policy making in which major decisions about national policy are made through intergovernmental negotiations among the chief executives of the national and subnational governments.<sup>370</sup> Nothing in the Canadian Constitution suggests remotely that this form of governance was contemplated by its drafters, by the British Imperial Parliament that enacted it, or the Canadian leaders who requested it; on the contrary, the Canadian Constitution makes the routine and conventional assumption that national policy in Canada would be made as it is elsewhere: in the deliberations of a broadly representative national legislature.<sup>371</sup> Executive federalism nevertheless emerged in Canada, but not as a principle of design; rather, as Ronald Watts has argued, it emerged as the logical but unanticipated consequence of two other constitutional choices: “the marriage of federal and parliamentary institutions.”<sup>372</sup>

Three principal conditions have underwritten the rise of executive federalism in Canada. First, Canadian provinces exercise a very substantial degree of independent power, and the ability of the federal government to accomplish its objectives thus often depends upon provincial cooperation.<sup>373</sup> Second, Canadian national and provincial governments all employ Westminster-style parliamentary institutions,<sup>374</sup> a form of government that greatly concentrates power in the hands of the prime minister and cabinet.<sup>375</sup> As a result, the Canadian Prime Minister and provincial Premiers can “deliver” their governments in a way that United States or Australian

369. *See supra* note 230.

370. As one commentator has put it, “[i]n Canada, intergovernmental relations have become the substitute for engagement through Parliament.” SMITH, *supra* note 231, at 93; *see also* RUSSELL, *supra* note 231, at 81 (“By the mid 1960s meetings of federal and provincial ministers and their expert advisers on virtually all topics became so numerous they were supplanting legislatures as the primary arena of Canadian policy making.”).

371. This assumption is implicit in Part IV of the Canadian Constitution, which establishes the national parliament and vests in it the legislative powers of the commonwealth, and Art. 91, which lays out the very significant powers of that body. Constitution Act, 1867, 30 & 31 Vict., c 3 (U.K.), art. 91.

372. RONALD L. WATTS, *EXECUTIVE FEDERALISM: A COMPARATIVE ANALYSIS* 1 (1989).

373. *See* Herman Bakvis & Grace Skogstad, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, in *CANADIAN FEDERALISM*, *supra* note 82, at 28; Papillon & Simeon, *supra* note 212, at 118; Warhurst, *supra* note 172, at 259.

374. HOGG, *supra* note 163, at 189-91.

375. WATTS, *supra* note 372, at 1.

presidents and prime ministers cannot.<sup>376</sup> Third, because the number of Canadian jurisdictions is small—one national government, ten provincial governments, and three territorial governments—the agreement of only fourteen individuals, a very manageable number, is required to make virtually any kind of national policy.<sup>377</sup> Taken together, these conditions have created a system in which “the big issues of public policy have been settled in an elaborate system of intergovernmental accommodations presided over by the first ministers.”<sup>378</sup>

The emergence of executive federalism in Canada in turn precipitated the creation of numerous other institutions of intergovernmental relations, including, most notably, a plethora of ministerial conferences and consultative processes,<sup>379</sup> most of which, according to the author of Canada’s leading treatise on constitutional law, “depend upon informal arrangements which have no foundation in the Constitution, or in statutes, or in the conventions of parliamentary government.”<sup>380</sup> The emergence of executive federalism in Canada, then, appears to be the result of a substantial rewriting of the constitutional scheme by Canadian government officials.<sup>381</sup> In Canada, ironically, this may not make the practice unconstitutional; Canadian constitutional law includes unwritten conventions,<sup>382</sup> so any practice, if maintained long enough, may work its way to constitutional status.<sup>383</sup> Again, though, the main point is this: subnational

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376. Donald J. Savoie, *Power at the Apex: Executive Dominance*, in *CANADIAN POLITICS* 115, 125 (James Bickerton & Alain-G. Gagnon eds., 5th ed. 2009). As the Supreme Court of Canada has observed, “the reality of Canadian governance [is] that, except in certain rare cases, the executive frequently and *de facto* controls the legislature.” *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, ¶ 54 (Can.).

377. Herman Bakvis & Douglas Brown, *Policy Coordination in Federal Systems: Comparing Intergovernmental Processes and Outcomes in Canada and the United States*, 40 *PUBLICUS* 484, 485 (2010).

378. Carty & Wolinetz, *supra* note 278, at 66.

379. As Russell puts it, “[b]y the mid 1960s meetings of federal and provincial ministers and their expert advisers on virtually all topics became so numerous they were supplanting legislatures as the primary arena of Canadian policy ... making.” Russell, *supra* note 231, at 81; see also BRUCE G. POLLARD, *MANAGING THE INTERFACE: INTERGOVERNMENTAL AFFAIRS AGENCIES IN CANADA* 7-14 (1986); Papillon & Simeon, *supra* note 212, at 120; Warhurst, *supra* note 172, at 261-63.

380. HOGG, *supra* note 163, at 107.

381. *Cf. id.*

382. *Id.* at 12-13.

383. *Id.* at 18.

government officials in Canada, as elsewhere, appear to exercise continual vigilance for opportunities to improve the quality of their influence on national policy making, by whatever means happen to arrive at hand, and to seize those opportunities when they can.

*B. Contestatory Federalism and the Problem of Constitutional Wandering*

This brings us back finally to where we began—to the Madisonian concept of a self-maintaining constitutional equilibrium. For Madison, a permanent division of governmental power was essential to the protection of liberty.<sup>384</sup> Human nature being what it is, “[t]he accumulation of all powers ... in the same hands,” he wrote, “may justly be pronounced the very definition of tyranny.”<sup>385</sup> To prevent tyranny thus requires preventing excessive accumulations of power, and Madison hypothesized that an initial constitutional division of authority could be maintained permanently by institutionalizing a process of mutual contestation among officials holding partial power.<sup>386</sup>

As we have now seen, Madison correctly predicted that a system of permanent contestation among government officials could be established with the introduction of federalism into the constitutional plan. However, it is not clear from the evidence that the process of intergovernmental contestation thus summoned into being is capable of stabilizing the constitutional division of power at its initial design specifications—of keeping officials and governments, in Madison’s words, “in their proper places.”<sup>387</sup> Rather, the evidence suggests that officials engaged in these struggles from time to time opportunistically conceive and deploy novel methods, sometimes of uncertain or doubtful constitutionality and sometimes clearly in contravention of the constitution, to enhance their ability to influence decisions taken at the other level—tactics to which they presumably resort when they find the existing set of tools of influence inadequate to their purposes (or in Madison’s terminology,

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384. THE FEDERALIST NO. 51, *supra* note 1, at 357-59 (James Madison).

385. THE FEDERALIST NO. 47, *supra* note 1, at 336 (James Madison).

386. *See supra* notes 33-36 and accompanying text.

387. THE FEDERALIST NO. 51, *supra* note 1, at 355 (James Madison).

inadequate to their ambitions).<sup>388</sup> Thus, although it seems that constitutions can successfully *initiate* processes of official checking and contestation,<sup>389</sup> it is less certain that constitutions can subsequently *confine* the ensuing contestation to an arena of struggle contemplated by the initial constitutional scheme.<sup>390</sup>

This conclusion, if correct, issues a strong challenge to the Madisonian theory of contestatory federalism. Can the theory survive? In this section, I take up briefly two possible responses. First, it may be possible to stiffen Madison's theory against this challenge by reconceiving it as acting on a longer time horizon—that is, by thinking about constitutional stabilization as something that happens not in the short term, but over long periods of time. Second, it is possible to understand the evidence as confirming the hypothesis of some theorists that interventionist judicial review is the only way to create a truly sustainable and liberty-protective balance between national and subnational power. Ultimately, however, both of these responses suffer from serious weaknesses.

### 1. *Expansion of the Time Horizon*

The evidence adduced in Part II seems to show that processes of intergovernmental contestation do not, contrary to Madison's prediction, stabilize the constitutional division of powers at their initial design parameters, at least over the short term. It does not necessarily follow, however, that such a system is incapable of doing so over a longer temporal horizon. On this view, even if consistent adherence to a specific constitutional equilibrium is impossible to sustain in the short term, it might nonetheless be maintained over a longer period if certain conditions obtain. In particular, if any given tactical move by national or subnational governments temporarily throws off the constitutionally prescribed balance of power,<sup>391</sup> we cannot necessarily rule out the possibility that countermoves by other players eventually will bring things back to where they

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388. See *supra* Part III.

389. See *supra* notes 18-21 and accompanying text.

390. See *supra* note 353 and accompanying text.

391. See, e.g., Minder & Kingsley, *supra* note 91 (discussing the Spanish Senate's decision to grant the Prime Minister power to "seize direct administrative control over the region and remove secessionist politicians").

belong. In this sense, the balance of power between levels of government may indeed, as some theorists have contended, be “permanently in motion,”<sup>392</sup> but, if that motion orbits what we might call a fixed constitutional center of gravity, even if it does so slowly, the system will remain in rough balance over the long term and will thus be sustainable.

Although this is in many ways an appealing modification, the concept of a moving yet self-maintaining constitutional equilibrium raises many difficulties. First, it is not clear why or under what conditions a process of perpetual contestation would produce a large-scale “orbital” pattern with the necessary self-stabilizing characteristics. It seems equally possible that a steady stream of constitutional perturbations would result either in continuous linear movement away from a fixed constitutional anchor point, or largely random movement in unpredictable directions, such that any return to the starting point would be more a matter of coincidence than the fulfillment of the constitutional plan. The physical analogy, in other words, may have limits; there is no physics of human behavior.

Second, determining the actual path and direction of constitutional change poses significant epistemological problems. It is extremely difficult to compare allocations of authority between national and subnational levels at different points in time.<sup>393</sup> Even when divisions of power remain stable, the utility of any particular power—and thus its practical significance—is largely a matter of context, depending greatly on the contingent political salience of matters to which the exercise of that power might be relevant. The authority of American states to validate same-sex marriage, for example, was worthless in 1910, but it was extremely valuable in 2010. Between those two points in time, nothing changed in the actual constitutional assignment of power. Instead, a change in the political context made a particular subnational power more important and salient than it had been before, in turn altering the balance of power between the levels of government, at least respecting this particular issue, thereby contributing to a significant reversal of the position of the U.S. national government.<sup>394</sup>

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392. Benz & Broschek, *supra* note 73, at 2.

393. See *supra* notes 122-43 and accompanying text.

394. In 1996, Congress came down strongly against same-sex marriage by declaring legislatively, in the Defense of Marriage Act (DOMA), that marriage consists only of “a legal

Did this alteration contribute to the restoration of a constitutionally prescribed balance of power, or did it work a deviation from a constitutionally desirable equilibrium point? It is extremely difficult to say in some non-arbitrary way. And if it is difficult to make judgments about the effect on the balance of power of changes caused by fluctuations in the political context while the intergovernmental allocation of powers remains fixed,<sup>395</sup> surely it is even more difficult to assess the impact of changes to the balance of power from actual expansion or contraction of powers resulting from clashes arising in the course of intergovernmental contestation.

Third, to create a constitution capable of producing stability over very long periods while absorbing—without serious risk to the system—an endless series of short-term shifts in power allocations would require a remarkable feat of constitutional foresight and engineering. Indeed, it seems doubtful that such a feat is humanly possible. The average lifespan of all world constitutions before they are replaced—not amended: replaced—is only nineteen years.<sup>396</sup> This suggests strongly that there are severe limits to the ability of constitutional designers to foresee and provide adequately for changing conditions.<sup>397</sup> If constitutions containing contestatory institutions endure for long periods of time, it may be excessively optimistic to attribute any long-term stabilization to conscious constitutional design; other social and political forces may well play more important roles.

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union between one man and one woman as husband and wife.” Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013). This brought its position into line with an earlier ruling of the U.S. Supreme Court sustaining the validity of laws criminalizing homosexual sex. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003). An extraordinary campaign of opposition in the states eventually galvanized the federal government’s repudiation of its earlier position. The Supreme Court overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); the executive branch decided it could no longer defend DOMA in 2011; and the U.S. Supreme Court struck it down in *United States v. Windsor*, 570 U.S. 744, 775 (2013). For fuller accounts, see generally LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).

395. See *supra* notes 394-95 and accompanying text.

396. ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 2 (2009).

397. *Cf. id.*

## 2. *Judicial Review as a Stabilizing Device*

The evidence reported here supports the conclusion that actors in federal systems will, if left to their own devices, eventually yield to the temptation to cheat by altering their behavior and practices in ways that are outside the contemplation of the constitutional plan,<sup>398</sup> and that, by hypothesis, poses a danger to its long-term stability and success. Some theorists of federalism have long taken the view that, in consequence, a stabilizing hand must be supplied by an impartial arbiter, whose role is to interpret and enforce the prescribed constitutional division of power against this kind of opportunistic misbehavior, and that this function is best performed by a constitutional court.<sup>399</sup> On this view, a constitutional court will, through intervention as necessary, restrain the enthusiasm of the contestants, maintain the constitutionally prescribed balance of power, and prevent either side in the conflict from accumulating an amount of power that might prove dangerous.<sup>400</sup>

Although this solution is highly conventional—nearly every federal system in the world makes use of a supreme or specialized constitutional court to serve this function<sup>401</sup>—it is not without difficulty. The success of judicial review in this context depends fundamentally on the concept of judicial “impartiality”; to perform the necessary stabilization function, a court must interpret and enforce the constitutional balance accurately and free from bias.<sup>402</sup> Yet there are reasons to doubt that constitutional courts are capable of making decisions about the proper division of authority between levels of government with the required degree of impartiality.

Scholars of comparative federalism have long contended that constitutional courts in federal states exhibit a pronounced tendency to favor national over subnational power when put to the choice. As the Canadian scholar Peter Russell recently wrote, “[t]here is a

398. See BEDNAR, *supra* note 77, at 8-9.

399. See *supra* notes 42-45; see also Patricia Popelier, *Federalism Disputes and the Behavior of Courts: Explaining Variation in Federal Courts' Support for Centralization*, 47 *PUBLIUS* 27, 29-31 (2017).

400. See Popelier, *supra* note 399, at 29-31.

401. Ethiopia's highest court lacks the authority to adjudicate disputes over the allocation of powers between levels of government. *Id.* at 28. Switzerland's high court can adjudicate the constitutionality of subnational law, but not national law. *Id.*

402. See *supra* note 42 and accompanying text.



natural tendency for the highest courts in federal countries to have a centralist bias.”<sup>403</sup> Constitutional courts are, after all, organs of the national government, so the vantage point from which they survey the constitutional terrain is not necessarily one that offers a neutral view.<sup>404</sup> Constitutional court judges typically owe their appointments to national officials.<sup>405</sup> They tend to live in the national capital, where they absorb “the central government’s perspective on the powers it needs in order to govern effectively.”<sup>406</sup> A recent study of eleven high courts in federal states concluded that nine of them show a “predominant leaning ... that ... has been unitarist.”<sup>407</sup> Another recent study of a slightly different group of high courts concluded that more than half of the courts studied incline toward “a centralist stance,” and that “no court takes an obviously marked decentralist stance.”<sup>408</sup>

An entirely different factor that might apply pressure to the impartiality of constitutional courts when it comes to decisions concerning the federal allocation of power is that constitutional courts are themselves players in a separation-of-powers game at the national level in which they contend against the national legislative and executive branches for influence over national policy.<sup>409</sup> In these contests, courts may wish to defend their own turf against encroachments from national legislative and executive officials.<sup>410</sup>

This dynamic is relevant here because judicial rulings concerning the constitutional distribution of authority between the national and subnational levels can have significant implications for the power of the national executive and legislative branches. Deciding that a

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403. See Peter H. Russell, *Foreword* to *COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?*, at vii-viii (Nicholas Aroney & John Kincaid eds., 2017); see also HUEGLIN & FENNA, *supra* note 7, at 311.

404. See Russell, *supra* note 403, at viii.

405. See U.S. CONST. art. II, § 2, cl. 2 (nomination by president, confirmation by senate); Art. 99, § 4, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (same); GRUNDGESETZ [GG] [BASIC LAW], art. 94 (Ger.) (appointment by *Bundestag* and *Bundesrat*). The judges of Canada’s Supreme Court are appointed by the federal cabinet. HOGG, *supra* note 163, at 170.

406. Russell, *supra* note 403, at viii.

407. Nicholas Aroney & John Kincaid, *Comparative Observations and Conclusions*, in *COURTS IN FEDERAL COUNTRIES*, *supra* note 403, at 482, 485.

408. Popelier, *supra* note 399, at 32.

409. This is merely the Madisonian theory of horizontal separation of powers as spelled out in *THE FEDERALIST* NOS. 47, 48, 51 (James Madison).

410. See *id.*

power rests with the national legislature rather than with state legislatures, for example, may increase the policy reach, authority, and political salience of the national legislature as compared to the national judicial branch. In circumstances in which the judicial and legislative branches may compete for influence within some particular policy arena, it is difficult to rule out the possibility that a court's federalism jurisprudence could be influenced by its ambitions in processes of horizontal contestation at the national level.<sup>411</sup> Conversely, as David Landau has recently argued, weakness in other branches of the national government may create conditions in which it may be difficult for constitutional courts effectively to assert judicial power as a means of "closing off routes for evasion" of constitutional structural provisions.<sup>412</sup> This is not to say that constitutional courts may not in many circumstances issue balanced rulings aimed at preventing drift from a constitutionally prescribed allocation of powers among levels of government. It is to say, however, that the utility of constitutional courts as instruments of long-term constitutional stability may be quite limited.

### CONCLUSION

Madisonian theory holds that a federal division of power is necessary to the protection of liberty, but that federalism is a naturally unstable form of government organization that is in constant danger of collapsing into either unitarism or fragmentation.<sup>413</sup> Despite its inherent instability, this condition may be permanently maintained in federal states, according to Madison, through a constitutional design that keeps the system in equipoise by institutionalizing a form of perpetual contestation between national and subnational governments and officials.<sup>414</sup> How that contestation actually occurs, however, and by what specific means, remain unspecified by the theory. Moreover, in modern federal states, where the national

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411. See, e.g., Antoni Abat I Ninet & James A. Gardner, *Distinctive Identity Claims in Federal Systems: Judicial Policing of Subnational Variance*, 14 INT'L J. CONST. L. 378, 406-08 (2016).

412. David Landau, *Political Support and Structural Constitutional Law*, 67 ALA. L. REV. 1069, 1071 (2016).

413. See *supra* notes 1-6 and accompanying text.

414. THE FEDERALIST NO. 51, *supra* note 1, at 357-59 (James Madison).

government almost invariably seems to have significant advantages of size, population, resources, and public loyalty and identification, it is not entirely clear how subnational units could possibly struggle with any success against national power.

This study investigates these questions by examining and collecting from nine federal states the methods actually deployed on the ground by subnational units to influence national policy making and to resist, undermine, or thwart exercises of national power with which the subnational unit disagrees. The evidence shows that subnational units engage in a very wide range of tactics, and that subnational units in many states resort to a great variety of methods and techniques to influence the substance of national policies and actions. These tactics range anywhere from outright defiance—and even the threat of secession—all the way to cooperative and highly integrated techniques such as voluntary consultation and negotiation.<sup>415</sup>

Most importantly, the evidence shows that subnational units engage in a pattern of creative invention by devising tools by which to exert influence at the national level, and sometimes the tools of influence so deployed lie outside the bounds of constitutionally contemplated methods of intergovernmental contestation. By engaging in these tactics, subnational units in essence alter the constitutionally prescribed balance of power that underwrites the federal state, at least in the short term, with consequences that are difficult to analyze and very likely impossible to predict. This dynamic casts doubt on the Madisonian premise that constitutions can, through careful engineering, be made to stabilize themselves at their initial design specifications. Indeed, it casts doubt on the possibility that constitutions are really capable of constraining official power for any significant length of time. A constitution may well be capable of launching a journey, but thereafter the direction and quality of that journey may be determined more by those in charge at any particular moment than by the commands of the constitution.

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415. See *supra* Table 1.