NOTE

Decentering or Decentralizing? Economic, Social, & Cultural Rights in Federal Systems

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Economic, social, and cultural (ESC) rights have proliferated in modern constitutional systems, but there has been no serious debate about how they might interact with another key element of constitutional design: federalism. What is more, no country to date has made a strategic choice to make regional, rather than national, governments primarily responsible for enforcing ESC rights. Using Myanmar as a case study, and drawing on lessons from the United States, India, and Brazil, this Note argues that a principled choice can be made to decentralize enforcement of these rights. It identifies three characteristics that may signal a hospitable political environment for making that choice: (1) a resistance to strong central authority, (2) a weak legal system, and (3) a strong history of economic social movements.

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I. INTRODUCTION

In recent years, proponents of economic, social, and cultural (ESC) rights have become increasingly optimistic about the future of their cause.[1] Their celebration may well be justified, as ESC rights have won many key battles. The consensus among the academic literature is largely supportive, and, perhaps more importantly, an increasingly large wave of countries have adopted such rights.[2] In doing so, however, these nations have almost reflexively situated their ESC rights at the national level, even when adopting a federal system.[3] The latest country to join this bandwagon is Myanmar.[4] Surprisingly, there is little academic debate about whether it is always best to situate ESC rights at the national level, or whether it might sometimes be better to give subnational units the primary responsibility for defining and enforcing those rights. This Note seeks to open that conversation.

1. *See, e.g.*, David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 190 (2012) ("For all practical purposes, the debate about whether to include social rights in constitutions is over.").

2. *Id.*

3. *See, e.g.*, CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.) tit. 2, https://www.constituteproject.org/constitution/Brazil_2014.pdf; S. AFR. CONST., 1996, ch. 2, http://www.gov.za/documents/constitution/chapter-2-bill-rights.

4. The legitimate nomenclature for this country remains a matter of some dispute. Since the military surrendered power in 2011, even some former opponents of "Myanmar" have begun using this designation. *See* Banyan, *Bye-Bye, Burma, Bye-Bye*, ECONOMIST, May 21, 2013, http://www.economist.com/blogs/banyan/2013/05/what-s-name-myanmar. Consequently, I will refer to the country as "Myanmar" throughout this Note. This choice is not an endorsement of the Burmese military or its policies.

This Note will use Myanmar's 2008 Constitution as an opportunity to explore the interaction of federalism and ESC rights. At times, Myanmar's Constitution seems at war with itself about whether and how to embrace a system of ESC rights. To give an example, the document in Article 22(c) announces, "The Union *shall* assist . . . to promote socio-economic development including education, health, economy, transport, and communication, so forth [sic], of less-developed National Races."[5] Later on, however, it equivocates: "The Union *may* assist the access to technology, investment, machinery, raw material, so forth, for national development."[6]

In many ways, this state of affairs makes sense. The Burmese people transitioned from a heavily centralized dictatorship with one of the worst human rights records in the world.[7] The people's experience under that regime was far from the kinds of rights these provisions embody. It is no surprise, then, that ESC rights, which scholars often regard as more complex than civil-political rights,[8] would generate immense uncertainty. One option, in the face of such obstacles, would be to decenter ESC rights in Myanmar and focus on building up civil and political rights first.

The process of making a constitution, however, is one that seeks to produce a framework of governance for generations to come, not merely to satisfy a country's immediate needs. In what follows, I argue that Myanmar presents an opportunity to consider under what conditions it might be better to deliberately decentralize the constitutional protection of ESC rights, giving priority to subnational entities. This project involves synthesizing the burgeoning body of theoretical literature addressing ESC rights and looking at how other countries have integrated such rights into their regimes. The result is a set of organizing principles to guide the choice of where to locate ESC rights generally, as well as a preliminary discussion about how to approach that choice in Myanmar.

This Note therefore proceeds as follows: Part II examines the delta between the 2008 Constitution's ESC rights as designed and the way they function in practice. I conclude that the gulf between the two is large and then observe that the fate of these rights may well be connected to one of the most salient issues in Burmese politics today — federalism. Part III steps back and examines the theoretical literature on ESC rights, federalism, and decentralization. It concludes that scholars have neglected the promise of linking these issues. It identifies three conditions that, together, might make a country particularly suitable to such a decentralized system of ESC rights:

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5. MYAN. CONST., Sept. 2008, art. 22(c) (emphasis added), http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf.

6. *Id.* at art. 371 (emphasis added).

7. *See Burma: Bureau of Democracy, Human Rights, and Labor 2007*, U.S. DEP'T OF STATE, Mar. 11, 2008, http://www.state.gov/j/drl/rls/hrrpt/2007/100515.htm.

8. *See* JEFF KING, JUDGING SOCIAL RIGHTS 5–6 (2012).

(1) a resistance to strong central authority, (2) a weak legal system, and (3) a strong history of economic social movements. Part IV considers these theoretical insights in light of a few instructive cases: India, Brazil, and the United States. Finally, Part V synthesizes the theoretical and empirical analysis in the context of Myanmar, recommending that Burmese constitutional framers give serious consideration to locating first-line protection for ESC rights at the state and regional level, in part because a centralized, judicially enforced system is unlikely to succeed under the present conditions.

This Note requires a working definition of ESC rights, and the literature provides a multiplicity of options. Many turn on the nature of the government's obligations, rather than on the content of the right in question.[9] These functional definitions cast ESC rights as those in which the government has an affirmative obligation to provide *something* to the people — for example, education or healthcare.[10] As some observers have noted, however, this functional definition is incomplete at best.[11] After all, it excludes what many might consider to be the oldest "economic" right of all: an individual's right to own private property free from government interference. Consequently, some scholars have argued that the functional definition breaks down because it seeks to draw lines that do not truly exist.[12] In other words, the functional difference between ESC rights and other types of rights often appears more as a matter of degree than anything else. While that may be true with respect to the analytical task courts face, this position may underestimate the *remedial* complexity of ESC rights.[13]

When enforcing ESC rights, the remedial complexity involved does indeed make a difference.[14] Political actors are often called upon to do something in response to decrees relating to ESC rights. For example, a judicial holding that schools are not adequately funded will often require an appropriations bill increasing funding levels. For the purposes of this Note, which primarily tackles structural questions, I therefore use the term in this more functional sense. This choice should not be taken to minimize the importance of more traditional (or "first generation") rights, like property.

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9. *See* ELLIE PALMER, JUDICIAL REVIEW, SOCIO-ECONOMIC RIGHTS, AND THE HUMAN RIGHTS ACT 14 (2007).

10. *See id.*

11. *See* Malcolm Langford & Jeff A. King, *Committee on Economic, Social and Cultural Rights*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 477, 485 (Malcolm Langford ed., 2008).

12. *See, e.g.*, Rebecca M. Bratspies, *On Constitutionalizing Environmental Rights*, *in* LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE 215, 215 (Penelope E. Andrews & Susan Bazilli eds., 2008).

13. *See* Brian Flanagan, *Judicial Review: Can Minority Protection Justify a Constitutionalization of the Economy*, *in* LAW AND RIGHTS, *supra* note 12, at 65, 71.

14. *See id.*

Rather, it reflects the administrative differences that separate first and second generation rights.

A semantic note on the word "right" is in order. As a textual matter, the Burmese Constitution uses the word "right" relatively infrequently. Many "rights" are phrased instead as obligations on the government to provide a service to the people.[15] The two framing devices — phrasing something as a "right" belonging to the people rather than an instruction to the government — have the potential to carry with them a meaningful distinction, despite their functional similarity.[16] Given the relative paucity of jurisprudence in Myanmar, however, I treat these two types of provisions equally.[17]

The next distinction to clarify is the gap between a justiciable right and a constitutional one. Some authors maintain that there is a strong, almost natural affiliation between the constitutional status of rights and the ability of judges to enforce those rights.[18] A growing body of literature, however, holds that rights can be protected by a variety of actors.[19] Since one of the open questions in the context of Myanmar's Constitution is which institution(s) should have the primary responsibility for securing whatever rights the people adopt, this Note will continue the work of disentangling "rights" from "justiciable rights."

The last definitional quandary to sort out is the distinction between federalism and decentralization. The two concepts overlap substantially — both deal with moving power to more localized nexuses. There is a more formal element to federalism, however.[20] It is possible to decentralize administration to a significant degree but leave ultimate supervisory responsibility in the hands of a single, central authority. At a high level, federalism insists that the regional subunits have at least some areas of autonomous sovereignty that are beyond the central government's reach.[21]

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15. Occasionally, Myanmar's Constitution phrases the government's socioeconomic role in more permissive language. *See, e.g.*, MYAN. CONST. art. 371 ("The Union *may* assist . . . economic development.") (emphasis added). I refer to these provisions *alongside* rights, on occasion, to provide context, but such provisions do not fall within this definition of "rights."

16. It is not difficult, for example, to imagine a world where a "right" confers a right of action for enforcement, where hortatory language directed at the government does not. *Cf.* Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 23–24 (1980) (drawing a similar distinction in the context of statutory interpretation).

17. Others have used a similar approach in different contexts. *See, e.g.*, Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1684 (2014).

18. *E.g.*, KING, *supra* note 8, at 19 ("Henceforth, when I write about constitutional social rights, I mean to refer to justiciable ones.").

19. *See generally* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008) (elaborating a general theory of rights divorced from judicial enforcement).

20. Sujit Choudhry & Nathan Hume, *Federalism, Devolution and Secession: From Classical Federalism to Post-Conflict Federalism*, *in* COMPARATIVE CONSTITUTIONAL LAW 356, 357 (Tom Ginsburg & Rosalind Dixon eds., 2013).

21. *Id.*

With these preliminary issues addressed, we can now turn to analyzing the constitutional system in Myanmar as it stands in 2016.

II. MYANMAR'S SYSTEM TODAY

A. ESC Rights

The sordid history of the 2008 Constitution's drafting is well-documented elsewhere.[22] Briefly, it began as early as 1993 when the military junta, then operating as the State Law and Order Restoration Committee (SLORC), appointed a National Convention tasked with developing a draft.[23] Little progress was made until 2003, however, when a new fifty-four-person National Convention resumed work.[24] The junta, having since adopted the name "State Peace and Development Council" (SPDC), led the drafting process. SPDC only presented fully formed drafts to the National Convention.[25] In the wake of the devastating Cyclone Nargis, the government held the referendum in May 2008.[26] According to SPDC, an improbable ninety-nine percent of eligible voters fought injury and debris to cast ballots, with 92.4 percent endorsing the Constitution.[27] The veracity and legitimacy of these results is deeply contested.[28] Nevertheless, the result of that referendum remains in effect as of this writing, eight years later.

The 2008 Constitution walks the line between capitalism and socialism,[29] and ESC rights can be found throughout. Those rights are concentrated in two chapters: Chapter I and Chapter VIII. The ESC rights in these two chapters range from the conventional[30] to the more avant-garde;[31] from the vague[32] to the meticulous.[33] The charter's commitment to these rights, like its commitment to rights more generally, varies. A particularly glaring example occurs in the context of the right of women to hold employment. First, the Constitution specifies, "Women shall be

22. *See, e.g.*, Yash Ghai, *The 2008 Myanmar Constitution: Analysis and Assessment*, ONLINE BURMA/MYANMAR LIBRARY 1–10 (Dec. 2008), http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf.

23. *Id.* at 7.

24. *Id.* at 8.

25. *Id.* at 10.

26. *Burma: Reject Constitutional Reform*, HUMAN RIGHTS WATCH (May 17, 2008, 8:00 PM), http://www.hrw.org/news/2008/05/16/burma-reject-constitutional-referendum.

27. *See id.*

28. *See id.*

29. *Compare* MYAN. CONST. art. 35 ("The economic system of the Union is market [sic] economy system."), *with id.* art. 28 (instructing the union to "earnestly strive to improve education and healthcare").

30. *E.g.*, *id.* art. 367 (articulating a right to healthcare).

31. *E.g.*, *id.* art. 45 (suggesting a government obligation to protect the environment).

32. *E.g.*, *id.* art. 363 ("The Union may assist and protect the religions it recognizes to the utmost.").

33. *E.g.*, *id.* art. 366 (laying out a tripartite right to education).

entitled to the same rights and salaries as that received by men in respect of similar work."[34] Two Articles later, however, in the context of civil service employment, a major qualification appears: "However, nothing in this Section shall prevent appointment of men to the positions that are suitable for men only."[35]

Given these internal tensions, we may well wonder whether ESC rights ought to be included in Myanmar's Constitution at all. Although this is not the first constitution in Myanmar to include ESC rights, the two systems differ significantly in content, reflecting a shift from a socialist economy to one ordered on market principles.[36] Perhaps the best way to learn about the normative receptivity of the Burmese people to ESC rights would be to ask, but that is easier said than done. Reliable, representative data about the values of the Myanmar people is very hard to come by. The most ambitious project along these lines is the Asia Foundation's *Myanmar 2014* survey. The methodology is rigorous, but not perfect. There are at least two concerns about the data's representativeness. First, the Bamar ethnic majority is, by all accounts, underrepresented.[37] Second, the survey over-represents the population of the seven states by design.[38] The surveyors do not explain that methodological choice. Because the states are historically home to comparatively larger populations of ethnic minorities, one potential explanation would be to use state residency as a proxy for ethnic identity. But, as the surveyors concede, "given the complex ethnic map of Myanmar, the views of the states as reported in the survey should not be taken as the views of the ethnic groups themselves."[39]

Notwithstanding these concerns, the scope of the project (3000 interviews conducted nationwide)[40] makes it the best existing indicator of the residents' political knowledge and values. While the surveyors asked relatively few questions about the values underlying ESC rights, there is suggestive evidence that a system of ESC rights that maintains a competitive

34. *Id.* art. 350.

35. *Id.* art. 352.

36. *Compare* THE CONST. OF THE UNION OF BURMA, 1974, art. 148(b) ("Every citizen shall have the right to freely undertake any vocation permitted by the State within the framework of the Socialist economy."), *with* MYAN. CONST. art. 370 ("Every citizen has, in accord with the law, the right to conduct business freely in the Union, for national economic development.").

37. The surveyed population was forty-one percent Bamar. ASIA FOUNDATION, MYANMAR 2014: CIVIC KNOWLEDGE AND VALUES IN A CHANGING SOCIETY 24, *available at* http://asiafoundation.org/country/myanmar/myanmar2014survey-reader.php [hereinafter MYANMAR 2014]. Most estimates place the actual Bamar population between sixty and seventy percent. *See, e.g.*, *Burma*, CIA WORLD FACTBOOK (Apr. 21, 2015), https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html (last visited Apr. 24, 2015).

38. MYANMAR 2014, *supra* note 37, at 11. Constitutionally, Myanmar's regional subunits consist of seven states and seven regions. The two are functionally equivalent, but the lines of the states are drawn with an eye toward capturing higher proportions of ethnic minorities. *Id.* at 22.

39. *Id.* at 11.

40. *Id.*

market economy would be consistent with Myanmar's values. Majorities of respondents agreed with two propositions that, together, yield this inference. First, sixty-nine percent agreed: "Competition is good. It stimulates people to work hard and develop new ideas."[41] Second, fifty-eight percent said, "Government should take more responsibility to make sure everyone is provided for."[42] Obviously, a set of ESC rights is not the only system that would embrace both of these propositions. Nor is it even necessarily the best way to combine the two. But these responses do provide limited evidence that the general contours of the ESC rights as they are set out in the 2008 Constitution are not incompatible with the values of Myanmar's people.[43] The remainder of this Note proceeds on the assumption that some system of ESC rights is normatively desirable in Myanmar.

That assumption brings us to our main concern: the constitutional structure of ESC rights in Myanmar. I spell out in some detail the elements of the system as designed, in part because no sustained English-language treatment yet exists. The elaborate infrastructure will stand in stark contrast to the system as it presently functions.

1. The Design

Myanmar's ESC rights are spread across Chapters I and VIII of the 2008 Constitution. Chapter I is titled "Basic Principles of the Union,"[44] while Chapter VIII is titled "Citizens, Fundamental Rights and Duties of the Citizens."[45] The labels attached to these chapters might suggest that the Chapter I "rights" are really no more than "Directive Principles of State Policy," along the lines of those popularized by the Irish Constitution.[46] Such provisions are considered "merely declaratory" and citizens have no way to enforce them.[47] If that is the case, then the structure is relatively simple — the rights in Chapter I are not enforceable at all, and aggrieved citizens should turn exclusively to Chapter VIII for the content of the government's obligations to them.

But the case for such an interpretation is not so clear cut. At the article-by-article level, there is little textual difference. It is true that many of the

41. *Id.* at 82.

42. *Id.* at 83.

43. Anecdotal evidence supports this conclusion as well. As part of this research, I conducted interviews with twenty-six individuals living or working in Myanmar. Twenty-one were native Burmese. They represented a wide range of ethnic backgrounds and personal histories. None took issue with the concept of ESC rights in general, and most (including Shan and Karen leaders) explicitly endorsed at least the rights contained in Chapter VIII of the document.

44. MYAN. CONST., Contents.

45. *Id.*

46. TUSHNET, *supra* note 19, at 238.

47. *Id.*

rights in Chapter VIII begin with the phrase, "Every citizen shall have the right to,"[48] or some variant thereof, and such a construction does not appear in Chapter I at all. But plenty of Chapter VIII rights also employ the phrasing, "The Union shall . . . ."[49] Excluding qualified rights,[50] Chapter VIII uses these two frames with near parity.

Chapter I also contains a statement purporting to explain its application. It reads, "The Basic Principles of the Union shall be the guidance in enacting laws by legislature [sic] and in interpreting the provisions of this Constitution and other laws."[51] Though this provision initially lends support to the "directive principles" interpretation, the provision differs in important respects from analogous provisions in constitutions well-recognized to create directive principles. The Irish Constitution states, "The application of [the directive principles] in the making of laws shall be the care of the [legislature] exclusively, and shall not be cognizable by any Court under any of the provisions of this Constitution."[52] India's Constitution likewise explicitly strips the courts of jurisdiction.[53] Myanmar's version not only excludes any explicit deprivation of jurisdiction, but explicitly encourages the use of the Basic Principles in interpreting the Constitution's provisions.

The evidence from legal scholars in Myanmar is likewise mixed. Professor U Htun Than in the Yangon University Department of Law adopts the "directive principles" analysis. He reports that Chapter I's provisions are "for the state," meaning not enforceable in court.[54] By contrast, Chapter VIII's rights are "for the public" and thus enforceable.[55] This analysis puts a premium on the assignment of a right to Chapter I or Chapter VIII. There is some reason, however, to believe that the allocation process was not a collectively deliberative one. The Head of Yangon University's Law Department, Khin Mar Yee, was involved in precisely this phase of the 2008 Constitution's drafting.[56] Tellingly, she was not involved in the policy conversations that drafted the individual provisions and received little guidance from those who were involved about what belonged

48. MYAN. CONST. art. 355.

49. *E.g.*, *id.* art. 356.

50. That is, those that are "subject to law" or "in accordance with Union policy" or similarly constricted.

51. MYAN. CONST. art. 48.

52. Constitution of Ireland 1937 art. 45, *available at* https://www.constitution.ie/Documents/Bhunreacht_na_hEireann_web.pdf.

53. INDIA CONST. art. 37, *available at* http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf.

54. Interview with U Htun Than, in Yangon, Myanmar (Jan. 7, 2015) (notes on file with the Virginia Journal of International Law).

55. *Id.*

56. Interview with Khin Mar Yee, in Yangon, Myanmar (Jan. 7, 2015) ("My duty was just placing the relevant [provisions] under the relevant headings.") (notes on file with the Virginia Journal of International Law).

where.[57] This history casts doubt on inferences based primarily on *where* a given provision falls in the Constitution, particularly where the textual construction sheds little light on the placement.

When it comes to enforcement, the Constitution appears to contemplate a judicial mechanism, but not a robust one.[58] A high percentage of the 2008 Constitution's rights are qualified in some way, though the precise verbal formulations vary. The right to healthcare is a representative example: "Every citizen shall, *in accord with the health policy laid down by the Union*, have the right to health care."[59] Such statements seem to leave the legislature wide latitude in developing the content of the right. To the extent that rights are judicially enforceable, citizens are directed to the Union courts.[60] Like many modern systems, Myanmar has created a separate court system specifically for the adjudication of constitutional problems.[61] Access to that court is relatively limited by the Constitution's terms, as a narrowly defined set of officials are authorized "to submit matters directly to obtain the interpretation . . . of the Constitutional Tribunal."[62] Notably, the Chief Justice of the Supreme Court is among the favored few, leaving the door open to movement from the ordinary judicial system to the Constitutional Tribunal.[63]

2. In Practice

In practice, there is no constitutional jurisprudence on the meaning of Myanmar's ESC rights. The Constitutional Tribunal has only issued five decisions in its history.[64] Unsurprisingly, given that only institutional leaders can submit complaints, those issues focused on the structure of the government, not on the rights of citizens. They addressed the nature of judicial power,[65] the classification of certain ministers,[66] the Tribunal's approach to stare decisis,[67] the parliament's oversight powers,[68] and the allocation of power to state legislatures.[69] The Tribunal issued all of these decisions relatively soon after it was established, offering some hope that it

57. *Id.*
58. *See* MYAN. CONST. 2008 art. 322, 325, 367.
59. *Id.* art. 367 (emphasis added).
60. *Id.* art. 322.
61. *See id.*
62. *Id.* art. 325 (listing the president, parliamentary leaders, Chief Justice of the Supreme Court, and the Union election commission chair).
63. *See id.*
64. Dominic Nardi, Jr., *Finding Justice Scalia in Burma: Constitutional Interpretation and the Impeachment of Myanmar's Constitutional Tribunal*, 23 PAC. RIM L. & POL'Y J. 631, 656 (2014).
65. *Id.* at 660.
66. *Id.* at 662–63.
67. *Id.* at 663–64.
68. *Id.* at 665–67.
69. *Id.* at 667–68.

might be a real player on the constitutional scene in Myanmar's new constitutional system.[70] But in the wake of the Tribunal's decision on parliamentary oversight, the legislature levied impeachment charges against it.[71] All nine members of the Tribunal subsequently resigned.[72]

For three years after the impeachment crisis, the Tribunal was dormant.[73] In February 2015, it broke its silence. The government had issued "white cards" to the Rohingya people, a politically unpopular community of Muslims living in Rakhine State, that would have authorized them to vote.[74] That move touched off a "storm of protest."[75] Shortly after, Tribunal Chairman U Mya Thein sent a letter to parliament, informing the legislature that the Tribunal regarded the "white-card" scheme to be unconstitutional.[76]

This latest chapter in the Tribunal's saga does not portend good things for its potential as a *protector* of rights. First of all, the decision itself constricted, rather than enhanced, the rights of the Rohingya. Secondly, even if the decision has a constitutional basis,[77] it is hard to ignore the timing. Coming after such intense public protests, the Tribunal's letter gives the appearance of caving under popular dislike for the Rohingya. A court that restricts rights in the face of public pressure is unlikely to adequately serve the rights enforcement role that the present system envisions for the Tribunal.

B. Federalism & Decentralization

Among the 2008 Constitution's most controversial structural choices is its approach to federalism and decentralization of power. At first blush, it appears to create a federal system. The country is divided into seven regions and seven states, along with a handful of "Union territories."[78] The regions and states are functionally identical, but the state lines are drawn in order to capture high proportions of ethnic minority groups. Each region and state has its own *hluttaw*, or parliament,[79] along with its own chief minister, or

70. *See* Nardi, *supra* at 64 (noting that all five came between March 2011 and August 2012).

71. *Id.* at 670.

72. *Id.*

73. *See id.* at 672–73.

74. Htoo Thant, *Tribunal Rules White-Card Voting Unconstitutional*, MYAN. TIMES, Feb. 23, 2015, http://www.mmtimes.com/index.php/national-news/13235-tribunal-rules-white-card-voting-unconstitutional.html.

75. *Id.*

76. *Id.*

77. This is dubious. The relevant articles are chock full of qualifying language and seem to allow the government wide latitude to prescribe qualifications for the franchise. MYAN. CONST. art. 391–95.

78. *Id.* art. 49.

79. *Id.* art. 161.

chief executive officer.[80] The Constitution contemplates a relatively robust bureaucracy at the state and regional levels as well.[81]

This architecture, however, may be little more than a façade. The Union president has the power to appoint the chief ministers, albeit subject to the approval of the state *hluttaw*.[82] The Union president also has broad powers to declare an emergency and assume direct rule of any state or region.[83] Even during non-emergency periods, the Constitution's schedule of powers, which allots legislative competency between the states and the Union, leaves very little business for the region and state *hluttaws* to handle.[84] The strident pro-Union rhetoric pervading Chapter I reinforces this picture of the 2008 Constitution as deeply ambivalent about its commitment to federalism.[85] Indeed, until relatively recently, "federalism" was considered a "dirty word" in Myanmar, as the military associated the concept more with ethnic separatism than an earnest commitment to power sharing.[86] It would not be far off the mark to say that the 2008 Constitution endorses limited decentralization without achieving a meaningfully federalist system.

III. LINKING ESC RIGHTS TO FEDERALISM AND DECENTRALIZATION

A. The Existing Theoretical Deficit

The academic literature on ESC rights generally passes over issues of federalism altogether. Most authors speak exclusively of national constitutions. This treatment is often implicit — the discussion reveals that authors are referring to national constitutions without ever acknowledging subnational documents.[87] Even when discussing federally organized systems, authors do not pause to wonder why the framers chose to situate ESC rights at the federal level, or whether that choice was wise.[88] As the next Part discusses in more detail, the exception to this rule is authors who write on ESC rights in the United States Constitution. These authors tend

80. *Id.* art. 261.

81. *Id.* art. 262.

82. *Id.* art. 261(b).

83. *Id.* art. 40.

84. *Compare id.* at Sched. 1 (listing Union powers), *with id.* at Sched. 2 (listing region and state powers).

85. *See, e.g.*, *id.* art. 6 (naming as first among "[t]he Union's consistent objectives" the "non-disintegration of the Union" and "non-disintegration of National solidarity").

86. *See* Lawi Weng, *'Federalism' No Longer a Dirty Word*, IRRAWADDY, July 19, 2012, http://www.irrawaddy.org/burma/federalism-no-longer-a-dirty-word.html ("Burma currently recognizes 135 distinct ethnic groups but [sic] for decades the military has vehemently objected to suggestions of a federal union for fear that different states would attempt to secede if granted regional autonomy.").

87. *See, e.g.*, TUSHNET, *supra* note 19; KING, *supra* note 8.

88. *See, e.g.*, P. SAROJINI REDDY, JUDICIAL REVIEW OF FUNDAMENTAL RIGHTS 8–13 (1976) (detailing the drafting history of India's Constitution).

to approach the United States as an anomalous, and normatively undesirable, case.[89] The implicit consensus among proponents of ESC rights seems to be: "national constitutions or bust."

Naturally, the literature focused on federalism and decentralization has been more attuned to the value that subnational governance can add, as well as the risks that attend decentralizing power. The debate takes on both normative[90] and descriptive[91] frameworks. It rarely, however, considers these questions in terms of constitutional rights. Instead, the decision is framed as a more general one about how to allocate power between the central authority and the subunits.[92]

The remainder of this Part bridges this theoretical gap. By merging the lessons of the federalism and ESC literatures, it concludes that locating first-line protection of ESC rights at the subnational level may be a viable and desirable option where three conditions are present: a resistance to strong central government, a weak legal infrastructure, and a history of strong, economically motivated social movements.

B. When to Consider Subnational Rights

The case for subnational rights begins at the same point as the case for subnational governance more generally. The basic question is the same: when does one decide to locate a particular power at one tier of government as opposed to the other? The following discussion illustrates some of the advantages to enhancing the powers of subnational units that bear on the question of whether to decentralize ESC rights.

The first of these advantages is to ameliorate a strong fear that the central government will exercise unwarranted (or, at least, unwanted) dominance of the regional subunits. Distrust of a powerful and distant centralized authority is one of the bedrock elements of federalism.[93] Where such distrust exists, it challenges the very legitimacy of the central power's authority to rule over certain aspects of the people's lives.[94] If there is such

89. *See, e.g.*, Cathy Albisa & Jessica Schultz, *The United States*, *in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 11, at 230, 239 ("Because the U.S. Supreme Court has failed to develop the Constitution into a legal instrument that affords protection for economic and social rights, legal advocates have turned toward subnational constitutions as a strategic avenue for their advocacy.").

90. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 313–14 (1998).

91. *See, e.g.*, Ehtisham Ahmad & Giorgio Brosio, *Does Decentralization Enhance Service Delivery and Poverty Reduction?*, *in* DOES DECENTRALIZATION ENHANCE SERVICE DELIVERY AND POVERTY REDUCTION? 1, 10 (Ehtisham Ahmad & Giorgio Brosio eds., 2009).

92. *See, e.g.*, David E. Wildasin, *The Institutions of Federalism: Toward an Analytical Framework*, 57 NAT'L TAX J. 247, 250 (2004).

93. *See* Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 238 (1990).

94. *See* Alemante G. Selassie, *Ethnic Federalism and Pitfalls for Africa*, 28 YALE J. INT'L L. 51, 57 (2003).

a resistance to strong central authority, ESC rights have two features that make them particularly likely to be among the powers that people will not trust the center to administer. First, because they touch on the provision of basic necessities, like healthcare and education, they are among the most common mechanisms by which citizens experience their government. Second, because they touch on such quotidian matters, ESC rights are likely to vary among regional cultures. Education and cultural rights in particular are often deeply intertwined with local custom.[95] In other words, ESC rights may be bound up with the regional identity motivating the desire for more local government in the first place.

The second theoretical advantage of decentralized governance that bears on ESC rights is more efficient delivery of social services. Scholars have long argued that the local knowledge of the subunit permits it to better orchestrate the delivery of services than a centralized regime.[96] To be sure, the empirical support for this claim is mixed.[97] It suggests that these advantages may be contingent on capacity[98] and institutional design principles that minimize the risk the central government will have to pick up the tab.[99] However, to the extent service-provision benefits do accrue, ESC rights, which deal with the obligation to provide certain services, seem implicated. If countries rely on regional and local subunits to take charge of the administration of these programs, there is a theoretical congruence to locating the principles behind that administration — ESC rights — at the same level of government, namely the sub-federal one.

Two other advantages associated with enhancing the governance responsibilities of political subunits are better representation of citizen preferences and more responsiveness when those preferences change.[100] At least three theories underlie this proposition. The first is numerical: smaller governance units have fewer citizens to which to cater. Thus, the weight the individual's views receive decreases as the size of the population increases.[101] The second theory derives from the intra-country competition that a federal system creates. That theory holds that the contest between subunits, primarily though not necessarily exclusively on economic terms, pushes

95. Of course, some scholars would dispute whether this, as a normative matter, should be the case. I deal here only in descriptive claims.

96. JENNIE LITVACK, JUNAID AHMAD & RICHARD BIRD, WORLD BANK SECTOR STUDIES SERIES, RETHINKING DECENTRALIZATION IN DEVELOPING COUNTRIES 5 (1998).

97. *See* Ahmad & Brosio, *supra* note 91, at 10.

98. *See id.* at 11 (using Bolivia as an illustration). I address capacity-based objections more fully in Parts IV and V.

99. Wildasin, *supra* note 92, at 261.

100. *See* LITVACK ET AL., *supra* note 96, at 5.

101. David Weinstock, *Towards a Normative Theory of Federalism*, 53 INT'L J. SOCIAL SCI. 75, 77 (2001).

states to better represent the interests of their citizens.[102] Finally, many scholars think it is simply easier to make change at the subnational level as a practical matter,[103] though of course this will depend on the idiosyncrasies of a particular system's design.[104]

Whether you view representation and responsiveness as among those principles that ESC rights *should* reflect may depend on your conception of what a right is. Some who push for robust systems of ESC rights may argue that the nature of a *right* is a value beyond the reach of democratic whims.[105] They are not to be compromised with in the push-and-pull of legislative bargaining.[106] These authors might agree that it is important that ESC rights *represent* the values of the people in some higher order way, but they would disagree that the increased flexibility associated with subnational governance is necessarily a positive development.[107]

The first order response to such objections is to contest this vision of rights. Some scholars have taken a hard line that the constitutionalization of these choices is antidemocratic and thus wrong.[108] In response, scholars like Professor Mark Tushnet respond that the charge of "antidemocratic" conflates "rights" with "justiciable rights."[109] Tushnet suggests that a guarantee's essential nature as a "right" is not compromised because enforcement pertains primarily to the political branches.

This essentialist debate has theoretical value, but it neglects the political realities facing many countries adopting ESC rights. Authors arguing for a judicially administered system envision a strong court system capable of

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102. Wallace E. Oates, *Toward a Second-Generation Theory of Fiscal Federalism*, 12 INT'L TAX & PUB. FIN. 349, 368 (2005).

103. *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Rights*, 115 PENN. ST. L. REV. 923, 924 (2011) ("[B]ecause of agency costs, subnational constitutional rights may tend to be . . . weakly entrenched in the sense of being subject to easy amendment, reversal by popular referendum, or dilution through legislative backlash.").

104. *See* John Kincaid, *Economic Policy-Making: Advantages and Disadvantages of the Federal Model*, 53 INT'L J. SOC. SCI. 85, 88 (2001).

105. *See, e.g.*, Rodolfo Arango, *On Constitutional Social Rights*, *in* HUMAN RIGHTS IN PHILOSOPHY AND PRACTICE 141, 141 (Burtom M. Leiser & Tom D. Campbell eds., 2001) (adopting a conception of social rights as a "social minimum").

106. *See* Jane Hiebert, *Governing Like Judges?*, *in* THE LEGAL PROTECTION OF HUMAN RIGHTS: SKEPTICAL ESSAYS 40, 64 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., 2011) ("Robust judicial review, along with remedial powers that can compel government to revisit and revise impugned legislation, appear essential for governments to take seriously the idea that rights should guide or constrain their legislative agenda.").

107. Tom D. Campbell, *Democratizing Human Rights*, *in* HUMAN RIGHTS IN PHILOSOPHY AND PRACTICE, supra note 105, at 175, 193.

108. *See* Jonathan Morgan, *Amateur Operatics*, *in* THE LEGAL PROTECTION OF HUMAN RIGHTS, *supra* note 106, at 428, 428 ("Human rights are the stuff of politics, not law. They are inherently contestable, and contested.").

109. TUSHNET, *supra* note 19, at 231 ("We can refer to social and economic rights if we are careful about what we mean: the Constitution imposes a moral or political obligation on legislatures to secure social and economic rights, but that obligation does not necessarily have to be judicially enforceable . . . .").

holding democratic actors accountable,[110] along with a robust legal infrastructure[111] to sustain it.[112] For example, Professor David Landau has argued that courts are more likely than other institutions to ensure that marginalized actors experience the benefits of ESC rights, as compared to the middle and upper classes, in part because they can issue far-reaching structural injunctions.[113] This mechanism, however, depends upon a judiciary that can both hear claims from those groups and issue the required remedy in a way that makes the political branches take heed.[114] The existing literature has no ready response for what a country ought to do where those preconditions are lacking.

In the absence of a hospitable legal climate, proponents of ESC rights may have nowhere left to turn *but* the political branches, supplemented by declaratory judicial review that is weak at best. Increasingly, political theorists suggest that this move is still consistent with a functional, if perhaps imperfect, system of ESC rights.[115] There are at least three mechanisms by which such a system can bring pressure to bear on errant legislation or administration. First, it can force officials to spell out, in detail, the reasoning behind their decisions, boosting transparency and public awareness.[116] Second, the constitutional status of the right (along with, perhaps, a judicial declaration of invalidity) can mobilize civil society and give activists another tool in their arsenal.[117] In other words, the claims these actors make might have more force if constitutional arguments in general are considered to be more fundamental than other political considerations. Third, courts and civil society can "prod" the government towards compliance without touching off constitutional crises that destabilize the entire political order.[118] The literature has noted that these mechanisms are particularly likely to meet with some measure of success in countries "comfortable with social democratic premises."[119] In such places, civil society is more likely to be motivated to act on the kinds of issues ESC rights

110. *See* David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 190, 192 (2012).

111. This term is deliberately broad. It encompasses the strength of legal education, the bar association, and the willingness of the public to bring those disputes to the courts.

112. See Peggy Maisel & Susan R. Jones, *Implementing the Social and Economic Promise of the Constitution: The Role of South African Legal Education, in* LAW AND RIGHTS, *supra* note 12, at 243, 243.

113. Landau, *supra* note 110, at 191.

114. *See id.* at 192.

115. *See, e.g.*, Tom Campbell, *Parliamentary Review with a Democratic Charter of Rights*, *in* THE LEGAL PROTECTION OF HUMAN RIGHTS, *supra* note 106, at 453, 464.

116. *See* Grégoire C.N. Webber, *The Court as a Forum for Justification*, *in* LAW AND RIGHTS, *supra* note 12, at 91, 97.

117. TUSHNET, *supra* note 19, at 241.

118. *See* Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT'L L. 151, 199 (2009).

119. TUSHNET, *supra* note 19, at 163; *see also* Ran Hirschl & Evan Rosevear, *Constitutional Law Meets Comparative Politics*, *in* THE LEGAL PROTECTION OF HUMAN RIGHTS, *supra* note 106, at 207, 214 ("In polities where leftist political forces have historically been influential . . . constitutional support for social welfare rights can be discerned.").

address. Thus, even if robust judicial review is theoretically superior, the idea of more politicized rights does have theoretical grounding.

This position builds on the idea of "second best" institutional design.[120] The principle animating this theory is that developing countries face a wide variety of legal and economic challenges simultaneously.[121] As such, institutional designs that might be ideal in the context of an advanced political and economic system may have unpredictable and unpleasant externalities when situated in such a milieu.[122] Even proponents of politically enforced rights enforcement acknowledge that the ideal arrangement for protecting ESC rights may involve a robust judiciary.[123] But in circumstances where those conditions are unlikely to materialize anytime soon, insisting on such an arrangement can contribute to another problem that skeptics of ESC rights have identified: the devaluation of "rights."[124] The theory is that a large and persistent gap between rights as they appear in the constitution and rights as they are experienced by the population turns those rights into paper tigers.[125] This, in turn, makes the concept of a "right" less valuable and diminishes the level of respect that constitutional terms generally command.[126] With this bleak possibility in mind, it is easier to appreciate the value of "second-best" institutions. Though they appear at first to be an unprincipled compromise to political reality, these institutions stand a better chance in the long run of fostering the values that they seek to protect.

This realist lens helps deal with the essentialist objection to incorporating the values of representativeness and responsiveness. It may be true that the ideal system treats rights as more of a lodestar to pull the political ship of state aright when it drifts off course. But when it is necessary to give the political branches more control, surely it is preferable to do so in a way that maximizes the representative and responsive nature of the decisions that they make.[127]

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120. Dani Rodrik, *Second-Best Institutions* 3 (Nat'l Bureau of Econ. Res., Working Paper No. 14050, 2008).

121. *See id.* at 1.

122. *Id.* at 3.

123. *See* TUSHNET, *supra* note 19, at 156–57 ("Legislative and executive official charged with interpreting a constitution can do an 'OK' job, and sometimes that is what they do.").

124. *Id.* at 252. ("Coupling strong rights with weak remedies, particularly when those remedies are rarely deployed because of resource constraints on plaintiffs, may be a formula for producing cynicism about the constitution.").

125. *See id.*

126. *See id.*

127. *See* discussion *infra* Section III.C. (addressing the obvious dangers from too much representativeness).

C. Minimizing Risks Associated with Subnational Rights

Locating ESC rights primarily at the subnational level is not without risk. Though these risks deserve careful attention and consideration, it will become clear that very few are *necessary* consequences of the choice to place ESC rights at the subnational level and instead depend on a number of other design decisions that constitutional framers might make. To begin, there are a number of generalized concerns that emerge when considering whether to decentralize ESC rights.

First, some hold that subnational constitutions are not *truly* constitutions, in the sense that they are more documents of everyday policymaking than expressions of fundamental values.[128] The primary support for this claim is the high number of quirky details that make their way into subnational constitutions.[129] One famous example is the New York Constitution's focus on the precise dimensions of ski trails in certain areas of the state.[130] If it is true that inclusion in a subnational constitution is a form of relegation, rights defenders worry that officials and the population at large will perceive ESC rights as inferior.[131]

Others may levy a rights-maximization argument at this proposal. Adopting the assumption that more rights enforcement is always better, they might argue that a national right carries with it the full apparatus of the central authority.[132] So armed, it will be a better resource for aggrieved citizens. Under this theory, states might be free to supplement a robust "core,"[133] but first-order protection should be situated with the strongest actor.

A corollary of the maximization point is a concern about supremacy. A general premise of federalism is that central governments have the power to intrude on the governance powers of subnational units. If ESC rights are not protected at the union level, it follows that they might be subject to a kind of federal trump card.[134] Exercising this authority would have dire consequences if a central government actually exercised this card, but even

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128. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 19 (2013).

129. *Id.*

130. *See* N.Y. CONST. art. XIV, § 1, *available at* https://www.dos.ny.gov/info/constitution.htm; ZACKIN, *supra* note 128, at 18.

131. *See id.* at 19.

132. *Cf.* Flavia Piovesan, *Brazil*, *in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 11, at 191, 191 ("Litigation strategies should be scaled up to the national level in order to maximize the potential for the justiciability and enforceability of socio-economic rights as true subjective public rights.").

133. *Cf.* Aoife Nolan, Nicholas J. Lusiana & Christian Courtis, *Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights*, *in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 121, 140 (Aoife Nolan ed., 2014) (discussing the concept of a "minimum core").

134. *Cf.* Taunya Lovell Banks, *Balancing Competing Individual Constitutional Rights*, *in* LAW AND RIGHTS, *supra* note 12, at 27, 29 (fretting about the possibility of a "hierarchy of rights" in the justiciability context).

the potential for such a veto might chill robust employment of these rights at the state level in an effort to avoid provoking a reaction.

Some considerations unique to the literature on "ethnofederalism" — or federalism in ethnically divided, post-conflict societies — countenance additional hesitation. These countries are often driven to federalism for different reasons. As Professors Sujit Choudhry and Nathan Hume have observed, "In these federations, internal boundaries are drawn to ensure that territorially concentrated national minorities constitute regional majorities . . . . The mission of federalism is different. Its principal goals are . . . to avoid civil war or secession."[135] The potential consequences of various design choices must be considered through this lens.

The first problem of ethnofederalism is that the very economic competition which is supposed to enhance the benefits of decentralization can exacerbate the country's political problems. Competition becomes less of a friendly rivalry and more a vehicle for political disagreements,[136] which prompts states to erect barriers in the market.[137] The result is a system that promotes neither economic development nor political reconciliation.

Such a system will privilege political subunits that are endowed with natural resources.[138] These subunits will be considerably better situated than others and may be motivated to use their economic advantage as an instrument of interstate conflict. Putting such subunits in primary control of the system of ESC rights might augment this advantage by expanding their control over the subunit's scheme of resource distribution.

Finally, in ethnofederal countries it is impossible to completely align geographic borders with ethnic populations.[139] There will always be populations that, whatever their prevalence nationwide, are minorities for the purposes of counting the subunit's population. Depending on the context, such minorities may hold extreme political views. This sets up the potential for discriminatory implementation of ESC rights or the services that they promise.[140] Combined with the earlier observation that these systems may rely heavily on the political branches to define and interpret the rights in question, the lack of political power that these groups might hold is deeply concerning. Newly minted minorities might find themselves the victims of repression of the type that the subunit's majority population sought to escape through the federal arrangement.

Though these are legitimate concerns, none provide a principled reason for rejecting subnational ESC rights, at least in all situations. As Zackin has

135. Choudhry & Hume, *supra* note 20, at 356.
136. *See* Selassie, *supra* note 94, at 89.
137. *Id.*
138. *See id.* at 91.
139. *Id.* at 93.
140. *See id.* at 94.

observed, that subnational constitutions contain high levels of detail is not necessarily an indication that those policy choices are the product of unprincipled decision making.[141] Such details are more often an indication of unique local concerns, which are one of the primary justifications for adopting a decentralized system in the first place.[142] This objection also has less force outside the United States, where lengthy and highly detailed national constitutions are the norm.[143] Countries with national constitutions that are similarly lengthy and detailed will be less apt to draw an inference of triviality.

The response to the rights-maximization objection is two-fold. First, it is not clear that the *optimal* level of rights enforcement is equivalent to the *maximal* level of enforcement. It is not healthy to remove more than is necessary from the sphere of political debate,[144] and economic modeling of law enforcement generally suggests that some level of under enforcement may be preferable from a social utility perspective.[145] Second, even if we take maximal protection as the goal, it is not necessarily the case that including ESC rights in subnational constitutions will generate *less* protection. For instance, negotiations producing the central authority's constitution may well require compromising to appeal to the broader constituency. This may entail sacrificing rights that might, in a more decentralized system, receive protection in at least some subunits. In other words, whether a central system generates more rights overall will vary according to in-country preferences.

One likewise can address the supremacy problem on a case-by-case basis. The real issue underlying this concern is the scope of the central government's authority. After all, principles of federalism only suggest the center will be supreme *in its sphere*. If that sphere is delineated so as to leave states authority when it comes to ESC rights, the fear of the federal trump subsides. This will leave the central authority with less day-to-day policymaking power than we are accustomed to under, say, the modern Interstate Commerce Clause in the United States.[146] Yet this makes sense — presumably one is going to be most interested in locating ESC rights at the subnational level when the system in question is one with a robust allocation to the states.

Finally, the ethnofederalism concerns also are not fatal to the idea of prioritizing the subnational level for ESC rights enforcement; they simply generate additional conditions for when this move would be appropriate.

141. ZACKIN, *supra* note 128, at 22–32.

142. *See id.* at 32.

143. *See* Versteeg & Zackin, *supra* note 17, at 1653–55.

144. *See* Robert Alexy, *The Construction of Constitutional Rights*, 4 LAW & ETHICS HUM. RTS. 20, 25 (2010).

145. *See* Nuno Garoupa, *The Theory of Optimal Law Enforcement*, 11 J. ECON. SURV. 267, 268 (1997).

146. *See* Wickard v. Filburn, 317 U.S. 111, 128 (1942).

Chief among these conditions is the motivation for federalism. To the extent that the primary goal of adopting a federal system is to achieve separation of ethnic groups to avert potentially violent political conflict, devolving ESC rights may not be the right choice. In such a situation, it may make sense for the central government to retain substantial power to ameliorate the economic inequalities that might materialize.

These concerns also illuminate two roles that a central government *can* play in the protection of ESC rights even if they are located primarily at the state level. The first role is equal protection. It is commonplace in federal systems for the central authority to provide backstop protections for all minorities to ensure that the subunits furnish whatever services they undertake to provide on a non-discriminatory basis.[147] The second potential role is for the central authority to police the ability of states to impose interstate market barriers. Such a role might resemble the one that the Interstate Commerce Clause was thought to play before the New Deal in the United States — a federal role to step in and stop the states from becoming too protectionist vis-à-vis their counterparts.[148]

The foregoing concerns should weigh in the decision-making process for any country that contemplates decentralization, whether in the context of ESC rights or power allocation more generally. But they are not necessary consequences of adopting a federal system of ESC rights. We will now turn to three countries that illustrate how the theoretical arguments above have played out in practice.

IV. LESSONS FROM OTHER COUNTRIES

To date, countries that adopted federal systems have employed very different approaches to ESC rights. This Part provides some illustrations of how the theoretical discussion above illuminates the diverging outcomes that several states have experienced. The goal is not to engage in a rigorous, comprehensive survey of these systems. Rather, the purpose of this discussion is to show that the experiences of these countries are at least consistent with the theoretical framework I have proposed.

A. India & Brazil

The contrast between the Indian and Brazilian cases highlights the factors supporting a comparatively robust nationally administered, judicially enforced system of ESC rights. Both India and Brazil locate their ESC rights at the central level. Textually, ESC rights in both countries began from

147. *See* A.E. Dick Howard, *Protecting Human Rights in a Federal System*, *in* COMPARATIVE CONSTITUTIONAL FEDERALISM 116, 132 (Mark Tushnet ed., 1990).

148. *See* CONSTITUTIONAL LAW 189–90 (Geoffrey R. Stone et al. eds., 6th ed. 2009).

similar origins — rights that were largely intended to be judicially unenforceable. Brazil's date to the Constitution of 1988.[149] India's were adopted at Independence in 1948, where the decision to make them "Directive Principles" was a compromise position.[150] Both sets of rights were declared justiciable by the central government's highest court, which adopted an initially assertive posture in the enforcement of those rights.[151]

It is at this point that the two narratives diverge. The Brazilian court's interpretations have caught criticism for exacerbating the plight of the poor — a constituency that many view ESC rights as targeted to help.[152] For example, Professor Octavio Luiz Motta Ferraz has observed that healthcare litigation in Brazil has concentrated on high-price drugs in Brazil's richest cities and states rather than addressing healthcare needs of poor Brazilians.[153] Even observers who are more charitably disposed toward the court's efforts so far lament the "low number of cases" issued to date.[154] India, by contrast, is usually heralded as a success story in the ESC rights literature.[155] To be sure, many still consider its work inadequate in certain subject areas.[156] The tone of this critique in the Indian context differs markedly from the Brazilian context, however. There is a sense that India is moving in the right direction, at least, as opposed to exacerbating the problem.

Recall the theoretical prediction above that judicially enforceable rights located at the central level will be harder to achieve in situations where (a) legal infrastructure and judicial pedigree are weak and (b) there is significant resistance to a strong central authority. The Indian and Brazilian experiences illustrate these predictions nicely. When Brazil adopted its system of ESC rights, it was coming out of forty-four years of military rule.[157] The judiciary atrophied during that period;[158] as a result, significant public distrust of the institution lingers.[159] India's relationship to its courts is quite different. Scholars have noted that the Subcontinent has long been home to a dynamic

149. Octavio Luis Motta Ferraz, *Harming the Poor Through Social Rights Litigation in Brazil*, 89 TEX. L. REV. 1643, 1654 (2011).

150. S. Muradlidhar, *India*, *in* SOCIAL RIGHTS JURISPRUDENCE, *supra* note 11, at 102, 103–04.

151. *See id.* at 122–23; Ferraz, *supra* note 149, at 1645.

152. *See* Ferraz, *supra* note 149, at 1647.

153. *Id.* at 1661–62.

154. Piovesan, *supra* note 132, at 191.

155. *See* Muralidhar, *supra* note 150, at 117 (crediting the Indian court with "[c]atalyzing changes in law and policy").

156. *See, e.g.*, *id.* at 123.

157. Piovesan, *supra* note 132, at 182.

158. Eliane Botelho Junqueira, *Brazil: The Road of Conflict Bound for Total Justice*, *in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION 64, 90 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003) ("At the beginning of the 1970s, the judges tried first and foremost to be legalists–strict interpreters of the law. And it could not have been otherwise, given the political moment . . . . To be daring carried risks.").

159. Piovesan, *supra* note 132, at 191 (identifying a "'reciprocal' aversion between the population and the judiciary").

legal order,[160] a legacy of the robust judicial administration installed by British colonialism.[161] True, Prime Minister Indira Gandhi's period of Emergency Rule during the 1970s challenged India's fragile structure, but the courts remained active and capable of pushing back against the executive even during this relatively brief episode.[162] It should therefore not surprise us that the Indian judiciary would be better situated than the Brazilian courts to follow through on the role it assumed for itself in the context of ESC rights.

Brazil and India's histories with centralized authority also point in opposite directions. Even during the period of military rule, Brazil's state governors remained quite powerful.[163] Under the framework established by the 1988 Constitution, the balance of power today in Brazil between the center and the states leans heavily in favor of the latter.[164] India's system, by contrast, is highly centralized.[165] Indeed, India does not even have a separate judiciary at the state level.[166] The two countries thus reflect very different levels of comfort with centralized authority.

Notably, the divergence in ESC enforcement between these two countries cannot be chalked up to state capacity. Though both face significant capacity-related challenges, evidence suggests that, if anything, India fares worse on this score. India systematically underperforms the rest of the "G20" on a variety of metrics, including basic governmental services closely linked to ESC rights.[167] Brazil performs somewhat better, resting around the median in many areas, although its judicial system fares poorly when it comes to the ease of enforcing contracts.[168] These comparisons suggest that India is, at minimum, no better situated than Brazil to fulfill the promises that its courts make.

The Brazilian and Indian experiences thus provide some evidence for the theoretical predictions about when a centrally administered system of justiciable ESC rights is unlikely to succeed. Because both systems locate

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160. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 288 (3d ed. 2007) ("There is no trace in Hindu law of procedural limits or institutional restraints, as were so important in the (slow) development of roman law and the common law.").

161. *Id.* at 296–97.

162. REDDY, *supra* note 88, at 250.

163. David Samuels & Fernando Luiz Abrucio, *Federalism and Democratic Transitions: The "New" Politics of Governors in Brazil*, 30 PUBLIUS 43, 55–56 (2000).

164. *See id.* at 45–46.

165. Sankaran Krishna, *Constitutionalism, Democracy, and Political Culture in India*, *in* POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 161, 164 (Daniel P. Franklin & Michael J. Braun eds., 1995).

166. REDDY, *supra* note 88, at 41.

167. Milan Vaishnav & Reedy Swanson, *India: State Capacity in Global Context*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Nov. 2, 2012), http://carnegieendowment.org/2012/11/02/india-state-capacity-in-global-context (discussing public sector employment, adjudication of disputes, raising revenue, law enforcement, and healthcare provision).

168. *Id.*

their ESC rights at the union level, however, they cannot provide much instruction about whether either would have been better off entrusting those rights to the states. For that, we turn to the United States.

B. The United States

The U.S. experience helps demonstrate why a principled choice might be made to locate first-line enforcement of ESC rights at the subnational level. In stark contrast to the federal Constitution, which does not address service provision at all, "[a]lmost every state . . . explicitly addresses important public goods" in its constitution.[169] In many of these states, judiciaries have increasingly asserted their interpretive powers to give content to those rights.[170] This experiment has not been an unalloyed success, as enforcement varies substantially.[171] Commentators have puzzled over the relative "underutilization" of these state rights, a phenomenon that extends to state constitutional rights generally in the United States.[172] Nevertheless, there is some evidence that, in at least a few states, judicial interpretation has prompted significant policy change, expanding the scope of ESC rights.[173] One celebrated example is in New York, where the highest state court developed a complex remedial scheme that prescribed 1.93 billion more dollars for schools in New York City.[174]

Authors who have written about state-level ESC rights in the United States have almost uniformly either taken for granted that ESC rights are located at the sub-federal level or treated it as a historical accident. Emily Zackin, who has produced the most sustained treatment of the subject, primarily explains this development in terms of the comparative ease of amending state constitutions as compared to their federal counterpart.[175] While it may be that this provides a narrowly satisfactory explanation for the strategic choice about where to locate these rights, the United States nevertheless possesses two other characteristics that are hospitable to subnational ESC rights.

The first characteristic is a system of federalism that, at least historically, left a large amount of power to the states. Though the federal government became a much more prominent force in American life during the mid-to-late twentieth century, it was during the nineteenth and early twentieth

169. Hershkoff & Loffredo, *supra* note 103, at 924.

170. Murray Wesson, *The Emergence and Enforcement of Socio-Economic Rights*, *in* REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 281, 282 (Liora Lazarus et al. eds., 2014).

171. *See id.* at 294–95.

172. *See* Hershkoff & Loffredo, *supra* note 103, at 963–69; Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 863 (2008).

173. Albisa & Schultz, *supra* note 89, at 239–47.

174. *Id.* at 242–43.

175. Versteeg & Zackin, *supra* note 17, at 1698.

centuries that the states adopted some of the most significant ESC rights.[176] Thus, the thrust of the institutional choices was made when the state police power would have been the most prominent repository of socioeconomic power. That balance was struck at the Founding, when the memory of British abuses left Americans especially wary of a powerful and distant central government.[177]

The second characteristic making the United States a welcoming host to subnational ESC rights is a strong tradition of social movements. The history of the adoption of these very rights serves as an illustration. As Zackin's research demonstrates, "Throughout the nineteenth and twentieth centuries and across the United States, activists, interest groups, and social movements championed positive rights, and built support for their inclusion in state constitutions."[178] It was this strong and vocal political tradition that enabled supporters to take advantage of the flexibility that state constitutions offered and sow the seeds of a regime of ESC rights in a country that many consider, both then and now, to be hostile to the communitarian undertones of such rights.[179]

There is, however, one variation from the theoretical model in the U.S. case. No one would argue that the United States has a weak legal infrastructure. Quite the opposite — Americans are famous for their litigiousness: that is, their preference for settling disputes in court.[180] Professor Lawrence Friedman has argued that the strength of America's legal system has yielded a "generalized expectation of justice."[181] Nothing about the theoretical model, however, suggests that weak legal culture is a necessary facet of a subnational ESC rights system. On the contrary, the role this characteristic plays in the model is that when a judiciary is *unavailable*, thus requiring a larger role for the political branches, allowing for local variation might be preferable. This does not suggest that states should be foreclosed from allowing such variation in the *presence* of a strong judicial branch, however.[182]

Because ESC rights were a mid-stream addition to the constitutional scene in the United States, it is difficult to extrapolate what might have been the ideal system to adopt at the outset of the Republic. Nevertheless, the features of American political life described here lend support to the idea

176. *See* ZACKIN, *supra* note 128, at 34–35. An exception is environmental rights, which are by and large the product of the late twentieth century. *Id.* at 35.

177. *See* THE FEDERALIST NO. 17 at 102–103 (Alexander Hamilton) (Legal Classics Library ed., 1983).

178. ZACKIN, *supra* note 128, at 2–3.

179. *See* Wesson, *supra* note 170, at 282.

180. Peter Charles Hoffer, *Honor and the Roots of American Litigiousness*, 33 AM. J. LEGAL HIST. 295, 296–97 (1989).

181. LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 150 (1985).

182. Indeed, many believe the United States would be better off with a centralized, judicially administered system these days. *See, e.g.*, Albisa & Schultz, *supra* note 89, at 239.

that a country can install a system of ESC rights at the subnational level, particularly where those rights benefit from supportive social movements as they have in the United States.

* * *

This comparative discussion has reinforced the theoretical arguments in Part III. The contrasting experiences of Brazil and India lend credence to the idea that countries with weak central governments and underdeveloped legal systems might not be a good fit for a federally administered, judicially enforced system of ESC rights. The United States demonstrated that, faced with an inhospitable central government, it is possible to turn to subnational units where political support for ESC rights is strong. Reaching more definite conclusions would require counterfactual evidence that we do not have. Perhaps Brazil, for example, would have floundered even if it had tried the subnational route. Or perhaps it would have flourished with politically driven but federally administered ESC rights. The lessons of institutional design are necessarily piecemeal. Armed nevertheless with some instructive examples, we are now prepared to reexamine the situation facing Myanmar.

V. ROADMAP FOR MYANMAR

It remains to be seen whether locating ESC rights at the subnational level would be a good fit for Myanmar. The foregoing discussion suggests that the option should, at a minimum, be seriously considered.

First, we must acknowledge that the present system is not likely to succeed. As Part II established, the current system's only mechanism of enforcement is judicial review at the Union Constitutional Tribunal. Myanmar is simply not equipped to make such a system effective anytime in the near future. The military's rule vitiated any legacy of a robust judicial role that the British colonial experience might have left. Legal education was suspended for years, even decades at a time.[183] At least one former judge considered himself a functionary of the military itself, obliterating any sense of judicial independence.[184] That experience left its mark: only twenty-eight percent of Myanmar's people consider the courts to have "high integrity" or "very high integrity."[185] The only institution with a worse public reputation is the police.[186]

183. Simon Roughneen, *School of Law a Small Step to the Rule of Law*, IRRAWADDY (Nov. 27, 2013), http://www.irrawaddy.org/burma/school-law-small-step-rule-law.html.

184. Interview with U Dadsin Tin Lu, former judicial officer, in Yangon, Myanmar (Jan. 13, 2015) (notes on file with the Virginia Journal of International Law).

185. MYANMAR 2014, *supra* note 37, at 91.

186. *Id.*

Second, we must consider whether any truly national system is likely to succeed in Myanmar. It is true that, unlike in Brazil, Myanmar's central government dominated throughout the entire period of military rule. This may initially suggest that it is better situated to adopt a more national system. There are, however, reasons to doubt whether such a highly centralized system, akin to India's, is a good fit for Myanmar. An Asia Foundation survey reveals that there is, at minimum, significant interest in a federal system. Fifty-four percent of respondents agreed with the statement, "Federalism can help resolve conflict in the country."[187] Only thirteen percent went so far as to disagree.[188] It is beyond the scope of this project to fully assess whether and what kind of federalism fits with Myanmar. For the purposes of this Note, suffice it to say that recent political developments have indicated that the country is moving, albeit hesitantly, in the direction of federalism.[189]

If Myanmar were to adopt a more significantly decentralized form of federalism, it would make sense to consider leaving ESC rights primarily to state and regional governments. The legacy of authoritarian rule has generated a distrust of strong, central authority that recalls the concerns of the United States during its founding era.[190] While a strong, independent judiciary might in theory be a better option, the preceding discussion reveals that this choice does not reflect the current state of affairs in Myanmar. However, Myanmar does have a history of strong social movements, including movements protesting restrictive economic choices by the government.[191] These characteristics might make Myanmar a good candidate for the "second-best" system that Part III outlines.

There is evidence that the states, if not the regions, have already begun to contemplate an expanded role for themselves. For instance, each of the seven ethnic states has a draft constitution circulating.[192] These documents are not legal, and in many cases they may have been drafted by individuals who either have been living outside of Myanmar or are otherwise unable to

187. MYANMAR 2014, *supra* note 37, at 96. It should be noted that forty-five percent of respondents admitted not initially knowing what "federalism" is, though surveyors provided a brief explanation before asking the follow-up question cited above. *Id.*

188. *Id.*

189. *See* Weng, *supra* note 86.

190. *See* DAVID I. STEINBERG, BURMA/MYANMAR 164–65 (2010).

191. Joshua Lipes, *Myanmar Monks Demand Official Apology for Saffron Revolution Crackdown*, RADIO FREE ASIA (Sept. 18, 2013), http://www.rfa.org/english/news/myanmar/monks-09182013183020.html (discussing the economic origins of the Saffron Revolution).

192. ARAKAN STATE CONSTITUTION 2004 (first draft) [hereinafter ARAKAN CONSTITUTION]; THE FIFTH INITIAL DRAFT OF CHINLAND CONSTITUTION 2008; KACHIN STATE CONSTITUTION (DRAFT) 2006 [hereinafter CHIN CONSTITUTION]; The SECOND PROPOSED DRATF [sic] OF FUTURE CONSTITUTION OF KAWTHOOLEI (KAREN STATE) 2006 [hereinafter KAREN CONSTITUTION]; KARENNI STATE SECOND DRAFT CONSTITUTION [hereinafter KARENNI CONSTITUTION]; DRAFT CONSTITUTION OF FUTURE RAHMONYA MON STATE [hereinafter MON CONSTITUTION]; SHAN STATE CONSTITUTION COMMISSION SECOND DRAFT 2008 [hereinafter SHAN CONSTITUTION].

claim to represent their state's population. Clearly, they cannot be taken as any more than a suggestive indication of what a final state constitution might look like. Nevertheless, two features are worth noting. First, all include a state-guaranteed set of ESC rights, accompanying an expanded set of legislative powers.[193] Second, there is a surprising degree of variation on how many and what kind of ESC rights to include.[194] These observations suggest that states are willing to take on the expanded portfolio necessary for ESC rights and that local preferences may vary. Such observations further the case that Myanmar should consider adopting a subunit-driven system of ESC rights.

The case for locating ESC rights at the state and regional level is not definitive. Myanmar will begin its current constitutional period as a much more ethnically heterogeneous country than the United States in the late eighteenth century. Because the Bamar majority dominated the military junta,[195] the conflict between the states and the Union has ethnic overtones. We must therefore consider whether the problems associated with ethnic federalism are likely to cause such a system to backfire in Myanmar.

While it is possible that decentralization would augment existing ethnic tensions, Myanmar does not exactly fit the ethnofederalism mold for at least two reasons. First, though state and regional level population data are lacking, sheer numbers suggest that Myanmar would not be creating the kind of overwhelming majority-minority states that are common in some ethnofederal systems.[196] Some states certainly would have proportionally higher levels of ethnic minorities than other parts of the country, but they likely would not constitute the kind of overpowering gaps that the ethnofederalism literature finds particularly troubling.[197] Second, and more importantly, the animating conflict behind a shift to federalism in Myanmar would be distrust of the Union government, not of other ethnic groups. Though this conflict is ethnically tinged, this motivation differs from countries where a federal system is adopted to try to prevent neighboring ethnic groups from engaging in armed conflict with one another.[198] It is in those systems where the most deleterious effects of ethnofederalism have been observed. Still, given the ethnic dimensions that federalism in

193. *See* ARAKAN CONSTITUTION art. 11; CHIN CONSTITUTION arts. 41–45; KACHIN CONSTITUTION arts. 18, 22, 27–28, 32; KAREN CONSTITUTION art. IX; KARENNI CONSTITUTION arts. 24–35; MON CONSTITUTION arts. 15–16; SHAN CONSTITUTION arts. 26–48.

194. *Compare* SHAN CONSTITUTION arts. 26–48 (elaborating a comprehensive set), *with* KAREN CONSTITUTION art. IX (isolating education as the only second-generation right specifically addressed).

195. STEINBERG, *supra* note 190, at 58.

196. *See Burma*, CIA WORLD FACTBOOK (May 1, 2015), https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html (last visited May 6, 2015) (estimating that the largest minority group in Myanmar, the Shan, comprise only nine percent of the overall population).

197. *See* Selassie, *supra* note 94, at 89.

198. *See, e.g.*, Selassie, *supra* note 94, at 67 (Ethiopia); Philip C. Aka, *Prospects for Igbo Human Rights in Nigeria in the New Century*, 48 HOW. L.J. 165, 228 (2004).

Myanmar would have, designers would do well to contemplate a role for the Union government in assuring that ethnically motivated discrimination does not take place.

Myanmar experiences significant capacity-related obstacles to developing a robust regime of ESC rights in any form. At the most basic level, the states and regions, and even the Union for that matter, lack functioning systems of taxation to fund the kind of service provision that ESC rights contemplate.[199] However, the Indian experience suggests that low capacity is not necessarily fatal to developing a system capable of impacting how scarce governmental resources are channeled. Of course, the states may face particularly dire capacity challenges given the lack of recent administrative experience in such a strongly Union-oriented system. This reality may mean that a phased transition would be more appropriate. This builds on the idea of "asymmetric decentralization."[200] The Union could construct a plan to hand over the reins once the states and regions develop a bureaucratic infrastructure capable of handling the administrative burden that overseeing a system of ESC rights would require.[201]

Finally, it is worth recognizing that the process of decentralization will require significant cooperation from the existing Union government. In the past, the Union and the military have taken a hard line against a federal system, which may be cause for pessimism. But there are signs that this line has softened considerably over time.[202] Moreover, the military's chief opposition party, the National League for Democracy (NLD), took power at the end of 2015.[203] The NLD itself is still constituted primarily of the Bamar ethnic majority,[204] but it has repeatedly signaled its willingness to work with ethnic minorities to devolve greater power to state and regional governments.[205] The NLD government's ongoing refusal to provide protection to the persecuted Rohingya group is certainly cause for

199. *See* KPMG, Myanmar Tax Profile (Nov. 2013), https://www.kpmg.com/Global/en/services/Tax/regional-tax-centers/asia-pacific-tax-centre/Documents/CountryProfiles/Myanmar.pdf.

200. LITVACK ET AL., *supra* note 96, at 24.

201. Another way to incorporate asymmetric federalism might be to allow more significant decentralization in the states than in the regions, but this might have the consequence of exacerbating the ethnic tensions that infuse Myanmar's federal aspirations.

202. Weng, *supra* note 86.

203. *Myanmar Election: Suu Kyi's NLD Wins Landslide Victory*, BBC NEWS (Nov. 13, 2015), http://www.bbc.com/news/world-asia-34805806.

204. Aung Hla Tun & Aubrey Belford, *Suu Kyi Landslide Poses Challenges with Myanmar's Minorities*, REUTERS (Nov. 13, 2015), http://in.reuters.com/article/myanmar-election-ethnic-minorities-idINKCN0T21QF20151113.

205. AFP, *Myanmar's Suu Kyi Reaches Out to Rebels with Federalism Vow*, MIZZIMA (Apr. 18, 2016), http://mizzima.com/news-domestic/myanmar%E2%80%99s-suu-kyi-reaches-out-rebels-federalism-vow; David I. Steinberg, *Myanmar Grapples with Federalism*, NIKKEI ASIAN REV. (Feb. 26, 2015), http://asia.nikkei.com/Viewpoints/Perspectives/Myanmar-grapples-with-federalism?page=2.

considerable concern.[206] Yet, the particular history of that group suggests that its treatment at the hands of the government may not be entirely representative of the prospect for progress on other fronts.[207]

VI. CONCLUSION

Where it makes sense to consider a federal system with substantial responsibilities for the subnational unit, it makes sense to consider locating ESC rights in the constitutions of those subunits. Scholars of ESC rights have, until now, failed to explicitly recognize this as an option or explore when it might be most attractive. This Note has argued that Myanmar may present precisely such a case. It possesses the three characteristics that theoretically recommend such a scheme: significant resistance to centralized authority, a weak legal infrastructure, and a legacy of strong, economically motivated social movements. A great deal naturally depends on the precise alignment of incentives and details of institutional design, details that are far beyond the scope of this project. It is enough for now to observe that Myanmar should seriously consider locating ESC rights at the subnational level in light of the factors described.

206. *See* Jennifer Rigby, *Aung San Suu Kyi Aide: Rohingya Are Not Our Priority*, TELEGRAPH (Nov. 19, 2015), http://www.telegraph.co.uk/travel/destinations/asia/burma/12006208/Aung-San-Suu-Kyi-aide-Rohingya-are-not-our-priority.html.

207. *See* Amy Tennery, *Why is No One Helping Myanmar's Rohingya?*, REUTERS (June 17, 2015), http://blogs.reuters.com/great-debate/2015/06/17/why-is-no-one-helping-myanmars-rohingya/ (explaining that many Myanmar people deny that the Rohingya even constitute a distinct ethnic group).