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VOLUME 24 • NUMBER 2 • 2019-2020

review

Table of Contents

Articles

Review Essay

Truth and Reconciliation Calls to Action across Intergovernmental Landscapes: Who *Can* and *Should* do What?

*Johanne Poirier and Sajeda Hedaraly**

This paper examines the Calls to Action outlined in the Truth and Reconciliation Commission on Residential Schools from the perspective of the current institutions of Canadian federalism. The first objective is to map out "who is being asked *to do what" in the Canada state, and to see how this corresponds to the actual division of powers — "who* can *actually do what." To illustrate the complexity of this intersection between the Calls to Action and division of powers in the Canadian state, we explore three policy areas in greater detail: child welfare, health care, and education. Canadian federalism was clearly imposed on Indigenous peoples, in addition to 'Crown sovereignty.' Neither has served them well. Our objective is not to contribute to this 'divide and conquer' approach. It is, rather, in a spirit of restorative justice and reconciliation, to outline how all orders of government must respond, whether they are explicitly identified in the Calls to Action or not. In conclusion, we explore the possibility that the realities of a constitutionally divided Crown — which is a rupture with history for Indigenous Peoples — might generate a constitutional duty to cooperate.*

Cet article analyse les Appels à l'action lancés par la Commission de vérité et réconciliation relative aux pensionnats destinés aux enfants autochtones à travers le prisme des institutions actuelles du fédéralisme canadien. Sans justifier le statu quo, le premier objectif est d'établir « à qui on demande *de faire quoi » et d'évaluer la correspondance entre ces revendications et « qui* peut *faire quoi » en vertu de l'interprétation dominante de la répartition des compétences au sein de la fédération canadienne. Afin d'illustrer la complexité de cette intersection entre les Appels à l'action et le partage des compétences, trois domaines de politiques publiques sont explorés : la protection de la jeunesse, les soins de santé, et l'éducation. Manifestement, tant le fédéralisme canadien que la « souveraineté de la Couronne » ont été imposés aux peuples autochtones : aucun ne les a bien servis. Cet article ne vise aucunement à renforcer une conception constitutionnelle qui « divise pour mieux régner ». Dans un esprit de justice réparatrice et de réconciliation, il s'agit plutôt de démontrer comment tous les ordres de gouvernement, qu'ils aient été identifiés explicitement ou non par la Commission, se doivent de répondre aux Appels à l'action. En conclusion, les autrices suggèrent que les conséquences découlant de la divisibilité de la Couronne dans le régime fédéral canadien — un phénomène en rupture avec l'histoire pour les peuples autochtones — peuvent générer une obligation constitutionnelle de coopérer dans le chef de tous les ordres de gouvernement.*

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Table of Contents

Introduction

The Truth and Reconciliation Commission on Residential Schools in Canada (the "TRC" or the "Commission") issued its Final Report, including ninety-four "Calls to Action" in December 2015.[1] The TRC was established pursuant to the *Indian Residential Schools Settlement Agreement* (the "Settlement"), as a partial response to class actions by Indigenous peoples against the federal government.[2] The Commission's mandate included the preparation of a report and recommendations in order to work toward the renewal of the relationship between the parties involved in the settlement, that is, the federal Crown and religious institutions.[3] Given the context in which they were elaborated as well as their tone, the ninety-four Calls to Action are more than the 'recommendations' that often accompany official inquiries. They are imbued with moral density and political urgency.

Unveiling the history of residential schools revealed a complex network of actors. The forward-looking Reconciliation segment of the Report, including the Calls to Action, offers a form of curative prescription. Here, actors who were not part of the Settlement, including provincial, territorial, municipal, and Indigenous communities, nations, and governments[4] are also called upon to take

1 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 319-37, online (pdf): *TRC* <www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [perma.cc/P3HK-R86Z] [*TRC Report*]. For the French version of the Calls to Action, see Commission de verité et réconciliation du Canada, *Commission de verite et reconciliation du Canada: Appels à l'action* (Winnipeg: Commission de verité et reconciliation du Canada, 2012), online (pdf): *TRC* <trc.ca/assets/pdf/Calls_to_Action_French.pdf> [perma.cc/W6ZL-8JAX] [*Appels à l'action*].

2 *Indian Residential Schools Settlement Agreement* (2006), art 7, online: *Residential School Settlement* <www.residentialschoolsettlement.ca/settlement.html> [perma.cc/8QJR-H8UK] [Settlement Agreement]. In *Baxter v Canada (AG)*, 83 OR (3d) 481, 2006 CanLII 41673 (SC), the Court certified the class action and approved the settlement in Ontario. Similar decisions were rendered in eight other Canadian provinces or territories, see Tabitha Marshall, "Indian Residential Schools Settlement Agreement" (11 July 2013), online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/indian-residential-schools-settlement-agreement/> [perma.cc/V2EW-QMVW]. In the "Definitions" section of the Settlement Agreement, "Canada" or "Government" means the Government of Canada. As will appear in this paper, in the *TRC Report*, the term "government" is also used to refer to provinces, territories, and "Aboriginal governments."

3 See Settlement Agreement, *supra* note 2, Schedule N, s 1(f).

4 The TRC refers to "Aboriginal" groups in most instances, but also occasionally uses the term "Indigenous." Since the Report was issued in 2015, the term "Aboriginal" has largely, but not entirely, been replaced by "Indigenous" in Canadian scholarship, leaving "Aboriginal" mostly to describe Canadian law with regards to Indigenous peoples, as used in section 35 of the *Constitution Act, 1982*, s 35, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act, 1982*]. "Indigenous" is, of course, the term used in the *United Nations Declaration of the Rights of Indigenous Peoples*, UNGA, 61st Sess, 295th Mtg, UN Doc A/RES/61/295 (2007) [*UNDRIP*]. We

action and pave the road to reconciliation.[5] The Commission does not address an amorphous and indistinct 'Canada.' The Calls to Action generally identify specific actors and enjoin them to take action, by themselves or in collaboration.

In so doing, the Commission seems to take stock of the federal and multi-level nature of the Canadian state, without, however, endorsing its structure, the division of powers, or its exclusion of Indigenous legal orders. This is no accident. The Commission could have avoided the multi-headed hydra that is the Canadian polity by addressing all its Calls to "Canada" or "the Crown," and letting different orders of government sort out how this translates in the Canadian constitutional order. This might have been a strategic or symbolically charged way of *not* legitimizing a federal system which was imposed on Indigenous peoples, without giving them an active role in it. However, not officially recognizing the federal character of Canada might have deprived the Calls to Action of their wide resonance. We may assume that the Commission chose to recognize, in a pragmatic manner, the plurality of government(s) to which 80% of its Calls to Action are directed in order to seek concrete and rapid responses.

Yet, while not ignoring them, the Calls to Action do not systematically align with 'official' state structures, which brings layers of complication, blame-shifting, and responsibility-avoidance by the holders of public power in Canada. The Commission's purpose was neither to decipher the Canadian federal regime, nor to clarify the actual distribution of constitutional powers, legal obligations, or political imperatives that befall members of the Canadian federation.

In other words, the TRC's mandate was not *prima facie* of a constitutional nature. It sought to outline 'who did what' and to identify 'who should do what' in the context of restorative justice. It did not seek to elucidate 'who *can* do what' pursuant to current Canadian constitutional law, nor to demonstrate whether — and if so, how — Canadian public authorities may have a constitutional *obligation* to act. It did not explicitly advocate for reforms of the

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use both terms, depending on context. We note that in French, in international and domestic law, the term "autochtone" is used as the equivalent to both "Aboriginal" and "Indigenous." Finally, the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*] uses the outdated word "Indians".

5 The expression "reconciliation" notably flows from case law by the Supreme Court of Canada, see e.g. *R v Van der Peet* [1996] 2 SCR 507 at para 50, 137 DLR (4th) 289 [*Van der Peet*], and is obviously used in the very name of the Commission which gave rise to the *TRC Report*. The term — and what it stands for — is controversial, since it is meant to reconcile Indigenous autonomy with "Crown" or "State" sovereignty: a typically non-Indigenous-centered vision. In this paper, we use "reconcile" and "reconciliation" as the Commission uses them. For the TRC, "reconciliation" refers to "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples" in Canada, see *TRC Report*, *supra* note 1 at 6.

Canadian federation or propose a blueprint of a more inclusive form of federalism. It did not outline alternative conceptions of the relation or imbrication of Indigenous and non-Indigenous sovereignties.[6] This is not a failing. It was simply not part of the TRC's already daunting mandate. This said, the TRC's recommendations are far-reaching and are compatible with a profoundly revised relationship between 'Canada' and 'Indigenous peoples'.

In this paper, we read the Calls to Action through the lens of federalism, as understood under existing Canadian law; not through Indigenous perspectives, nor those of institutional architects who could — and should — imagine a more inclusive form of federalism than what has been termed the "provincial federation."[7] We mean to understand the Calls to Action in the context of the current Canadian federal system, in which the state — sometimes designated as "the government" or "the Crown" — comprises distinct orders, each with their own powers and responsibilities. We do note, of course, when and how the Calls to Action evoke Indigenous peoples, whether it is through their communities, nations, or governments. However, our analysis is mostly directed at 'traditional actors' of the Canadian federation: the federal order, the provinces, and the territories. The aim is partly to see how a reader — say a civil servant in a provincial administration — may take the Calls to Action and ponder how its government ought to react, given the current division of powers. Or how judges, taking the Calls to Action seriously, may partly palliate the impact of existing federal structures and interpretative doctrines on Indigenous peoples. Put simply, we choose to read the Calls to Action through the lens of current — official and dominant — federal structures, while acknowledging the way in which they negate Indigenous legal orders. We hope this exercise might be useful in light of the increasing overlapping jurisdiction between orders of government, as well as a staggering number of grey zones, which explain, but do not justify, the haze which surrounds the identification of who can actually act.

In part I, we scrutinize 'who is being called to do what' in the Calls to Action, the focus being on the *who*, as opposed to the *what*. In part II, we then attempt to sketch in broad strokes which order(s) of government *can* respond to

6 Contrast with Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communications Group, 1996) [*RCAP*], which endorses an 'organic' conception of a federation composed of three orders of government, in which Indigenous orders would have wider jurisdiction than anticipated in the Charlottetown Accord, "Draft Legal Text" (9 October 1992), s 29, online: *Electronic Frontier Canada* <www.efc.ca/pages/law/cons/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html> [perma.cc/5PCL-G4T5].

7 James [Sa'ke'j] Youngblood Henderson, "*UN Declaration on the Rights of Indigenous Peoples* and Treaty Federalism in Canada," (2019) 24:1 Rev Const Stud 17 at 25.

the Calls to Action pursuant to the current and evolving interpretation of the division of powers in the Canadian federation. Part III explores in greater detail 'who is being asked to do what' and 'who can do what' in three policy areas targeted by the TRC: child welfare, healthcare, and education. The purpose here is to identify when the Calls 'match' the formal boundaries of Canadian constitutional law, and when they apparently do not.[8] As we analyze the Calls to Action, we also tentatively reflect on what the (mis)match might reveal about the TRC's conception of the Canadian federation.

This mostly descriptive exercise also has a limited prescriptive horizon. Decoding which order of government has the constitutional authority to act leads to the inescapable and arguably banal conclusion that, in most cases, only cooperative action will yield effective results. Hence, in conclusion, we tentatively explore the potential that Canadian federalism may impose legal obligations to cooperate on the part of the various governments, specifically in the context of implementing the Calls to Action and generally in all matters relating to the interests of Indigenous peoples.

Before launching this 'forensic' analysis of the Calls to Action, however, we underline what this paper does not purport to do. By focusing on the 'traditional actors' of the Canadian federation — federal order, provinces, and territories — we do not suggest that these are, or should be, the only relevant actors. We do not defend the current federal organization of Canada and its impact on Indigenous peoples. We readily acknowledge that Canadian federalism is part of the persistent legacy of the Canadian colonial project. We certainly do not condone the presumption of Crown sovereignty which still grounds Canadian caselaw.[9] Nor does this paper directly challenge the very concept and project of 'reconciliation,' despite criticisms it has generated.[10] In other words, our reading of the Calls to Action through the lens of the current federal arrangement is not meant to deny the imperative of the reimagining and designing of a more inclusive and decolonized (con)federal landscape in which Indigenous peoples would be fully equal partners.

8 We limit ourselves to three domains. A similar exercise would be just as revealing regarding other policy sectors identified in the Calls to Action such as justice, sports, the erection of memorials, corrections of registries to reinstate victims' names that were changed in residential schools, etc.

9 See *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; *Van der Peet*, *supra* note 5 at para 36. For critiques of this jurisprudential presumption, see several of the contributions in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws Special Report* (Waterloo, Ont: Centre for International Governance Innovation, 2017) [*UNDRIP Implementation*].

10 See Michael Coyle, "The Transformative Potential of the Truth and Reconciliation Commission: A Skeptic's Perspective" (2017) 95:3 Can Bar Rev 767.

Our main and more modest objective is to clarify the intergovernmental implications of the Truth and Reconciliation Commission's Calls to Action. The paper takes the TRC's mandate and report at face value and analyzes the Calls to Action, as drafted, through current Canadian constitutional structures. In doing so, we do not deny that those structures are grounded in hierarchical colonial assumptions that are in need of deep reconsideration. However, we believe there is some virtue in shedding light on the legal context which will likely affect how a critically important text may be understood by 'traditional actors.' This, in turn, may affect the implementation of the Calls to Action in the short term. We hope that by uncovering who is being *asked* to do what, and who *can* do what under current Canadian law, we can underscore the need for new forms of inclusive intergovernmental cooperation. Again, this choice does not deny the existence or significance of Indigenous self-government structures, nor the fact that Canadian federalism could be understood to already, at least partly, include a third order of government.

In other words, trying to decipher how current Canadian federal structures and jurisprudence can and should respond to the TRC's Calls to Action is not a defense of the *status quo*. Nor does it deny that an authentic recognition of Indigenous peoples' right to self-determination, as notably underlined by *UNDRIP*, necessarily entails foundational revisions of the deep-seated unequal power relations between Indigenous and non-Indigenous peoples. While we read them through the lens of current federal structures, the TRC's Calls to Action are far-reaching and are compatible with a profoundly revised relationship between 'Canada' — however it is structured and composed — and 'Indigenous peoples' — in all their diversity.

Part I: Who is Being Called to Act?

The *TRC Report* makes ninety-four Calls to Action which urge various actors to redress the relationship between Canada and Indigenous peoples. A number of non-governmental actors are called upon, including church parties to the Settlement Agreement, the Pope, post-secondary institutions, and the corporate sector. While we do not wish to underplay their role in Canada's "cultural genocide,"[11] nor in the reconciliation process, this paper focuses on Calls to

11 *TRC Report*, *supra* note 1 at 1; The Right Honourable Beverley McLachlin, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance" (Annual Pluralism Lecture for the Global Centre for Pluralism delivered at the Aga Khan Museum, 28 May 2015) at 7, online (pdf): *Global Centre for Pluralism* <www.pluralism.ca/wp-content/uploads/2017/10/APL2015_BeverleyMcLachlin_Lecture.pdf> [perma.cc/US9C-KZZE]; Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?" (2016) 62:1 McGill LJ 243.

Action to governmental parties whose actions are bounded by the structure of the Canadian Constitution.

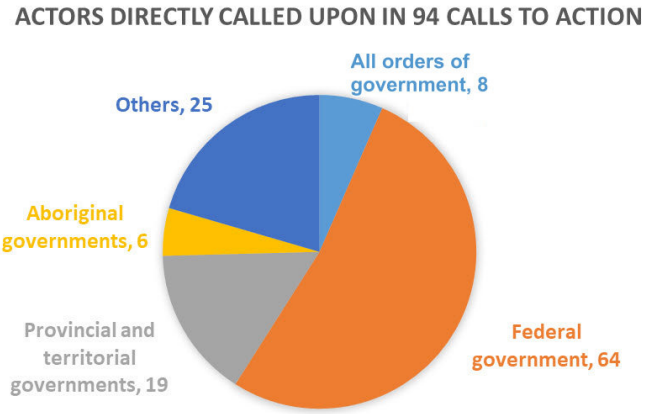

Figure 1: *The "federal government" includes the Government of Canada, Parliament, the Prime Minister, and the parties to the Settlement. Provincial and territorial governments include the Council of Ministers of Education, Canada (CMEC). "Others" include municipal governments and a number of public and private actors. The chart includes more than 94 instances because Calls to Action which are addressed to more than one actor were counted separately. For example "we call upon the federal and provincial governments" are counted once in "federal" and once in "provincial" categories.*

Out of the ninety-four Calls to Action, seventy-six — over 80% — are exclusively or partially addressed to formal Canadian 'governmental entities,' that is, the federal, provincial, territorial, or municipal governments. Forty-nine Calls to Action — more than 50% — target solely the federal order. Provinces and territories are also called upon, but are, with one exception, always *in addition* to the federal order. A number of Calls to Action also mention Aboriginal/Indigenous "groups," "communities," and "people(s)." Six of them are specifically directed at "Aboriginal governments."

The following subsections seek to decipher several terms and expressions used to refer to those various governmental entities. We start with a brief incursion into the TRC's fluid use of the term "government," which is not to be taken in a technical sense.

I.1 Executive versus Legislative Branches

In the Canadian legal and political tradition, the term "government" is a polysemous and ambiguous one. It can refer to the executive branch. It can also refer, more globally, to public authorities that enjoy constitutional recognition and power. In the absence of a fully developed theory of the State,[12] in Canadian legal writing, the term "government" is often used as a synonym of the state or l'État.[13] To complicate things further, in a federal regime such as Canada's, the term "government" or "l'État" always needs to be qualified, since there are 14 executive branches, 14 legislative branches and, to a certain extent, 14 judicial branches.[14] In other words, there are, within Canada, multiple governments, and thus, multiple 'States.'

With a few exceptions, which we identify below, the Calls to Action do not distinguish between the two meanings of the term "government." In the French version, the term "État" generally corresponds to "the government," hence pointing to all branches. Moreover, some Calls to Action are addressed to "governments," in a way that is clearly or implicitly aimed at the *legislative*, rather than the executive branches. For instance, the "*Government* of Canada" is asked to amend existing legislation and to enact new laws.[15] The "federal, provincial and territorial *governments*" are also asked to "review and amend their respective statutes of limitation."[16] Moreover, several Calls to Action addressed to "governments" are likely to require some legislative action. For instance, a number of them call for the implementation of international law instruments, such as *UNDRIP*. In many cases, implementation into domestic law requires legislative action,[17] although this is not made explicit by the Calls to Action.[18]

In short, the TRC was not particularly concerned with the official *separation* of powers between branches of government.[19] Basically, it is for each order

12 See Cheryl Saunders, "The Concept of the Crown" (2015) 38:3 Melbourne UL Rev 873 at 876.

13 This is also often the case of the term "Crown," see I.2, below. In their Glossary, Patrick J Monahan, Byron Shaw & Padraic Ryan attribute both meanings to "the Crown," see *Constitutional Law*, 5th ed (Toronto: Irwin Law, 2017) at 531.

14 This count is only accurate if we exclude Indigenous governments or legal orders.

15 See e.g. *TRC Report*, *supra* note 1, CTA 6, 34 [emphasis added].

16 *Ibid*, CTA 26 [emphasis added].

17 See Hugo Cyr & Armand de Mestral, "International Treaty-Making and Treaty Implementation" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 595; Oonagh Fitzgerald & Risa Schwartz, "Introduction" in *UNDRIP Implementation*, *supra* note 9, 1 at 1-2.

18 See *TRC Report*, *supra* note 1, CTA 43, which uses the term "governments" with regards to the implementation of *UNDRIP*.

19 See e.g. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 44 [*Mikisew Cree*]: "[i]t is of little import to Aboriginal peoples whether it is the executive or Parliament

of government to assess which of its institutions needs to act according to principles of Canadian law, regardless of the term used in the TRC.

I.2 The 'Crown'

The 'Crown' is one of the most intractable concepts in Canadian constitutional law.[20] It has a number of meanings that depend on context and evolve over time.[21] It can refer to the executive branch, in contrast to the legislative one. The term is also often used interchangeably with 'the government' as a synonym of 'the State' in other, mostly Western, legal traditions. In French, the 'Crown' is increasingly, but not systematically, rendered by "l'État" rather than "la Couronne."[22] In fact, the term used for "the Crown" in the French version of the Calls to Action is "*l'État*."[23]

'The Crown' carries important historical and symbolic values in the context of relations between Indigenous peoples and British — then Canadian — authorities. On the one hand, references to the Crown may invoke nation-to-nation relationships as originally conceived when the British sovereign concluded treaties with self-governing Indigenous peoples. On the other hand, it conveys undeniable markings of subordination, particularly when it is assumed, as current case law does, that 'the Crown' has asserted its sovereignty over the Canadian territory irrespective of (pre)existing Indigenous sovereignties. The 1763 *Royal Proclamation*, which is both an expression of European

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which acts in a way that may adversely affect their rights."

20 See Marcella Firmini & Jennifer Smith, "The Crown in Canada" in Oliver, Macklem & Des Rosiers, *supra* note 17, 129; David E Smith, *The Invisible Crown: The First Principle of Canadian Government* (Toronto: University of Toronto Press, 1995); Jamie D Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich, 2015).

21 See Saunders, *supra* note 12 at 882-84.

22 Even in federal legislation, the term "Crown" in English is generally — but not systematically — rendered by the term "État" in French. See e.g. *Crown Liability and Proceedings Act*, RSC, 1985 c C-50, which becomes *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

23 See *Appels à l'action*, *supra* note 1, CTA 27, 28, 45, 53, 86, 92. This may arguably be a 'translation' slip. While this is a matter of speculation, it is plausible that in this context, the term "Couronne" would have been preferred by Indigenous peoples, and possibly also the Commissioners. Given the historical and constitutional relationship with the Sovereign, Indigenous peoples have generally insisted that the term "Couronne" be maintained in the context of their relationship between Canada. For instance, it appeared that when the new Department of Crown-Indigenous Relations was created, the jurilinguists' recommendation was that it be called "Ministère des relations entre l'État et les peuples autochtones." This was refused and "Couronne" appears in the name of the Department. On the importance of the term "Crown," see Mark D Walters, "'*Your Sovereign* and *Our Father*': The Imperial Crown and the Idea of Legal-Ethnohistory" in Shaunnagh Dorsett & Ian Hunter, eds, *Law and Politics in British Colonial Thought: Transpositions of Empire* (New York: Palgrave Macmillan, 2010) 91.

supremacy and sometimes assimilated to an "Indigenous Bill of rights," reflects this tension and ambiguity.[24]

The term "Crown" is used nine times in the Calls to Action, generally in the expression "Aboriginal-Crown relations." The "Crown" itself is never explicitly targeted, with one exception:

> We call upon *the Government of Canada*, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation *to be issued by the Crown*.[25]

This proclamation "would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown," and would seek to "[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation."[26] Call to Action 45 thus points to a conception of the Crown in its most 'majestic' *and* constitutional form: a legal and political entity with whom Indigenous peoples are on an equal footing.

In this context, the TRC conveys an image of 'the Crown' as a unified entity, unaffected by the federal structure of Canada.[27] The choice is perfectly understandable considering the nation-to-nation conception of Crown-Indigenous relations and the historical promises made by 'the Crown' to Indigenous populations. What matters is that, for *non-Indigenous* authorities, references to the Crown cannot be solely — and automatically — equated with the federal order of government. The Crown — *qua* 'government' or 'State' — is divided under current federal structures and specific action may or must be taken by the federal and/or provincial and territorial public institutions.[28] For

24 See JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (Toronto: University of Toronto Press, 2009) at 66-76; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto University Press, 2002) at 124-27; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow*, *Delgamuukw* and *Haida Nation*" (2005) 23 Windsor YB Access to Just 17 at 22; Eva Mackey, "Unsettling Expectations: (Un)certainty, Settler State of Feeling, Law, and Decolonization" (2014) 29:2 CJLS 235 at 243.

25 *TRC Report*, *supra* note 1, CTA 45 [emphasis added]. The French version of this Call to Action is just as ambiguous: "Nous demandons au *gouvernement du Canada* d'élaborer, en son nom et au nom de tous les Canadiens, et de concert avec les peuples autochtones, une proclamation royale de réconciliation *qui sera publiée par l'État*," see *Appels à l'action*, *supra* note 1, CTA 45 [emphasis added].

26 *TRC Report*, *supra* note 1, CTA 45.

27 See Kent McNeil, "The Obsolete Theory of Crown Unity in Canada and Its Relevance to Indigenous Claims" (2015) 20:1 Rev Const Stud 1.

28 See *ibid*; Anne Twomey, "Responsible Government and the Divisibility of the Crown" (2008) Public L 742 at 749; Smith, *supra* note 20 at 156-73; Warren J Newman, "Some Observations on the Queen, the Crown, the Constitution, and the Courts" (2017) 22:1 Rev Const Stud 55 at 60-61.

example, the principle of the Honour of the Crown applies equally to the federal order and to provinces.[29] In short, the TRC occasionally uses "the Crown" to refer to 'Canada' in a nation-to-nation confederal relationship. It is then for those within the 'Canadian' side of the equation to decipher what the federal division of powers, and the divisibility of the Crown that ensues, implies. The TRC does not always do it for them.

I.3 Incarnations of the Federal Order

Calls to Action use heterogeneous and fluid terminology to refer to federal authorities. The expression "federal government" occurs thirty-eight times, "government of Canada" on eight occasions, and "Canadian government" once.[30] The federal order is also called upon to act through the Social Science and Humanities Research Council, Library and Archives Canada, and the Canadian Arts Council. The Prime Minister is called upon once, while no Call to Action is directed at provincial and territorial premiers. Similarly, only Call to Action 53 is expressly addressed to the federal Parliament, while none directly target provincial or territorial legislative assemblies.

Call to Action 46 calls upon Parties to the Settlement Agreement to sign a "Covenant of Reconciliation" that identifies "principles for working collaboratively to advance reconciliation in Canadian society." The federal government was the only governmental party to the class action and the ensuing Settlement. Provinces and territories, which were not, are *not* expressly invited to join in this Covenant. This exclusion may be challenging given, for instance, the purpose of the Covenant, which includes the implementation of *UNDRIP*, the rejection of colonial doctrines such as *terra nullius*, and the renewal of Treaty relationships.[31] In Canadian law, implementation of international commitments, international treaty-making, and property law undeniably involve both federal, and provincial and territorial orders.[32]

29 See *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 50 [*Grassy Narrows*].

30 The expression "Canadian *governments*" in the plural is used once to designate federal, provincial, territorial, and municipal orders, see title preceding CTA 43, *TRC Report*, *supra* note 1 at 325.

31 See John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701.

32 See Cyr & de Mestral, *supra* note 17; Fitzgerald & Schwartz, *supra* note 17. At the time of writing, the House of Commons adopted a federal Bill, but it failed to obtain the assent of Senate, see Bill C-262, *An Act to Ensure that the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2019, online: *Open Parliament* <openparliament.ca/bills/42-1/C-262> [perma.cc/4DTE-TEFD]. British Columbia is the first province to have legislated to implement *UNDRIP*, see *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.

I.4 Provinces and Territories

Provinces and territories are occasionally called upon in the TRC, but, with one exception, always in conjunction with the federal order.[33] Yet, as we shall see in part II, through jurisprudential interpretation as well as federal action and omission, a wide range of policy areas affecting Indigenous peoples are now also under provincial jurisdiction. The result is a complex — and sometimes unpredictable — jurisdictional overlap. At this stage, however, it suffices to note that several Calls to Action are directed at provinces and territories as well as to Ottawa.

Territories differ from provinces to the extent that their autonomy derives from delegating legislation passed by the federal Parliament.[34] They nevertheless enjoy a form of *de facto* constitutional status.[35] The systems of governance of these northern regions differ from the rest of the country, especially with the prevalence of self-government powers and land claim settlements.[36] While territorial institutions might play a critical role in the context of reconciliation, the distinction between provinces and territories does not appear relevant for present purposes. Provinces are never called upon to act by the TRC without the territories also being convened, and vice versa.

I.5 "All levels of government" or Multiple Orders of Government

The *TRC Report* specifically call upon "all levels of government" to "enable residential school survivors and their families to reclaim names changed by the residential school systems,"[37] to increase and retain Indigenous health-care providers,[38] and to provide annual reports to the National Council for Reconciliation that is to be created by the federal Parliament, "in collaboration with Aboriginal peoples."[39] Similarly, "all levels of government" which fund denominational schools are asked to include segments on Indigenous spiritual beliefs and practices in their curriculum.[40]

33 See *TRC Report*, *supra* note 1, CTA 82, which asks provinces and territories to install monuments in their respective capital cities. CTA 81 requests the same from Ottawa.

34 See *Nunavut Act*, SC 1993, c 28; *Yukon Act*, SC 2002, c 7; *Northwest Territories Act*, SC 2014, c 2, s 2.

35 See Yukon Legislative Assembly, "Information Sheet No 7: The Differences between Provinces and Territories" (17 September 2012), online (pdf): *Yukon Assembly* <yukonassembly.ca/sites/default/files/inline-files/info-sheet-differences-province-territories.pdf> [perma.cc/HPS4-FB7E]

36 See Doug McArthur, "The Changing Architecture of Governance in Yukon and the Northwest Territories" in Frances Abele et al, eds, *Northern Exposure: Peoples, Powers and Prospects in Canada's North* (Montréal: McGill-Queen's University Press, 2009) 187 at 189-90.

37 *TRC Report*, *supra* note 1, CTA 17.

38 *Ibid*, CTA 23.

39 *Ibid*, CTA 55.

40 *Ibid*, CTA 64.

Other Calls to Action are more explicitly directed at "federal, provincial, and territorial governments"[41] or the "Government of Canada, provincial and territorial governments and the courts,"[42] while others also include "municipal governments."[43] Some Calls to Action explicitly request intergovernmental cooperation, with the federal government presumably in the lead. For example, Call to Action 75 calls on the "federal government to work with provincial, territorial, and municipal governments" and other parties to address a number of issues related to burial grounds associated with residential schools.[44]

I.6 Intergovernmental Bodies

Call to Action 63 is specifically directed at an intergovernmental body. The Council of Ministers of Education, Canada (CMEC) is called upon to "maintain an annual commitment to Aboriginal education issues." The TRC chose to ask this executive cooperative organ composed of every provincial and territorial minister of education[45] to take action rather than to call upon the provincial governments themselves. Interestingly, the choice to address this Call to the CMEC excludes the federal government, which is not a member of this cooperative body, from the Call to Action. The Call is thus aimed at a structural form of purely horizontal cooperation.[46]

Noteworthy, in the context of a reflection on the intergovernmental impact of the TRC, no Call to Action even mentions the Council of the Federation. Meanwhile, Call to Action 53 advocates the creation of a "National Council for Reconciliation" through federal legislation, "in collaboration and consultation with Aboriginal peoples," but without any mention of provinces or territories.

I.7 Indigenous Peoples, Organizations, Communities, and Governments

A number of Calls to Action designate Indigenous peoples, communities, and organizations as actors with which the other orders of government should consult, work, or collaborate. Hence, several Calls to Action require action on

41 *Ibid*, CTA 26.

42 *Ibid*, CTA 52.

43 *Ibid*, CTA 43, 47, 57.

44 See also *ibid*, CTA 2 (statistics on children in care) and 90(i) (funding of sports programs).

45 See Council of Ministers of Education, Canada, "What is CMEC," online: *CMEC* <www.cmec.ca/11/About_Us.html> [perma.cc/ZW3W-FRHS].

46 On horizontal versus vertical cooperation, see Johanne Poirier & Cheryl Saunders, "Conclusion: Comparative Experience of Intergovernmental Relations in Federal Systems" in Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Toronto: Oxford University Press, 2015) 440.

the part of official government parties, in collaboration or consultation with "Aboriginal peoples"[47] or "Aboriginal organizations,"[48] Governments are also directly called "to work with "Aboriginal communities,"[49] while the federal government is requested to appoint an Aboriginal Languages Commissioner, in consultation with Aboriginal groups.[50]

A limited number of Calls to Action are also expressly directed at Aboriginal *governments*, particularly when proactive initiative, as compared with consultation, is required. For instance, "Aboriginal governments" are asked, together with federal, provincial, and territorial ones, to reduce "the number of Aboriginal children in care,"[51] "develop culturally appropriate parenting programmes,"[52] or "early childhood education programmes,"[53] as well as to commit to eliminating overrepresentation of Aboriginal youth in custody.[54] This reflects the fact that responsibilities over certain aspects of social policy and education are currently assumed by Indigenous nations pursuant to treaties, major land-claims settlements, or other forms of intergovernmental arrangements.[55]

This distinction between Aboriginal "groups" or "organizations" and "governments" raises the question of whether or not the expression "all orders of government" might include Indigenous governments, even when they are not expressly mentioned.[56] Hence, when Aboriginal people(s) are mentioned in conjunction with "all levels of government,"[57] could this suggest that Aboriginal governments are also invited to collaborate with Aboriginal peoples? In other words, may the Calls to Action also be read as prescribing some actions within

47 See e.g. *TRC Report*, *supra* note 1, CTA 19, 87.

48 See e.g. *ibid*, CTA 41, 53.

49 *Ibid*, CTA 36.

50 See *ibid*, CTA 15. The office of the Commissioner has since been created pursuant to the *Indigenous Languages Act*, SC 2019, c 23, though the relevant provisions are not, at the time of writing, in effect.

51 *TRC Report*, *supra* note 1, CTA 1.

52 *Ibid*, CTA 5.

53 *Ibid*, CTA 12.

54 *Ibid*, CTA 38.

55 See Martin Papillon, "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States" (2011) 42: 2 *Publius: J Federalism* 289 at 301; Sébastien Grammond, "Federal Legislation on Indigenous Child Welfare in Canada" (2018) 28 JL & Soc Pol'y 132.

56 Interestingly, the *Final Report of the National Enquiry into Missing and Murdered Indigenous Women and Girls* addresses its recommendations to "all governments," which include "federal, provincial, territorial, municipal, and Indigenous governments," see *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (2019) at 176, online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf> [perma.cc/8P3K-LPJM].

57 See e.g. *TRC Report*, *supra* note 1, CTA 40: "all levels of government, in collaboration with Aboriginal people."

Indigenous communities, such as between members, traditional leadership, and Band Councils?[58]

This said, even when comprehensive self-government agreements are in place, "Aboriginal governments" may not be the appropriate actor to respond to a specific objective. For example, Call to Action 3 asks "*all levels of government* to fully implement Jordan's Principle," a request addressed to governments involved in jurisdictional disputes regarding funding for child services.[59] The principle dictates that the first governmental body contacted to provide services to a First Nations child should pay for these services. It can then seek reimbursement from another department or order of government if appropriate.[60] *A priori*, this Call does not include Aboriginal governments.

There are of course a number of ways to conceive Indigenous societies and polities in Canada: communities, nations, sovereign peoples, self-governing entities, and others. There are also a number of ways of conceiving the place which Indigenous peoples occupy in the Canadian federation: as a form of delegated municipal order;[61] as a third-order of government;[62] through the lens of "adapted federalism," which requires the creation of a new public government such as Nunavut or of a yet to be invented polity representing all

58 John Borrows raised this possibility in a public lecture, "From Principle to Implementation: Indigenous Rights, the Constitution and UNDRIP in Canada" (Indigenous Law Association lecture delivered at the Faculty of Law, McGill University, 21 September 2017) [unpublished].

59 *TRC Report*, *supra* note 1, CTA 3 [emphasis added]; Anne Blumenthal & Vandna Sinha, "No Jordan's Principle Cases in Canada? A Review of the Administrative Response to Jordan's Principle" (2015) 6:1 Intl Indigenous Policy J 1 at 3.

60 The need for Jordan's Principle became manifest when Jordan River Anderson spent two years in a hospital until he passed away at the age of five in 2005 instead of being cared for at home, due to a disagreement between federal and provincial authorities on who should cover the cost of his home care, see *First Nations Child and Family Caring Society of Canada et al v AG of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 at para 88 [*FN Caring Society*]; Cindy Blackstock, "Jordan's Principle: Canada's Broken Promise to First Nations Children?" (2012) 17:7 Pediatrics & Child Health 368. In January 2016, the Canadian Human Rights Tribunal ordered the federal government to broaden its definition of Jordan's Principle, to properly implement it, and reiterated the urgency of this requirement three months later, see *First Nations Child and Family Caring Society of Canada et al v Canada (AG) (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 10. Four months later, the federal government responded that it had done so, see email from Jonathan DN Tarlton to Dragisa Adzic (10 May 2016), online: *Document Cloud* <s3.documentcloud.org/documents/2829073/Fed-Govt-Response-to-CHRT.pdf> [perma.cc/9F5S-EGLE].

61 See Frances Abele & Michael J Prince, "Four Pathways to Aboriginal Self-Government in Canada" (2006) 36:4 American Rev Can Stud 568 at 572-74.

62 See *Ibid* at 576-79; Martin Papillon, "Canadian Federalism and the Emerging Mosaic of Aboriginal Multi-Level Governance" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 3rd ed (Don Mills, Ont: Oxford University Press, 2012) 291. See also *RCAP*, *supra* note 6 at 205-07.

Indigenous peoples; or as co-equal with the overall Canadian polity pursuant to a treaty-federalism.[63]

It is difficult to assess the TRC's conception(s) of the place which Indigenous peoples and governments are meant to occupy in the Canadian federation. For example, Call to Action 45 asks the Canadian government to "reaffirm the nation-to-nation relationship between Aboriginal Peoples and the Crown," as well as to "renew or establish Treaty relationships" and "ensure that Aboriginal Peoples are full partners in Confederation." This could be understood as endorsing both a Treaty-Federalism conception — a form of confederalism — or a third order of government, as included actors in the federation. Several conceptions likely co-exist or are implied in the *TRC Report*, each with a potentially distinct impact on intergovernmental relations. An analysis of these underlying visions is, however, beyond the scope and objective of this paper.

At a minimum, we can posit that the more Indigenous groups are characterized as governmental or self-governing entities, the greater the possibility of their formal integration into intergovernmental decision-making as members of the federation or in partnership with it. This would stand in contrast to the present situation where Indigenous groups are to be 'consulted,' and asked to 'collaborate' with the formal holders of power.

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The purpose of part I is to identify the government actors specifically "called to act" in a process of reconciliation. While the federal order is clearly the main target, other components of the current federal regime are also requested to take action. Moreover, a detailed reading of the Calls to Action creates an intuitive impression that provinces and territories are sometimes — deliberately or not — not explicitly called upon, when under Canada's current constitutional framework they should be. This led us to seek to capture who, under the current federal structures and jurisprudential interpretation of powers, has constitutional capacity to respond to the Calls to Action, whether or not they have been explicitly identified by the Commission.

63 See Youngblood Henderson, *supra* note 7; Kiera L Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalism" in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism*, 2nd ed (Peterborough, Ont: Broadview, 2003) 167.

Part II: Who *Can* Do What? The Calls to Action and the Constitutional Division of Powers

The Calls to Action deal with a wide variety of policy areas, ranging from child welfare to language protection, from monuments of commemoration to health care, from improvement to the justice system to the implementation of *UNDRIP*, from the training of public servants through means of promoting reconciliation through sports, business, and even immigration. Part II offers general observations on the division of powers, and the jurisdiction of the federal order regarding Indigenous peoples and lands. It then evokes the impact of the *Indian Act* and the resulting reality of overlapping jurisdiction federal and provincial jurisdiction.[64] It finally attempts to chart the correspondence between 'who is being called to do what' and 'who can, from a current constitutional perspective, do what'.

II.1 The Federal Division of Powers: 'Completeness,' Exclusivity, and Concurrency

The *Constitution Act, 1867* distributes legislative competences between the federal and provincial orders. Under 'orthodox' Canadian law, this division of powers is largely based on a principle of exhaustiveness.[65] Hence, every issue, every matter, every policy, every problem, and every solution is presumed to come within the purview of either federal or provincial authority. No matter should fall between the cracks of constitutional powers.

Of course, this is undeniably a 'Canadian-state-centered' interpretation of the federal division of powers. The idea that legal authority is only and entirely divided between these orders of government is challenged by an acknowledgement of Indigenous peoples' right of self-determination and sovereignty.[66] Again, our aim is not to endorse this dominant conception, which negates Indigenous legal traditions and orders in the current constitutional framework. The objective of this section is only to clarify how legislative and executive authority is divided from the perspective of current Canadian positive law.

64 We by no means pretend to do justice to the highly complex — and evolving — area of constitutional law. For greater detail, see Thomas Isaac, *Aboriginal Law*, 5th ed (Toronto: Thompson Reuters, 2016).

65 See *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 34; *Quebec (AG) v Canada (AG)*, 2015 SCC 14 at para 44 [*Long-Gun Registry*]. In *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in*], this "completeness" was reasserted in the context of Aboriginal title in a way that denies the existence of inherent Indigenous jurisdiction: see Michael McCrossan & Kiera L Ladner, "Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power" (2016) 49:3 Can J Political Science 411.

66 See McCrossan & Ladner, *supra* note 65.

In addition to this presumption of exhaustivity, the division of powers also largely rests on a principle of *exclusivity*. The *Constitution Act, 1867* enumerates competences in parallel lists of explicitly 'exclusive' federal powers in section 91, provincial ones in sections 92 and 93, as well as a limited number of concurrent ones in sections 94A to 95 and certain aspects of section 92A. Over the years, as a result of increased state action in a vast number of policy areas, interwoven action has become commonplace, and courts have resorted to a number of interpretive doctrines to allow — and even encourage — actual overlap between the jurisdictions of the two orders of government. Under the label of "cooperative federalism," this had led to a number of areas of *de facto* concurrency, in addition to the limited number of *de jure* ones.[67]

This fluid interpretation of jurisdiction can generate uncertainty and conflict. Each order of government may seek to be actively involved over a particular issue — a highly visible one from an electoral perspective, perhaps — as has long been the case of different aspects of social protection.[68] Conversely, conflict can arise when both orders of government refuse to act on the ground that they neither have the constitutional power nor an obligation to intervene. This has often been the case with regard to the provision of services to Indigenous peoples and communities.[69]

It bears pointing out that the presumed 'complete' distribution of jurisdiction between the federal and provincial orders does not imply that the power to legislate involves an obligation to do so,[70] at least not from a federalism perspective. Any obligation that may exist — to legislate, regulate, consult, or honour treaties, for example — has its foundations elsewhere: in Aboriginal rights recognized by section 35 of the *Constitution Act, 1982*, the *Charter*, treaty rights, the Honour of the Crown, and many others. In other words, under Canada's existing federal regime, the power to legislate implies the power to do nothing. This, of course, can have dire effects on service delivery. The jurisprudential

67 See Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism" in Oliver, Macklem & Des Rosiers, *supra* note 17, 391 at 393-98; Johanne Poirier, "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45 RDUS 47 at 52-80; Eugénie Brouillet & Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Oliver, Macklem & Des Rosiers, *supra* note 17, 415.

68 See Johanne Poirier, "Federalism, Social Policy and Competing Visions of the Canadian Social Union" (2002) 13 NJCL 355 [Poirier, "Social Union"].

69 See Blumenthal & Sinha, *supra* note 59; *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 13 [*Daniels*].

70 See *Daniels, supra* note 69 at para 15.

trend toward *de facto* overlap partly aims at facilitating public action: if one order does not act, another may.

II.2 Federal Jurisdiction Regarding Indigenous Peoples and Lands

Jurisdiction regarding Indigenous peoples is particularly labyrinthine, evolving, and contentious. This paper cannot purport to do justice to this complexity.[71] What matters for our purposes is that regardless of the original intentions of the framers, or of Indigenous peoples' understanding of their relationship with the Crown, under the current federal regime, federal, provincial, and territorial orders of government have jurisdiction over matters that affect them. This results from increased public intervention in social or environmental protection for instance, which were very limited in 1867, and of the judicial interpretation of the division of powers.

In 1867, the federal Parliament was granted exclusive jurisdiction over "Indians and Land Reserved for the Indians."[72] In a way, this was a simple transfer of 'Crown' responsibility from the British to Ottawa.[73] This federal power partook of the colonial project of the 'Canadian' government, which sought to expand unto Western territories. Ottawa originally took responsibility for services provided to "Indians," and mostly for controlling most aspects of their lives, notably through the *Indian Act* first adopted in 1876.[74]

While the constitutional meaning of "Indian" in section 91(24) includes First Nations, Métis, and Inuit people,[75] the *Indian Act*'s definition applies only to a subset of those individuals, namely 'status Indians' who meet criteria outlined in the *Act*.[76] Around 45% of Indigenous Peoples fall within the purview of the *Indian Act*.[77] In other words, while the federal order has constitutional jurisdiction relative to all Indigenous peoples pursuant to section 91(24) of the

71 For greater details, see Isaac, *supra* note 64; Jean Leclair & Michel Morin, "Fascicule 15: Peuples autochtones et droit constitutionnel" at no 113, in Stéphane Beaulac & Jean-François Gaudreault-DesBiens, eds, JCQ *Droit public — Droit constitutionnel*.

72 *Constitution Act, 1867,* s 91(24).

73 See Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2015) at 245-46.

74 See John F Leslie, "The Indian Act: An Historical Perspective" (2002) 25:2 Can Parliamentary Rev 23 at 25.

75 See *Daniels*, *supra* note 69 (for non-status Indians and Métis people); *Reference as to Whether the Term "Indians" in Head 24 of Section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec*, [1939] SCR 104, 2 DLR 417 (for Inuit people).

76 See *Indian Act*, RSC 1985, c I-5, ss 5-7.

77 In 2016, Statistics Canada reported 1,673,780 Indigenous persons in Canada, including 587,545 Métis, 65,025 Inuit and 977,235 members of First Nations. Around 76% of the latter have "registered" status, see Statistics Canada, "Total Population by Aboriginal Identity and Registered or Treaty Indian Status, Canada, 2016" (18 April 2019), online: *Statistics Canada* <www12.statcan.

Constitution Act, 1867, its main legislative instrument applies to less than half of them.[78] The *Indian Act* represents, despite its many shortcomings, a partial recognition of responsibility toward status Indians by the federal order, which, at the same time delegates some of its responsibilities to provinces, as is discussed in the following section.

II.3 Ambiguity Arising from Section 88 of the *Indian Act*

An added complication comes from the ambiguous impact of section 88 of the *Indian Act*, through which the federal Parliament incorporates "by reference" provincial "laws of general application," except those relating to land.[79] This legislative incorporation only applies to Indigenous peoples 'covered' by the *Indian Act*, that is, 'status Indians.'

The scope and impact of section 88 are highly controversial.[80] Traditionally, it was understood that provincial laws of "general application" could apply to Indigenous peoples unless they affected the "core of Indianness." That core — dealing with status, for instance — was thus shielded from any provincial laws, pursuant to the constitutional doctrine of interjurisdictional immunity. Arguably, if section 88 only targeted provincial legislation that does not affect the core of the federal jurisdiction over Indians, it would be redundant, since provincial laws can "incidentally" affect federal powers.[81]

An alternative view is that section 88 actually expands provincial jurisdiction by allowing the application of provincial laws that would not otherwise be applicable to status Indians, due to the doctrine of interjurisdictional immunity. Whether the latter actually still applies to section 91(24) — and if so, to

gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-CAN-eng.cfm?Lang=Eng&GK=CAN&GC=01&TOPIC=9> [perma.cc/WJ9M-MUQJ].

78 Indigenous peoples who have signed 'modern treaties' are also excluded from the application of the *Act*, such as the Cree in Québec and the Nisga'a in British Columbia.

79 Leclair & Morin, *supra,* note 71, no 123 [translated by author].

80 See e.g. Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34:1 UBC L Rev 159 [McNeil, "Aboriginal Title"].

81 The SCC, however, may allow this redundancy, see e.g. *NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at para 71, in which the concurring reasons states that "a provincial law of general application will extend to Indian undertakings, businesses or enterprises, whether on or off a reserve, *ex proprio* vigore and by virtue of s. 88 of the *Indian Act* … *except* when the law impairs those functions of the enterprise which are intimately bound up with the status and rights of Indians" [emphasis in original]. This interpretation would thus allow provincial laws to apply both by their own force and through section 88. The majority opinion does not discuss this issue.

what extent — is uncertain.[82] Assuming there remains a 'core' that provincial laws may not touch, section 88 may have the effect of lifting this shield, at least with regards to some Indigenous peoples.[83]

Officially, the enactment of section 88 "does not diminish [the federal government's] constitutional responsibilities," it only partly delegates its exercise.[84] Nevertheless, for John Borrows, this incorporation "allows the federal government to almost completely abandon its section 91(24) constitutional responsibility" in favour of provinces.[85]

II.4 Overlapping Federal and Provincial/Territorial Jurisdiction

The expansion of social services to all Canadians in the post-war welfare state era led to more provincial involvement in social policy and intergovernment conflict and interaction, including with regards to Indigenous peoples.[86] The elaboration and delivery of social services for Indigenous peoples could thus *a priori* fall within the purview of either order of government, either *proprio vigore*, or through the effect of the *Indian Act*. Often, neither government wants to bear the financial burden associated with the provision of these services, depriving Indigenous communities of essential services provided to other Canadians. Even in instances where both orders of government work cooperatively, each can nonetheless claim that the core responsibility rests on the other.[87]

Natural resource extraction, management, and protection is another area of recurrent jurisdictional tension, since provinces have ownership and legislative authority over public lands, while Ottawa has jurisdiction over land "re-

82 See *ibid*; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 [*Kitkatla Band*]; *Tsilhqot'in*, *supra* note 65.

83 See Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2015) at 28-18; Leroy Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in J Anthony Long & Menno Boldt, eds, *Governments in Conflict? Provinces and Indian Nations in Canada* (Toronto: University of Toronto Press, 1988) 175 at 182; McNeil, "Aboriginal Title," *supra* note 80 at 177. This said, provincial laws could only apply to the extent that they are not 'inconsistent' with other federal legislation, pursuant to the doctrine of federal paramountcy.

84 *FN Caring Society*, *supra* note 60 at para 83.

85 John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 168.

86 See T Kue Young, "Indian Health Services in Canada: A Sociohistorical Perspective" (1984) 18:3 Soc Science & Medicine 257 at 260; Grammond, *supra* note 55 and cases cited.

87 See Frances Abele, "Intergovernmentalism and the Well-Being of First Nations" in Ghislain Otis & Martin Papillon, eds, *Féderalisme et Governance Autochtone/Federalism and Aboriginal Governance* (Québec: Presses de L'Université Laval, 2013) 167.

served for the Indians."[88] Even as it recognized Aboriginal title for the very first time in 2014, the Supreme Court ruled that provincial laws may also apply to territory over which Indigenous nations have the greatest property entitlement under Canadian law.[89] Here again, the presumption is that legislative power is either federal or provincial, or both. It may be limited by Aboriginal rights. But power itself is not shared or limited by inherent Indigenous sovereignty.

II.5 So, Who Can Do What in the End?

In brief, 'who can do what' in matters which relate to Indigenous peoples depends on which Indigenous groups are concerned. The federal order always has jurisdiction, the provinces sometimes do, overlap is frequent, and it may be that provincial legislative authority is even greater with regards to 'status Indians' through the action of section 88 of the *Indian Act*. This sketch, to repeat, is grounded on the questionable presumption that legislative powers are exhaustively divided between the federal and provincial orders, leaving no room, in Canadian law, for inherent jurisdiction derived from Indigenous legal traditions or orders.[90]

To summarize the foregoing, according to the conventional understanding of the division of powers:

- The federal order can always legislate with regards to Indigenous peoples and the lands 'reserved' for them.
- Provincial laws of *general application* may apply *proprio vigore* to all Indigenous peoples. In principle, such laws may not affect the 'core' of the federal jurisdiction. However, they may directly address Indigenous interests, at least to the extent that they have an ameliorative or protecting purpose.
- Provincial laws of *general application* may also apply *proprio vigore* to Indigenous territory, including Aboriginal title lands.
- Arguably, some provincial legislation which cannot constitutionally apply to Indigenous peoples — if they affect the "core of Indianness" — may nevertheless apply to status Indians pursuant to section 88 of the *Indian Act*.

88 See Webber, *supra* note 73 at 244. See e.g. *Kitkatla Band*, *supra* note 82; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

89 See *Tsilhqot'in*, *supra* note 65. Arguably, one limit to this increasing provincial reach may be that provincial laws should *not* unduly *restrict* Indigenous interests, but in fact aim at promoting and protecting them, see Leclair & Morin, *supra* note 71 at nos 126-27.

90 See McCrossan & Ladner, *supra* note 65.

- Overlap is thus not only possible but frequent, particularly in several areas of social policy which lie at the heart of the Calls to Action.
- Provincial laws must not be inconsistent with federal legislation. There is no notion that, absent federal legislation, Indigenous legal norms ought to apply, rather than provincial ones.
- Federal and provincial jurisdiction is equally 'burdened' by Aboriginal and treaty rights pursuant to section 35 of the *Constitution Act, 1982*.

With this sketch in mind, we may now examine in greater detail how some Calls to Action 'match' — or not — the division of powers in the Canadian Constitution and attempt to see the strategy behind the identification of government authorities called to action.

Part III: The Calls to Action Regarding Child Welfare, Health, and Education: A Vision of Canadian Federalism?

A detailed exploration of the 'match' between actors targeted by all Calls to Action and the distribution of powers would be a daunting — if revealing — exercise. In what follows, we attempt to do so with three domains: child welfare, health care, and education. While done in an inevitably summary fashion, the objective is simply to point to the challenge — or inadequacy — of 'fitting' requests for action into the evolving, fluid, and often controversial interpretation of the division of powers between federal and provincial orders. We also aim to offer some tentative explanations for the choices operated by the TRC in this context.

III.1 Child Welfare

In practice, on-reserve services regarding child welfare are provided cooperatively by the federal and provincial governments.[91] Either federally-mandated agencies through First Nations Child and Family program or provinces deliver on-reserve child and family services funded by Indigenous Services Canada (ISC).[92] There is significant asymmetry in the ways in which services are conceived and delivered across the country.[93]

91 See *FN Caring Society*, *supra* note 60 at para 66; Blumenthal & Sinha, *supra* note 59 at 3.

92 Formerly "Aboriginal Affairs and Northern Development Canada" (AANDC), which has now been split into Indigenous Services Canada (ISC) and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), see "Indigenous Services Canada/Crown-Indigenous Relations and Northern Affairs Canada," online: *Government of Canada* <www.aadnc-aandc.gc.ca> [perma.cc/UVY4-7Q3D]

93 See Grammond, *supra* note 55.

Oddly, given this intertwined delivery, as recently as 2016, Ottawa argued before the Human Rights Tribunal that child welfare services were exclusively an area of provincial jurisdiction.[94] If this were the case, federal funding would be entirely discretionary, and made pursuant to the federal spending power. The Tribunal disagreed and held the federal government responsible for the quality of services offered to Indigenous children on reserves.[95] While Ottawa did not challenge the ruling, it failed to comply.[96] In 2019, the Tribunal ruled on compensation for "victims/survivors of Canada's discriminatory practices."[97]

In essence, courts and tribunals have singled out the federal order as the main actor responsible for the provision of on-reserve child welfare services. In contrast, there is no clear delineation of jurisdiction for remaining Indigenous individuals and groups. The TRC roughly follows this logic. All five Calls to Action related to child welfare require the federal government to act, but four of those also target provincial and territorial governments. The sole exception relates to Call to Action 4, which requests that the federal government "enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody case."

In 2019, in partial response to the Calls to Action, the federal Parliament passed *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*.[98] It goes further than establishing national standards: it affirms that the inherent right of self-government of Indigenous peoples, recognized and affirmed by section 35 of the *Constitution Act, 1982*, includes legislative authority in relation to child and family services.[99] The *Act* then offers two avenues to Indigenous groups wishing to exercise this legislative authority. Note that in both of these schemes, Indigenous law would not apply if it would be contrary to the best interests of the child.[100] Moreover, in case of conflict between two

94 See *FN Caring Society*, *supra* note 60 at para 78.

95 See *Ibid* at paras 83-86.

96 See Cindy Blackstock, "The Complainant: The Canadian Human Rights Case on First Nations Child Welfare" (2016) 62:2 McGill LJ 285 at 324. So far, eight non-compliance orders have been issued under the style of cause *First Nations Child and Family Caring Society of Canada et al v AG of Canada (for the Minister of Indian and Northern Affairs Canada)*, see 2016 CHRT 10; 2016 CHRT 16; 2017 CHRT 7; 2017 CHRT 14; 2017 CHRT 35; 2018 CHRT 4; 2019 CHRT 7; 2019 CHRT 39 [*FN Caring Society 2019*].

97 *FN Caring Society 2019*, *supra* note 96 at para 12. Ottawa is seeking judicial review of this decision. Its motion for a stay pending application was denied, see *Canada (AG) v First Nation Child and Family Caring Society of Canada*, 2019 FC 1529.

98 *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, SC 2019, c 24 [*ICYF Act*].

99 *Ibid*, Preamble and s 18(1).

100 *Ibid*, s 23.

Indigenous laws, the law of the group, community, or people with which the child has stronger ties will apply.[101]

The first scenario envisages that an Indigenous group may simply "give notice" of its intention "to exercise its legislative authority" to the federal and relevant provincial orders.[102] The *ICYF Act* says nothing about rules to resolve conflicts between Indigenous law and federal or provincial law in this context. In case of conflict with federal law, it seems that the latter will prevail. The intersection with provincial law, for its part, is rather blurry, and whether provincial or Indigenous law would prevail is uncertain. Given Parliament's silence on this issue, and the fact that it cannot alter jurisdiction by legislation, it appears that normal rules of interpretation would apply.[103]

Pursuant to the second option, an Indigenous governing body may request that the federal and provincial governments enter into a tripartite coordination agreement with it in relation to the exercise of its legislative authority.[104] If such an agreement is reached within one year of the initial request, Indigenous law concerning child welfare will apply.[105] But, and this is a notable innovation, Indigenous law will also apply if an agreement is *not* reached within a year of the initial request, despite the Indigenous governing body's "reasonable efforts" to negotiate one.[106]

In that second context, the *ICYF Act* confers the relevant Indigenous law "force of law as federal law."[107] It also anticipates potential conflicts between Indigenous law on the one hand, and federal or provincial law on the other.[108] In the event of conflict or inconsistency between Indigenous law and other federal law — except certain provisions of the Act itself and the *Canadian Human Rights Act* — the Indigenous law will prevail.[109] In other words, the federal order is 'vacating' jurisdictional space in favour of Indigenous authorities, while simultaneously asserting inherent Indigenous jurisdiction. It affirms

101 *Ibid*, s 24.
102 *Ibid,* s 20(1).
103 Including, we presume, the limited interjurisdictional immunity derived from *Tsilhqot'in*, *supra* note 65. The impact of section 88 of the *Indian Act* in this context is also rather uncertain. Our point is not to detail all the possible solutions but to flag the uncertainty regarding these three 'uncoordinated' sources of law.
104 *ICYF Act*, *supra* note 98, s 20(2).
105 *Ibid*, s 20(3)(a).
106 *Ibid*, s 20(3)(b).
107 *Ibid*, s 21(1).
108 *Ibid*, s 24.
109 *Ibid,* s 22(1).

that in case of conflict, with limited exceptions, Indigenous law will have paramountcy over federal law.

In this second scenario, the *ICYF Act* also imposes cooperation unto provinces. Indeed, if a coordination agreement is reached, or if one is not reached within one year despite an Indigenous group's reasonable efforts to do so, relevant Indigenous law is to prevail over any conflicting provision in a provincial act or regulation.[110] It thus seems that the federal Parliament is delegating the exercise of its own paramountcy over conflicting provincial law to Indigenous legislators. And while this is somewhat speculative, Ottawa is apparently choosing not to legislate beyond the *Act* itself. It leaves provincial or Indigenous law to regulate this policy area and, through a legislative provision, aims to gives priority to the latter in case of conflict. However, if no coordination agreement is reached, the paramountcy of Indigenous law will only apply if the Indigenous community has shown "reasonable efforts" to reach such an agreement.[111]

This is a complex constitutional strategy. It can be read as moving away from a conception of the division of powers between federal and provincial governments being 'exhaustive,' and toward a recognition of Indigenous governments as federal partners, in some way *on par* with provinces. Or it can be understood as a revocable 'delegation' of authority by Ottawa of part of its legislative powers to Indigenous communities, including a delegation of federal paramountcy over provincial law to Indigenous communities. The Québec government is challenging the *ICYF Act*'s constitutionality through a reference procedure before its Court of Appeal. While it shares the objective of increasing Indigenous autonomy in this area, it argues that setting aside provincial powers by the federal Parliament is unconstitutional.[112]

Clearly, child welfare remains a jurisdictional battlefield. The TRC called upon all orders of government to take action. But it strategically targeted the federal order to legislate in a way that may yield an innovative restructuring of the current division of powers. While not ignoring provinces and territories, it

110 *Ibid*, s 22(3).

111 *Ibid*, s 20(3)(b).

112 See Laurence Niosi, "Enfants autochtones: le gouvernement Legault conteste l'autorité d'Ottawa," *Radio-Canada* (19 December 2019), online: <ici.radio-canada.ca/espaces-autochtones/1442013/enfants-autochtones-renvoi-cour-appel-quebec> [perma.cc/HH2L-W4QA]; "Reference in Relation with the Act Respecting First Nations, Inuit and Métis Children, Youth and Families" (16 January 2020), online: *Québec Court of Appeal* <courdappelduquebec.ca/en/news/details/reference-in-relation-with-the-act-respecting-first-nations-inuit-and-metis-children-youth-and-fam-1/> [perma.cc/PJX6-72XF].

simultaneously — and implicitly — seems to have paved the way for a concrete, gradual, and pragmatic implementation of a third order of government.

III.2 Health Care and Services

Health services with regards to Indigenous peoples is another area where both *de jure* and *de facto* jurisdiction is unclear and contested.[113] While on-reserve services are provided by the federal government through the *Indian Act* and *Indian Health Regulations*,[114] provinces have broad jurisdiction over health given their responsibilities for hospitals in section 92(7), property and civil rights in section 92(13), and matters of a local or private nature in section 92(16) of the *Constitution Act, 1867*.[115] Indigenous individuals and groups often find themselves in the midst of jurisdictional tugs-of-war.[116]

Seven Calls to Action — 18 to 24 — relate to healthcare. Two of these require the federal, provincial, and territorial governments to act. First, Call to Action 18 requests an acknowledgement by all of them "that the current state of Aboriginal health … is a direct result of previous Canadian government policies … and to recognize and implement the health-care rights of Aboriginal people." Therefore, even if the situation is due to the "Canadian government," the other orders of government are also asked to act. Similarly, the TRC asks "all levels of government" to increase the number of Indigenous healthcare professionals.[117]

By contrast, Calls to Action 19 and 21 respectively ask the federal government "to establish measurable goals to identify and close the gaps in health outcomes between Aboriginal and non-Aboriginal communities" and "to provide sustainable funding for existing and new Aboriginal healing centres." The exclusion of provincial governments from these Calls to Action is striking given the predominant provincial responsibility over health care.

Of particular interest is Call to Action 20, which deplores "the jurisdictional disputes concerning Aboriginal people who do not reside on reserves" but only requests the federal government "to recognize, respect, and address

113 See Grammond, *supra* note 55.

114 See Martha Jackman, "Constitutional Jurisdiction over Health in Canada" (2000) 8 Health LJ 95 at 106.

115 See *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 68 ("[t]he provincial health power is broad and extensive"). See also Hogg, *supra* note 83 at 33-15; Poirier, "Social Union," *supra* note 68.

116 See Jackman, *supra* note 114 at 106, 111.

117 *TRC Report*, *supra* note 1, CTA 23.

the distinct health needs of the Métis, Inuit, and off-reserve Aboriginal peoples." The exclusion of provinces from this Call appears deliberate, given their inclusion in other related Calls to Action. Through this omission, the TRC may be taking another stance on the federal-provincial battlefield and asserting that Ottawa cannot elude its responsibilities for the health care services of non-status Indians.[118]

III.3 Education

Jurisdiction over education is exclusively provincial per section 93 of the *Constitution Act, 1867*. However, Parliament has also legislated in the matter pursuant to section 91(24).[119] This was, of course, the main source of federal authority for establishing residential schools. The federal cabinet may also authorize the Minister to conclude agreements with a province or territory about education.[120] Intergovernmental cooperation has yielded several tripartite memorandums of understandings between federal, provincial, and Indigenous authorities aimed at improving educational outcomes for Indigenous students.[121]

Eleven Calls to Action concern education. Calls to Action 6, 8, and 65 only address the federal government, while one targets the interprovincial body CMEC, which excludes the federal government. Some Calls to Action target both federal as well as provincial and territorial orders, while "Aboriginal governments" are also called upon with regards to develop "culturally appropriate" early childhood education programs.[122]

As in the case of healthcare, some Calls to Action only point to the federal order in policy areas over which provinces also likely have jurisdiction under the double aspect doctrine. For example, Call to Action 7 requires the federal government to eliminate gaps in educational and employment between Indigenous and non-Indigenous "Canadians." The exclusion of provinces is again noteworthy, as the elimination of such gaps is a stated objective of the inter-provincial CMEC.[123]

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118 The *TRC Report* was issued before *Daniels, supra* note 69, which ruled that the federal order has jurisdiction, pursuant to section 91(24) of the *Constitution Act, 1867, supra* note 4, over 'non-status' Indians and Métis people.

119 See *Indian Act*, *supra* note 76, s 114(2).

120 See *ibid*, s 114(1).

121 See Indigenous Services Canada, "First Nation Education Partnerships and Agreements" (28 May 2018), online: *Indigenous Services Canada* <www.sac-isc.gc.ca/eng/1308840098023/153140011558> [perma.cc/39HL-2SMQ].

122 *TRC Report*, *supra* note 1, CTA 12.

123 See Council of Ministers of Education, Canada, "Learn Canada 2020: Joint Declaration Provincial and Territorial Ministers of Education" (2020), online (pdf): *CMEC* <cmec.ca/Publications/Lists/

III.4 Overall Coherence Behind the Specific Calls to Action

The foregoing illustrates that while some Calls to Action match constitutional authority under current Canadian law, others do not. The federal order is almost inevitably called upon. This reflects its broad jurisdiction in matters relating to Indigenous peoples. Explicit identification of other orders of government does occur, however. It is neither systematic nor always connected to their constitutional jurisdiction.

Why are the provinces asked to act with regard to certain aspects of health care and not others? Why are all orders of governments asked to cooperate to reduce the number of Indigenous children in care, while only Ottawa is requested to legislate to that effect? Why is the federal order, without the express cooperation of provinces, asked to adopt a new "Aboriginal education legislation," when the provinces are the main providers of educational services? Why are Indigenous governments sometimes associated with other addressees, and sometimes not? Why an almost exclusive focus on the federal order in some cases, and a Call to other governmental — or non-governmental — actors in others? In other words, what logic, purpose, and strategic thinking grounded the TRC's identification of governmental 'targets'? Clearly, a detailed reading of the Calls to Action raises as many questions as it answers. Attempting to decode the TRC's motivation remains a matter of conjecture.[124] We nevertheless offer two tentative explanations.

First, just as the federal order plays a lead role in the Truth section of the Report, it appears in virtually every segment of the Reconciliation section. In the Reconciliation dimension of its work, the Commission directed Calls to Action at governmental actors in addition to the federal one, in a way that appears more pragmatic than ideological. Directing requests for action to actual actors rather than to an abstract 'Crown' or 'Canada' might have been understood to be more effective. The point was not necessarily to "get it right" from a current Canadian legal and constitutional perspective, but rather to ensure that public and other authorities felt compelled to take stock of the Calls to Action.

Categories of Calls to Action concerning child welfare, healthcare, and education nearly always target federal, provincial, and territorial orders, as

Publications/Attachments/187/CMEC-2020-DECLARATION.en.pdf> [perma.cc/8ZX2-4XBF].

124 Pursuing this further would require a distinct methodological approach than the one used in this paper. It would notably involve more systematic and structured interviews. This said, it is likely that answers would not be univocal regarding specific motivations, or on the drafting method chosen in specific Calls to Action.

well as, occasionally, Indigenous governments. Taken 'globally,' this breakdown also corresponds to the jurisdictional overlap that results from constitutional interpretation. In other words, the Commission always calls all the relevant actors within each category of Calls to Action, even if it does not always do so in individual Calls. Taking stock of this jurisdictional overlap underscores the need for all public actors to take all of the Commission's Calls to Action seriously. In other words, 'traditional' actors of the Canadian federation must heed the Calls, even when they are not directly targeted by a specific Call to Action.

Second, despite the pragmatic acknowledgment of Canada's existing federal system, the TRC also singles out the federal order in areas where shared jurisdiction is likely. In so doing, the CRT may have strategically sought to counter Ottawa's attempts to elude its constitutional responsibility toward Indigenous peoples. It may also creatively facilitate 'third order of government' solutions introduced by Ottawa, in a way that does not negate provinces, but somewhat shrinks their jurisdiction in favour of Indigenous legal orders, in gradual and asymmetrical fashions.

Conclusions: A Moral, Political, and Constitutional Duty to Cooperate

Reconciling Indigenous voices, interests, strategies, priorities, political aspirations is — and will remain — a major challenge facing Indigenous peoples. Adequately responding to the Calls to Action also presents challenges to the 'traditional' actors of the Canadian federation. Implementing the *TRC Report* has undeniable and profound intergovernmental implications.

The vast majority of the ninety-four Calls to Action are directed at Canadian public authorities and institutions. With one exception, various iterations of federal authorities are always identified. Provinces and territories are also requested to take action, almost always in conjunction with the federal order. Several Calls to Action are also directed at Indigenous governments. The TRC chose not to address its Calls to an indistinct 'Canada' or 'Crown.' In so doing, it somewhat acknowledged the federal structure of Canada, even if it does not necessarily endorse it. This was likely a strategic choice. It could have evoked a 'unified' Crown, thus emphasizing more historical models of nation-to-nation relationships. It sometimes did, as in the Call for a new Royal Proclamation in Call to Action 45. In most cases, however, the TRC petitioned specific actors, more likely to elicit a direct, rapid, and less elusive response.

This said, one may wonder why certain Calls to Action are addressed to specific public authorities, while very closely related ones are not. This puzzlement led us to attempt to decipher the Calls to Action in order to partially sketch not only '*who* is being asked to do what' by the TRC but also 'who *can* do what' pursuant to current Canadian constitutional law. Sometimes we find a 'match,' and sometimes not quite. Underscoring this lack of precise correspondence is not meant as a criticism: the Commission's mandate was not constitutional and its choice of 'addressees' may not be faulted for not fitting with a constantly evolving, complex, often nebulous division of powers which Indigenous peoples have neither chosen nor endorsed. Nonetheless, when taken globally, as opposed to individually, the various Calls to Action relative to specific policy areas — such as child welfare, health services, and education — clearly highlight that all orders of government in the current federal regime have some constitutional competence and are rightly called upon to take action by the Commission.

Under Canadian public law, the mere existence of an order of government's legislative power in a specific policy area does not generate any legal obligation to actually legislate or otherwise take action.[125] A power to act is not an obligation to do so. Moreover, while intergovernmental collaboration is facilitated and encouraged by the Supreme Court of Canada,[126] judges have shied away from finding any constitutional obligation to cooperate on the parts of the 'official' actors of the federation.[127] In other words, whether the federal, provincial, and territorial orders actually legislate in their respective spheres of jurisdiction is, under Canadian law, considered to be a policy or political decision. This is also the case of their eventual choice to cooperate with other members of the federation. Given the increasing overlapping and intertwining jurisdiction in all matters — including in policy areas targeted by the TRC — this can generate inaction and/or uncoordinated action in silos.

125 See *Daniels*, *supra* note 69 at para 25. Limited 'positive' constitutional rights provide an exception to this rule.

126 See *Canadian Western Bank v Alberta*, 2007 SCC 22; *Reference re Securities Act*, 2011 SCC 66 at para 133; Gaudreault-DesBiens & Poirier, *supra* note 67.

127 See Gaudreault-DesBiens & Poirier, *supra* note 67; *Long-Gun Registry*, *supra* note 65 at para 19; Johanne Poirier, "The 2018 Pan-Canadian Securities Regulation Reference: Dualist Federalism to the Rescue of Cooperative Federalism" (2020) 94:2 SCLR (2d) 85 at 90-91; Jan Raeimon Nato, "Development of Duties of Federal Loyalty: Lessons to be Learned, Conversations to be Had" (Winner of Baxter Family Competition on Federalism, 2019), online (pdf): <www.mcgill.ca/law/files/law/2019-baxter_federal-loyalty-lessons-discussions_jan-nato.pdf> [perma.cc/L9PN-J4WJ]; Noura Karazivan, "Cooperative Federalism v Parliamentary Sovereignty: Revisiting the Role of Courts, Parliaments and Governments" in Alain-G Gagnon & Johanne Poirier, eds, *Canadian Federalism and Its Future: Actors and Institutions* (Montréal: McGill-Queen's University Press, 2020) 307-309.

The TRC did not explicitly call for a reconceptualization of the current federal regime to fully encompass 'Treaty-federalism' or 'Third-order of government federalism,' although some endorsement seems implicit in certain Calls to Action. Those models should be kept on the radar and refined in order to challenge a hierarchical vision of Crown sovereignty. In the short(er) term, and in parallel, however, we believe that responses to the divide-and-conquer — or ignore-and-conquer — attitude of the 'traditional' actors of the federation could be found even within the confines of existing Canadian public law. Hence, in conclusion, we briefly evoke two ways that might alleviate the negative consequences of the formal division of powers in Canada on the implementation of the Calls to Action.

The first would be the broadening of Jordan's Principle, which "all levels of government" are being called upon to "fully implement."[128] As mentioned above, the principle was developed in the context of on-reserve healthcare services for First Nations children.[129] It enjoins the first government requested to offer or pay for a service to do so, postponing and displacing intergovernmental wrangles.[130]

In *FN Caring Society*, the Canadian Human Rights Tribunal ruled that the federal order retains a *duty* to provide appropriate financing, even if its jurisdiction over 'Indians' could be interpreted as giving it the power to do nothing at all. Legal and constitutional prohibition against discrimination — between Indigenous and non-Indigenous people — entails positive *duties* on formal state actors. In this context, having jurisdiction does *not* entail the power to do nothing with it.[131] Furthermore, existing federal-provincial cooperation in the provision of on-reserve child and family services does not diminish Ottawa's constitutional responsibilities.[132] Action is required, not by the federal division of powers, but because inaction, or ineffective action, may violate rules of substantive equality.

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128 *TRC Report*, *supra* note 1, CTA 3.

129 See text corresponding to *supra* note 60.

130 Parliament endorsed a private motion to "immediately adopt a child-first principle" in 2007. Subsequent legislative attempts to adopt Jordan's Principle failed. Non-legislative initiatives led to agreements with Manitoba and Saskatchewan. These implementations of the principle were narrower than the definition adopted in the 2007 motion and were denounced for that reason by First Nations groups, see Blumenthal & Sinha, *supra* note 59 at 6-8.

131 For Colleen Sheppard, Jordan's Principle has had significant legal impact, even as a non-binding parliamentary motion. Sheppard argues that Jordan's Principle also calls for greater participation by Indigenous communities in policy determination and service delivery, thus to notable recognition of Indigenous autonomy and self-determination, see "Jordan's Principle: Reconciliation and the First Nations Child" (2018) 27:1 Const Forum Const 3.

132 See *FN Caring Society*, *supra* note 60 at para 83.

Understood through the lens of federalism, an expanded conception of Jordan's Principle would require effective coordination between orders of government with the power to act. Given the intermingling of competences that the contemporary federal regime has generated, our submission is that Jordan's Principle not only imposes a duty to act, but also a duty to act in a collaborative fashion to alleviate the tug-of-war that results from Canada's federal structure and jurisprudence.

The second means through which current Canadian law could be adapted to alleviate the negative impact of the current division of powers on the implementation of the Calls to Action is a still exploratory constitutional duty to cooperate on the parts of a 'divided' Crown.

As mentioned, over the last two decades, Canadian courts have enthusiastically promoted a certain vision of 'cooperative federalism,' in a way that has increased jurisdictional overlap. However, notably in view of the principle of parliamentary sovereignty, judges have rejected the idea that the 'traditional' actors of the federation have an obligation to act in good faith and/or cooperatively.[133] In other words, in 'regular' intergovernmental dealings, cooperation is facilitated, but not constitutionally mandated. However, we submit that in their interaction with Indigenous peoples, or in any action which affects Indigenous peoples, the 'traditional' members of the federation may be under a constitutional imperative to cooperate. This obligation would serve to partly counter-balance the highly complicating impact of the division of powers in current Canadian law for Indigenous peoples.[134]

The principle of the Honour of the Crown generates a number of positive obligations on the part of every order of government.[135] Our hypothesis is that public authorities which exercise the 'governmental' functions of the

133 See sources cited *supra* note 127.

134 See *Newfoundland and Labrador (AG) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, where the majority of the Court "d[id] not accept that the later establishment of provincial boundaries should be permitted to deprive or impede the right of Aboriginal peoples to effective remedies for alleged violations of these pre-existing rights" (para 49). See also the dissenting opinion's acknowledgment that prior occupation by Indigenous peoples must be reconciled with federalism (paras 209-13). While the case does not deal with constitutionally-mandated cooperation, both sets of reasons call for mitigating the negative impact of the current federal architecture for Indigenous claims that straddle provincial borders. Our submission is based upon a similar conviction that the promise of section 35 may only be fulfilled by a reconceptualization of the members of the federation's constitutional duties.

135 See *Grassy Narrows*, *supra* note 29 at para 35; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 20; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para 73; *Mikisew Cree*, *supra* note 19 at para 42; Craig Scott, "Consultation, Cooperation and Consent in the Commons' Court: 'Manner and Form' after Mikisew Cree II" (2020) 94:2 SCLR (2d) 155.

Crown must also coordinate their action, lest the federal division of powers create a vacuum and/or jurisdictional battles and blame-shifting, which are anything but 'honourable.' Our suggestion is, in a sense, robustly 'procedural.' It is not that equality rights or the Honour of the Crown requires that laws and policies should be uniform across Canada. It is, rather, that in policy development and delivery, members of the Canadian federation must consult, cooperate, engage, and act in good faith. Not only in their respective dealings with Indigenous peoples but also in a *multilateral* fashion that involves all orders of government, including Indigenous ones. There is, of course, a political obligation to do this. Our submission is that it may *also* be constitutionally mandated. In short, in the federal system, a divided Crown must act cooperatively if it is to act honourably. The principles of federalism and of the Honour of the Crown(s) — in the plural — ought to be interpreted in symbiosis.[136]

This modulation of the scope of federal and provincial, and eventually Indigenous, jurisdiction to recognize constitutionally-mandated cooperation could fruitfully draw inspiration from Indigenous legal traditions,[137] including the concepts of relationality,[138] 'respect,'[139] 'love,'[140] and 'good faith.'[141] These concepts could be mobilized to challenge jurisdictional turf wars and encourage constructive interdependence in a spirit of "humility."[142] A proper implementation of the TRC's Calls to Action requires no less.

136 The authors are working on a distinct paper on this constitutional obligation to cooperate and the notion of the Honour of the Crown(s). On the interaction between constitutional principles, see *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 49-82, 161 DLR (4th) 385.

137 John Borrows, "Creating an Indigenous Legal Community" (2005) 50:1 McGill LJ 153 at 165-66.

138 See e.g. Alan Hanna, "Reconciliation through Relationality in Indigenous Legal Orders" (2019) 56:3 Alta L Rev 817.

139 Kirsten Manley-Casimir, "Toward a Bijural Interpretation of the Principle of Respect in Aboriginal Law" (2016) 61:4 McGill LJ 939.

140 John Borrows, "Indigenous Love, Law, and Land in Canada's Constitution" in Steven Lecce, Neil McArthur & Arthur Schafer, eds, *Fragile Freedoms: The Global Struggle for Human Rights* (Oxford: Oxford University Press, 2017) 123.

141 Sarah Morales, "(Re)Defining 'Good Faith' through *Snuw'uyulh*" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 277 at 291-302.

142 Lindsay Borrows, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149.

Federal Loyalty and the 'Nature' of Federalism

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Is the federal loyalty principle — viz., each level of government in a federal system must make non-trivial efforts to ensure non-interference with the jurisdiction of the other — inherent to federalism? Despite controversy about the meaning and scope of 'federal loyalty,' the claim that it is inherent to federalism has a transnational pedigree. If this 'inherence claim' is true, it could have substantial implications for global constitutionalism. Among other implications, it could help justify judicial recognition of federal loyalty in federal states that allow judicial review. Unfortunately for proponents of federal loyalty, however, any combination of plausible understandings of federalism and federal loyalty presents a similar kind of multi-lemma problem: One must deny the inherence claim, grant that it is trivial, deny that many paradigmatic federal systems are actually federal, or grant that federal loyalty relies on another underlying normative principle and somehow identify the principle despite no one being able to do so to date. In each case, denying the inherence claim is the best option. Federal states must decide whether to entrench federal loyalty requirements through regular amendment procedures.

Le principe de la loyauté fédérale — c.-à-d. chaque palier de gouvernement dans un régime fédéral doit faire des efforts non négligeables afin d'assurer la non-ingérence avec les juridictions des autres — est-il inhérent au fédéralisme? En dépit de la polémique entourant le sens et la portée de la « loyauté fédérale », l'affirmation selon laquelle elle est inhérente au fédéralisme a une généalogie transnationale. Si cette « affirmation d'inhérence » est vraie, elle pourrait avoir des répercussions considérables pour le constitutionalisme mondial. Parmi les répercussions, elle pourrait aider à justifier la reconnaissance judiciaire de la loyauté fédérale dans les états fédéraux qui permettent la révision judiciaire. Malheureusement pour les partisans de la loyauté fédérale, cependant, toute combinaison de compréhensions vraisemblables du fédéralisme et de la loyauté fédérale présente un problème « multi-lemme » semblable : on doit nier l'affirmation d'inhérence, reconnaître qu'elle est insignifiante, nier que de nombreux régimes fédéraux paradigmatiques sont en fait fédéraux ou admettre que la loyauté fédérale dépend d'un autre principe normatif sous-jacent et d'une manière ou une autre identifier le principe malgré le fait que personne n'y a encore réussi. Dans chaque cas, nier l'affirmation d'inhérence est la meilleure option. Les états fédéraux doivent décider s'ils doivent fixer les exigences de la loyauté fédérale par des procédures de modification régulières.

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Table of Contents

Introduction

The claim that the federal loyalty principle — viz., each level of government in a federal system must make non-trivial efforts to ensure non-interference with the jurisdiction of the other[1] — is inherent to federalism appears in scholarship from disparate states. For example, Austrian scholar Anna Gamper claims that features of her administrative constitutional order are inherent in all federal systems: "Constitutional loyalty is an intrinsic value principle of all constitutions. … [In federal states, this requires] loyalty to the constitution … [and] each other," entailing federal loyalty.[2] For another example, Canadian scholar Jean-François Gaudreault-DesBiens's dualist state does not recognize the principle, but Gaudreault-DesBiens says that it "is *inherent* to any federal regime" even absent recognition in constitutional texts.[3] Call this posit that federalism entails a necessary commitment to some form of federal loyalty principle 'the inherence claim.'

The interesting finding in comparative political theory that the inherence claim is asserted transnationally could have important consequences for global constitutionalism. If the federal loyalty principle — henceforth 'federal loyalty,' but also known as 'comity,' 'fidelity,' 'mutual consideration,' 'Bundestreue,' and 'solidarity'[4] — is inherent to federalism, courts can plausibly recognize the principle in any federalist state.[5] This would help justify transnational constitutional practice. Federal loyalty originated in Germany, where it was judicially

1 See "On 'Federal Loyalty,'" below.

2 "On Loyalty and the (Federal) Constitution" (2010) 4:2 Vienna Online J on Intl Constitutional L 157.

3 "The Ethos of Canadian Aboriginal Law and the Potential Relevance of Federal Loyalty in a Reconfigured Relationship between Aboriginal and Non-Aboriginal Governments: A Thought Experiment" in Ghislain Otis & Martin Papillon, eds, *Fédéralisme et gouvernance autochtone/Federalism and Aboriginal Governance* (Laval, QC: Presses de l'Université Laval, 2013) 51 at 53 [Gaudreault-DesBiens, "Ethos"] [emphasis in original]. See also Jean-François Gaudreault-DesBiens, "The Canadian Federal Experiment, or Legalism without Federalism? Toward a Legal Theory of Federalism" in Manuel Calvo-Garcia & William LF Felstiner, *Federalismo/Federalism* (Madrid: Dykinson, 2004) 81 at 112, 122 [Gaudreault-DesBiens, "Experiment"].

4 These terms may not be synonymous, but are treated as such in e.g., Gaudreault-DesBiens, "Ethos," *supra* note 3; Gamper, *supra* note 2. See also Alberto Miglio, "Differentiated Integration and the Principle of Loyalty" (2018) 14:3 European Constitutional L Rev 475 at 476, n 2 on "sincere cooperation." Erika Arban, "Exploring the Principle of (Federal) Solidarity" (2017) 22:2 Rev Const Stud 241 claims that solidarity is distinct from, yet inherent in, federal loyalty. Whether the claim that solidarity is inherent to federalism in Edmond Orban, "La Cour constitutionnelle fédérale et l'autonomie des Länder en République fédérale d'Allemagne" (1988) 22:1 RJT 37 at 42 adopts the distinction between federal solidarity and federal loyalty is debatable.

5 See "The Inherence Claim's Potential Value," below.

recognized as stemming from the nature of Germany's federal union.[6] It has since migrated to other states, often as a 'legal transplant.'[7] But an inherent principle need not be 'transplanted' to federal states. It can simply be recognized as part of the existing constitutional order of any such state.[8]

In this work, I adopt empirically-informed conceptual analysis and conceptual mapping methods to test the inherence claim. I first detail some reasons to conduct the present analysis, many of which relate to the reasons why one may be tempted to adopt the inherence claim. I then begin my analysis by presenting competing definitions of 'federalism' and 'federal loyalty.' These definitions reflect mainstream scholarly views on their meanings and the observed legal and political practices of characteristically 'federal' states. I next examine whether any plausible definition of 'federalism' that can capture even paradigmatic practices of federal law and politics entails — or is even consistent with — a non-trivial understanding of federal loyalty. I then examine theoretical and practical reasons why one would want to accept or deny the claim. I finally explain how my findings impact legal 'transplants' in federal states and the harmonization of global federalism.

Unfortunately for proponents of federal loyalty, I find that federal loyalty is not a necessary feature of federalism on the most plausible understandings of federalism. Any combination of plausible understandings of federalism and federal loyalty presents a similar problem. In each, one must choose between some mix of the following: deny the inherence claim; grant that it is trivial; deny that many paradigmatic federal systems are actually federal (thereby undermining the explanatory force and underlying motivations of each version of federalism); or grant that federal loyalty relies on another underlying normative

6 *Housing Funding Case*, 1 BVerFGE 299 (1952). See also Francesco Palermo & Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford: Hart, 2017) at 250.

7 Gamper, *supra* note 2 at 160-61. On legal transplants, see Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed (Athens: University of Georgia Press, 1993). Pierre Legrand, "The Impossibility of Legal Transplants" (1997) 4:2 MJECL 111 provides representative criticism. Federal loyalty has certainly 'migrated' in some form. On migration, see Sujit Choudhry, ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

8 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 53 claims that adoption of federal loyalty in Canada would not be a legal transplant because Canada already recognizes parts of international comity law and fiduciary obligations. But Canada has not recognized a federal loyalty principle on any of the plausible definitions discussed here. Gaudreault-DesBiens uses the inherence claim to deny that it would be a transplant in Jean-François Gaudreault-DesBiens, "Cooperative Federalism in Search of Normative Justification: Considering the Principle of Federal Loyalty" (2014) 23:4 Const Forum Const 1 at 3 [Gaudreault-DesBiens, "Cooperative"]. This is more interesting for present purposes, especially given the transnational pedigree of the underlying claim.

principle and somehow identify the principle despite no one being able to do so to date.

In each case, denying the inherence claim is the best option. Yet this need not be a negative finding for global constitutionalism: ultimately, federal loyalty likely cannot be incorporated into some constitutional contexts and/or will not always fulfill the aims of federalism. Each federal state can and should decide whether it can and will incorporate federal loyalty requirements into its constitutional text. Any incorporation should use regular constitutional amendment procedures.

The Inherence Claim's Potential Value

The current transnational support for and potential value of the inherence claim justifies the present analysis.[9] For another example of support beyond those listed above, Hugo Cyr appeals to the inherence claim as part of a "normative justification" for cooperative federalism. He argues that federalism's inherent commitment to solidarity contradicts a cooperativist "internal logic" of federalism, at least in Canada. His solidarity-based 'underlying logic' would have required different outcomes in several cases in that traditionally dualist state.[10] Despite this apparent endorsement, the definition of 'federal loyalty' and what it would mean for it to be 'inherent' to federalism nonetheless remains unclear.[11] This gap alone demands scrutiny of the claim.

9 See the literature cited in notes 2-4, 8, above. For a useful summary of related works brought to my attention after drafting this piece, see "Empowering Courts: Imposing a Duty to Act Loyally?" in Noura Karazivan, "Cooperative Federalism v Parliamentary Sovereignty: Revisiting the Role of Courts, Parliaments and Governments," in Alain-G Gagnon & Johanne Poirier, eds, *Canadian Federalism and Its Future: Actors and Institutions* (Montreal/Kingston: McGill-Queen's University Press, 2020) [forthcoming 18 June 2020]. That section highlights the role the inherence claims has played in modern Canadian constitutional scholarship. It also notes claims about the need to recognize a 'loyalty' principle by Paul Daly (in "L'abolition du registre des armes d'épaule: le rôle potentiel des principes non écrits" (2014) 23:4 Const Forum Const 41) and Kate Glover (in "Structural Cooperative Federalism" (2016) 76 SCLR (2d) 45). Whether Daly and Glover view the principle as 'inherent' is, however, less clear than in other cases. Both Karazivan and I also discuss Johanne Poirier's advocacy for federal loyalty.

10 "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23:4 Const Forum Const 20 (referring to loyalty as "solidarity"). Cyr cites Gamper for the inherence claim (*ibid* at 31). He also uses 'internal logic' language (*ibid* at 20). Per Cyr, the constitutional principles of autonomy and subsidiarity also independently support cooperative federalism. I discuss the relationship between loyalty, cooperation, and other principles below.

11 See "On 'Federal Loyalty,'" below. Loyalty is also absent in leading introductions to federalism, see e.g., Dimitrios Karmis & Wayne Norman, eds, *Theories of Federalism: A Reader* (New York: Palgrave MacMillan, 2005); Andreas Føllesdal, "Federalism" (7 June 2018), online: *The Stanford Encyclopedia of Philosophy* <plato.stanford.edu/entries/federalism/> [perma.cc/XWG6-6JU5].

Yet the value of the present analysis need not rely on widespread transnational support for the inherence claim. Clarifying what 'federal loyalty' means and whether and how it could be 'inherent' should also clarify the 'nature' of federalism. The reasons why the inherence claim appears prima facie plausible and worthy of defense further motivate and contextualize my analysis. Analyzing their potential merits will prove valuable regardless of whether the inherence claim has widespread support. Theoretically, for instance, knowing whether federalism requires federal loyalty should provide insight into the normative logic of federalism. My analysis is an example of how one can test other purported principles. Practically, in turn, my analysis can clarify debates about whether federal loyalty should be recognized in federal states. If, for instance, claims about federal loyalty's relationship to other constitutional values that are used to construct a plausible inherence claim do not withstand scrutiny, this provides reason to question claims that federal states should, let alone must, recognize such a principle. I accordingly turn to putting the inherence claim in its best light before critiquing it.

The inherence claim is a theoretical claim about the nature of federalism, though it is often asserted, rather than argued for in detail. The idea appears to be an assertion that two entities cannot both possess distinct powers if there is no guarantee that one entity will not grossly interfere with the other's powers, and that each side needs some level of consideration for the other side to guarantee non-interference.[12] This relies on a conceptually and empirically contestable conception of sovereignty that is rarely argued for and that I challenge below.

The conceptual case for federal loyalty instead usually relies on the idea that any plausible account of 'federalism' requires recognition of the inherence claim. This argument asserts that 'loyalty' is characteristic of 'principled federalism.'[13] 'Federalism' admits many distinctions. Recognizing federal loyalty as inherent to federalism purportedly allows one to overcome traditional distinctions by identifying an underlying normative core. Gaudreault-DesBiens helpfully characterizes this view when he notes that "recognition of federal loyalty as a dimension inherent in the principle of federalism is especially interest-

12 See e.g., Gamper, *supra* note 2; Gaudreault-DesBiens, "Cooperative," *supra* note 8; Jan Raeimon Nato, "Development of Duties of Federal Loyalty: Lessons Learned, Conversations to be Had" (Winner of Baxter Family Competition on Federalism, 2019), online (pdf): *McGill* <www.mcgill.ca/law/files/law/2019-baxter_federal-loyalty-lessons-discussions_jan-nato.pdf> [perma.cc/GK4Q-QH23]. This tentative distillation of the idea in these texts will, however, be challenged by further examinations below.

13 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 71, 78.

ing for Canada because it ignores the traditional borders erected between common law and civil law federations, competitive and cooperative federations, … [and] dual and integrated federations."[14] Loyalty is, apparently, a deeper principle underlying other distinctions. Such a principle is necessary for there to be a principled federalism. Recognizing the principle is what it *means* to be federalist. But, as seen below, even the forms of federalism most amenable to federal loyalty do not pick out 'federal loyalty' as a necessary feature, let alone the normative core, of federalism.

Other arguments accordingly posit ways that the truth of the inherence claim could make federalism more normatively compelling and/or otherwise provide fruitful legal or political tools. These speak to the reasons to adopt forms of federalism, not the *nature* of federalism, but could support the inherence claim. If the inherence claim is true, it can serve as a 'harmonizing' principle for federal states, providing a potentially valuable common ground for all such states.[15] Harmonization is, of course, highly contentious, but some plausible arguments could favour it and an inherent constitutional principle would aid harmonization across federal states. The inherence claim could also have potential benefits *in* particular states.[16] Theoretically, the inherence principle reflects and may support a reciprocity and/or formal parity between federal and sub-state governments federalism is designed to promote.[17] Traditional 'federalism' meant to provide different levels of government with exclusive powers. Inherence claim proponents state that federal loyalty's constraints on exercising those powers is necessary to protect them.[18]

While the necessity of federal loyalty for protecting different spheres of jurisdiction is partly what is at issue here and thus cannot justify the claim, one can identify reasons why proponents might think it is so. For instance, subjecting parties to the same constraints on their powers could ensure that powers are

14 Gaudreault-DesBiens, "Cooperative," *supra* note 8 at 3.

15 On harmonization as a goal of comparative constitutional law, see Michel Rosenfeld & András Sajó, "Introduction" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1 at 12-13.

16 The inherence claim can thus benefit particular states even if harmonization is problematic or impossible (as suggested by e.g., Martin Boodman, "The Myth of Harmonization of Laws" (1991) 39:4 Am J Comp L 699).

17 Gamper, *supra* note 2 champions reciprocity. The formal equality argument builds on suggestions in texts above.

18 See the works in notes 2-4, 8-11, above. It also appears implicit in Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back? Evolving and Competing Conceptions of Canadian Federalism" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 391.

exercised 'reciprocally,' and that each level of government would take care to ensure the other party's powers are respected.[19] At minimum, subjecting parties to the same formal constraints could make them formally equal in the scope of their powers. It could even equalize such powers. Where, for instance, a federal actor has powers that could be wielded to make it comparatively stronger than the other, requirements that the party exercise those powers with the other party's powers in mind could limit exercises that would produce substantive power differentials. Federal loyalty could accordingly minimize the dangers of a more powerful federal entity's 'overreaching' use of its formal or concurrent powers.[20] These results appear consistent with federalism's ends, however defined.[21] They could also help resolve power differentials as multi-national federations incorporate actors who faced past injustices. For example, proponents suggest that federal loyalty could aid Canadian-Indigenous relationships.[22]

The inherence claim may also be a valuable tool for constitutional theory-building. Federal loyalty shares affinities with other constitutional principles. Its inherence and affinities with those other principles could combine to form the normative framework for a cooperation-focused theory of federalism. This theory could provide building blocks for arguments that other constitutional principles should be considered part of the interpretative core of constitutional law in federal states. Most obviously, the cooperation required by non-trivial forms of federal loyalty fits well with 'cooperative federalism,' an increasingly popular conceptual posit whereby federal actors' powers are understood as overlapping in important ways and are to read in such a way as to allow their operational consistency where possible.[23] Constitutional courts in Canada and Switzerland thus appealed to federal loyalty when moving toward cooperative federalism,[24] potentially providing theoretical justification for deviations from past interpretative norms and, arguably, their respective constitutional

19 See e.g., note 17, above.

20 Note, however, that one of the best overviews of concurrent powers, Uwe Leonardy & Dirk Brand, "The Defect of the Constitution: Concurrent Powers Are Not Co-Operative or Competitive Powers" (2010) 4 J South African L 657, also argues that concurrent powers should not be understood as requiring cooperative powers.

21 See below for competing accounts of those ends.

22 Gaudreault-DesBiens, "Ethos," *supra* note 3.

23 This definition draws on overviews of the Canadian and transnational literatures in Arban *supra* note 4 at 249-50 and Gaudreault-DesBiens & Poirier, *supra* note 18 at 401-02. For the potentially strong fit between cooperative federalism and federal loyalty, see e.g., Gaudreault-DesBiens & Poirier as well as Gamper, *supra* note 2 and Nato, *supra* note 12. Cyr, *supra* note 10 argues that federal loyalty normatively justifies cooperative federalism. Gaudreault-DesBiens, "Cooperative," *supra* note 8 arguably provides a similar line of argumentation.

24 See e.g., Arban, *supra* note 4 at 249-51.

texts.[25] Some scholars also believe that autonomy, subsidiarity, and/or democracy support cooperative federalism and could combine with federal loyalty to form an underlying normative justification for cooperative understandings of federalism.[26] Federal loyalty may also fit well with 'constitutional loyalty,' the posit whereby all legal actors must do what the constitution stipulates.[27] At minimum, it can serve as a constraint on constitutional loyalty, suggesting that 'what the constitution stipulates' must be understood as inherently requiring cooperation, regardless of what the formal text of the constitution says.[28]

The inherence claim also provides a way of identifying federal states and a tool for interpreting laws in such states. This is a borderline theoretical-functional reason to adopt the claim. Marcus Klamert's statement on the inherence claim's potential implications for European Union (EU) law highlights these possibilities, saying "[i]f federal loyalty is inherent with federal systems, and if the EU is a federal construct, federal loyalty would be inherent with EU law."[29] This suggests that all federal constructs are consistent with federal loyalty. We can thus identify federal entities partly by looking at their potential consistency therewith. This could help resolve debates about what counts as a 'federal' state. We can then appeal to federal loyalty to interpret the constitutional rules of federal states absent explicit incorporation of the principle. This could contribute to interpretative debates by demonstrating that unwritten constitutional principles exist and can be used, and that federations can and should use the federal loyalty principle.[30]

Functionally, in turn, the inherence claim could serve several salutary ends, though whether these ends are in fact salutary may depend on one's conception of federalism in a way that will eventually undermine the claim that 'federalism' as such requires federal loyalty. As noted above, if the inherence claim is

25 Switzerland's federal constitution includes a loyalty principle, see *Switzerland's Constitution of 1999 with Amendments through 2014*, art 44, online (pdf): *Constitute Project* <www.constituteproject.org/constitution/Switzerland_2014.pdf?lang=en> [perma.cc/5QH3-2CF3] [*Swiss*]. The inherence claim is accordingly unnecessary there. Swiss use of loyalty still demonstrates the claim's potential value.

26 Cyr, *supra* note 10 argues that autonomy, subsidiarity, and 'solidarity' each provide a normative justification for cooperative federalism and jointly form the "normative structure" of Canadian federalism that requires a cooperative understanding thereof. This clearly links the principles, though Cyr also suggests that they are severable. Daly, *supra* note 9 argues that democracy and federal loyalty both support cooperative federalism. He does not clearly link the two principles, though he implicitly suggests that they can coexist as supports for the same end.

27 Gamper *supra* note 2 at 160ff details their possible relationships.

28 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 77-78 suggests that it also promotes "equilibrium" and "trust."

29 Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford: Oxford University Press, 2014) at 47.

30 Gaudreault-DesBiens, "Ethos," *supra* note 3, s 3 is devoted to such unwritten principles.

true, federal states can secure loyalty's benefits absent legal transplant.[31] Courts can adopt the principle as an interpretive tool and impose its constraints and other obligations on federal actors' exercises of their competences without explicit authority to do so under the constitution. Federal loyalty is supposed to secure 'smooth functioning' of federal systems, minimize conflicts between its constituent parts,[32] and "ensure constitutional stability and predictability by privileging solutions that discourage abrupt and unexpected shifts in the relationships between the governments of the federation."[33] The Constitutional Court of Germany likewise suggests that federal loyalty will support "national unity" and the "integrity" of the state and its parts.[34] An 'inherent' federal loyalty principle could support these ends where they are lacking. Requirements in the more demanding forms of federal loyalty, like forced consultation and/or negotiation, could further foster these plausible ends and values of federalism.[35]

The inherence claim could also provide concrete judicial tools for promoting cooperation and, consequently, produce results many would desire. Many consider cooperation itself a moral good. While 'federal loyalty' and 'cooperation' are both contested terms, many commitments under each specification of federal loyalty below appear to require cooperation.[36] The *kinds* of cooperation required by federal loyalty could also be valuable. For instance, some Canadian proponents of the inherence claim highlight how federal loyalty could have led to a different outcome in *Québec (AG) v Canada (AG)* as an example of the principle's potential for bolstering good cooperative action. In that case, Québec challenged the federal government's decision to destroy data in a database created pursuant to a federal-provincial long-gun registration program after the federal government decided to withdraw from the program. Québec sought to create a provincial registry and claimed that the federal government was bound to share data collected in the joint program. Every Justice of the Supreme Court of Canada (SCC) agreed that the federal government was under no such duty and that there was no way to force the federal government to share its data.[37] Yet proponents of federal loyalty argue that the principle could have led to a different outcome. For instance, Cyr's piece before the SCC's

31 Recall note 7, above, and surrounding. See also Klamert, *supra* note 29 at 47.

32 Gamper *supra* note 2 at 161.

33 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 62.

34 See e.g., Leonardy & Brand, *supra* note 20 at 661 (summarizing German caselaw cited elsewhere in this text).

35 For those requirements, which exist in some states, see the text and notes in "Demanding Federal Loyalty," below.

36 "On Federal Loyalty," below, outlines the specifications.

37 2015 SCC 14 [*Québec*]. Four dissenting judges did recognize a duty to cooperate. A majority decision requiring consultation could provide some support for a less demanding form of federal loyalty in

decision argued that denying access to and/or destroying the data violated the inherent federal solidarity principle and the relevant federal legislation should be "inapplicable to provinces seeking to access the data that [was] cooperatively collected."[38] While the SCC did not adopt Cyr's view, recent work argues that the principle would have required negotiation prior to the destruction of the materials and may have required keeping and/or sharing it.[39] Either result would have respected Québec's input and could have helped regulate firearms in Canada, appeasing many.[40] The inherence claim could also explain some case results. For instance, the inherence claim could provide a coherent explanation for why Québec cannot unilaterally secede from Canada: no other actor must 'buy-in' for a secession right to exist, but other constitutional actors' interests require that the right can only be exercised in cooperation with others.[41]

Whether these ends *are* salutary is questionable and claiming that any principled federalism must view them as salutary arguably begs the question,[42] but these ends are plausibly compelling in a way that at least justifies analyzing the inherence claim. A truth claim's potential functional value does not, of course, render it true, so some theory always remains necessary. Each claimed benefit of the inherence claim can only be defended with a plausible account of what the claim entails and how it brings about those ends. *Whether* these results are good results depends on the truth of the inherence claim — and whether all normatively justifiable accounts of federalism are necessarily consistent with

Canada. A more demanding form of federal loyalty would need to be inherent for the outcome of that case to differ though.

38 Cyr, *supra* note 10 at 33-34.

39 Nato, *supra* note 12. In another, pre-decision article, Daly, *supra* note 9 at 46 argued that the SCC should "formally recognize … an obligation of good faith" where the federal and provincial governments create cooperative regulative bodies pursuant to joint legislative programs in dual aspect areas. Per Daly, such a principle would have constrained the federal government's ability to destroy the data since its elimination would have negative effects on the provincial programs and required consultation prior to taking action that would undermine any cooperative regime, including the database. Whether Daly views the principle as 'inherent' is, again, unclear. Notably, however, Daly limits application of the principle only to joint/cooperative programs. This offers yet another articulation of the principle that can only be 'inherent' to forms of federalism that allow cooperative actions in the first place.

40 See e.g., criticisms in Jean Leclair, "Un principe affaibli," *La Presse* (3 April 2015), online: <www.lapresse.ca/debats/courrier-des-lecteurs/201503/31/01-4857128-un-principe-affaibli.php> [perma.cc/HZ4Z-8HQZ]; Johanne Poirier, "Souveraineté parlementaire et armes à feu: le fédéralisme coopératif dans la ligne de mire?" (2015) 45:1/2 RDUS 47. Yet, as noted below, one should not accept federal loyalty just to avoid the result in *Québec*, *supra* note 37.

41 Nato, *supra* note 12 at 22-24, discussing *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 29, 161 DLR (4th) 385 [*Secession*]. *Cf.* my discussion of the case below.

42 See "The Inherence Claim Cannot Explain Plausibly Justified Constitutional Law," below.

that claim, as its proponents propose. The functional reasons to support the inherence claim nonetheless justify analyzing the theoretical case for it.

The question is whether and how any account of the claim can produce its claimed benefits. Unfortunately, the theoretical and/or functional reasons to accept the inherence claim do not survive critical scrutiny — and the reasons to accept federal loyalty as normatively valuable do not support federal loyalty's claimed inherence. Indeed, the inherence claim cannot be rendered both substantive and coherent in a way that would produce any of the claimed benefits above. Attending to the forms that 'federalism' and 'federal loyalty' could take makes this clear.

On 'Federalism'

A vast literature provides conceptual analysis of 'federalism' and 'federal loyalty.' Yet each plausible definition of federalism fits uneasily with all leading ways of understanding federal loyalty and undermines the inherence claim. It suffices here to note that 'federalism' can be understood ideologically or institutionally. Ideological federalism views 'federalism' as an idea of political justice through a combination of unity and diversity with various political forms. Institutional federalism views political arrangements' formal features as distinctive of 'federalism.'

i. Ideological Federalism

Ideological federalism distinguishes the idea of federalism from the institutional forms that may realize it. Proponents distinguish federalism as an idea, and federations as one form of realizing that idea.[43] The idea is rooted in a desire to combine unity and diversity.[44] Federations are a form of realizing this aim where there is no subordination to the centre.[45] In other words,

43 See e.g., Ronald L Watts, *Comparing Federal Systems*, 3rd ed (Montréal: McGill-Queen's University Press, 2008) at 6.

44 Nicholas Aroney & John Kincaid, "Comparative Observations and Conclusions" in Nicholas Aroney & John Kincaid, eds, *Courts in Federal Countries: Federalists of Unitarists?* (Toronto: University of Toronto Press, 2017) 482 at 536. For the federalism equals unity plus diversity formula, see also Eugénie Brouillet, "The Federal Principle and the 2005 Balance of Powers" (2006) 34 SCLR (2d) 307 at 310; Michael Burgess, "Federalism and Federation: Putting the Record Straight" (2017), online: *50 Shades of Freedom* <50shadesoffederalism.com/theory/federalism-federation-putting-record-straight/> [perma.cc/2VWZ-E4LT].

45 Watts, *supra* note 43 at 8.

> Federalism is a normative doctrine: it promotes institutional design which favours unity and diversity, 'self-rule' and 'joint- rule,' 'autonomy' and 'participation,' within a single polity. … *[F]ederat-IONs* are real-life incarnations of this political concept.[46]

Whether all ideological understandings of federalism can be reduced to a 'unity plus diversity' schema is questionable in a way that immediately challenges the inherence claim.[47] But that schema is a useful placeholder in the present account. If federalism describes a variety of ideological positions with various ends, as I suspect, it will be *less* likely that each ideological form must combine with a non-trivial specification of federal loyalty. Indeed, many would deny that the inherence claim's functional 'benefits' are benefits at all.[48] The case for the inherence claim may already assume a federalist ideology amenable to federal loyalty in a way that begs the question of whether all plausible federalist ideologies must require it. But many ideological federal views, including those most amenable to the inherence claim, could be placed under the 'unity plus diversity' schema.[49] An 'inherent' principle should be consistent with — and presupposed by — the mainstream views that fit beneath it. Indeed, that schema may be most amenable to federal loyalty, making consistency here especially important for the inherence claim.

ii. Institutional Federalism

Institutional federalism views 'federalism' as the name for a set of institutional arrangements with defined features, regardless of their origins or the normative ideals that they seek to instantiate. Federalism can be used to promote various ends. Even if we focus on a single end, various institutional forms can promote unity and diversity. These facts support institutional federalism. For instance, on a classical understanding, federalism attempts to promote the benefits of large and small governance, not unity and diversity.[50] 'Normative justifications'

46 Johanne Poirier, "Who is Afraid of (Con)Federalism?" in Kris Deschouwer & Johanne Poirier, eds, *(Con)Federalism: Cure or Curse?* (Brussels: Re-Bel Initiative, 2015) 27 at 28, online (pdf): *Rethinking Belgium* <rethinkingbelgium.eu/wp-content/uploads/2019/08/Re-Bel-e-book-18.pdf> [perma.cc/WYM2-MZJB] [Poirier, "Afraid"] [emphasis in original].

47 See e.g., the sources in note 11, above. See also Daniel Weinstock, "Towards a Normative Theory of Federalism" (2001) 53:167 Intl Soc Science J 75. As Weinstock notes, the 'ideology' of federalism still requires greater elucidation.

48 *Ibid*. For examples of differing views, see e.g., commentary in *Québec*, *supra* note 37; *Secession*, *supra* note 41.

49 Aroney & Kincaid, *supra* note 44 demonstrate this. For a clearer example of potential overlaps, Johanne Poirier for one, both champions this ideological formulation ("Afraid," *supra* note 46) and elsewhere (Gaudreault-Desbiens & Poirier *supra* note 18) highlights the fundamental importance, if not inherence, of federal loyalty to federalism.

50 Martin Diamond, "The Ends of Federalism" (1973) 3:2 Publius: J Federalism 129 at 130.

for federalism include arguments that federalism best achieves the values of democracy, citizenship, and liberty.[51] Those are just three prominent approaches that are not obviously reducible to unity and diversity. Moreover, while federalism is often understood as undermining efficiency,[52] one can divide powers for the sake of efficiency.[53] The institutional federalist allows this conceptual possibility. It is then unclear whether the set of institutional forms that could realize these aims is sufficiently circumscribed so as to be useful for constitutional design. We even lack a clear indicator of the exact mix of unity and diversity needed to qualify as instantiating the idea. Highly centralized governance could theoretically provide the ideal mix. Nicholas Aroney and John Kincaid thus note that the meaning of ideological federalism must be "clarified."[54]

Institutional arrangements are supposed to more easily identify a unique political concept of 'federalism.' Yet proponents of institutional federalism debate which set of features are distinctive of federalism. Candidates include "the division of state functions between … different orders of government both enjoying political autonomy; … the supremacy of the federal/national constitution; and … a system of cooperation among the levels, including the judicial adjudication of disputes between and among the entities over the respective constitutional powers."[55] Clarity on which features are necessary is lacking. As seen below, cooperation may not be a necessary feature.

The ideological-institutional division is imperfect. Both definitions admit borderline cases. 'Hybrid' or 'quasi-federal' systems — including regional entities and 'devolved' systems — complicate the picture.[56] Some accounts contain ideological and institutional components, blurring boundaries.[57] Other distinctions are also important. For instance, ideological and institutional federalists both distinguish dualist federalism, in which each level of government has exclusive fields of jurisdiction that do not overlap with others' jurisdiction and in which they are free to act as they see fit, and cooperative federalism, where, "in most areas, decision-making and implementation require action by both levels

51 Weinstock, *supra* note 47.

52 See e.g., *ibid* at 77.

53 See e.g., Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009).

54 Aroney & Kincaid, *supra* note 44 at 536.

55 Palermo & Kössler, *supra* note 6 at 39.

56 See e.g., Watts, *supra* note 43; Daniel J Elazar, *Exploring Federalism* (Tuscaloosa, Ala: University of Alabama Press, 1987). For a more recent case study, see Joaquim Rius-Ulldemolins & Mariano M Zamorano, "Federalism, Cultural Policies, and Identity Pluralism: Cooperation and Conflict in the Spanish Quasi-Federal System" (2015) 45:2 Publius: J Federalism 167.

57 See e.g., Watts, *supra* note 43 at 8; Brouillet, *supra* note 44 at 311.

of government and thus their integration to a certain degree."[58] These nuances are, however, unlikely to change my analysis. The idealized types provided by the present division account for all paradigmatic federations. They are representative of most mainstream views. If federal loyalty is inherent to the system, it is likely to be inherent to a mainstream view capturing all paradigms. An 'inherent' principle should be consistent with one of the broadest definitions of federalism that accounts for those cases. Whether it is inherent to idiosyncratic cases says little about its general inherence. The ideological-institutional division thus suffices here. It is unlikely that adopting a different definition of federalism will provide a different conclusion on the truth of the inherence claim.

On 'Federal Loyalty'

'Federal loyalty' also admits different definitions. Its most basic form asserts that "the federation and the constituent states … are mutually bound to consider each other's interests and to act loyally vis-à-vis each other."[59] Yet the requirements to 'act loyally' and, by extension, the scope of federal loyalty, admit multiple readings, from the trivial to the very demanding. I will survey three representative interpretations before examining their relationship to 'federalism.'

i. Trivial Federal Loyalty

The first interpretation of federal loyalty merely requires considering others' interests. This makes federal loyalty trivial. Loyalty is always "an internal limit to the exercise of a competence. The argument … [for a loyalty violation] is not that the … entity over-exercises its competence outwardly, but that, within the very limits of the concerned subject-matter, it does not at all or too little consider the interests of the other tier."[60]

This approach struggles to ground a normative legal principle. Mere consideration cannot create enforceable legal obligations. Attempts to specify the requirement using other normative terms do not solve the issue and raise others. For instance, if 'to act loyally' is just an obligation to "respect each other,"[61] the scope of consideration required remains opaque and potentially trivial. A substantive version of this definition requires a better understand of the duties

58 Palermo & Kössler, *supra* note 6 at 46 (with more distinctions at 44ff).
59 Gamper, *supra* note 2 at 160.
60 *Ibid* at 164.
61 *Ibid* at 162.

of respect. Those duties need to be grounded and may make loyalty redundant when so-grounded.

Federal loyalty thus needs to be more than just consideration of or respect for others' interests. Otherwise, it is merely 'trivial federal loyalty' with little unique normative content.

ii. Demanding Federal Loyalty

At the other end of the spectrum, mainstream interpretations of federal loyalty posit panoplies of demanding obligations governments must fulfill when exercising legislative competences. On one interpretation, Germany's federal loyalty principle "imposes … a set of core duties … to prevent major ruptures of the federation's equilibrium"[62] *minimally* including:

> a negative duty to show self-restraint when potentially affecting the others' interests … limiting as much as possible negative externalities[,] … a positive duty to act in good faith … [which] requires that a level of government should not try to do indirectly what it is forbidden to do directly[,] … [recognizing] the existence of a federal common good that transcends the federated units' individual or aggregate interests[,] … [and rejecting] unilateral appropriation … of the power to define that common good.[63]

Federal actors must not only refrain from actions that may limit other actors' abilities to exercise their competences but must consult and cooperate with other actors to avoid such limitations. On another demanding reading that reflects South Africa's explicit constitutional requirements,[64] federal loyalty requires cooperation, coordination, consultation, and exhaustion of all remedies prior to judicial remedy to avoid encroachment on others.[65] Actors must take substantive steps to cooperate and coordinate when passing legislation. When, inevitably, conflicts arise, they must attempt to resolve the issue absent judicial interference. Call an interpretation requiring all substantive obligations associated with Germany or South Africa 'demanding federal loyalty.'

62 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 69.

63 *Ibid* at 77-78. His view relies on mainstream readings of *Atomic Weapons Referenda II Case*, 8 BVerfGE 122 (1958); *Television 1 Case*, 12 BVerfGE 205 (1961); and *Finance Equalization III*, 86 BVerfGE 148 (1992).

64 *The Constitution of the Republic of South Africa, 1996*, s 41.

65 Leonardy & Brand, *supra* note 20 at 663.

iii. Median Federal Loyalty

The final interpretation states that loyalty requires a subset of the 'demanding' obligations. Call this 'median federal loyalty.' South Africa's demanding text is something of an outlier in transnational law. Even EU law, which includes a series of substantive obligations,[66] many of which pertain to institutional cooperation and conflict resolution,[67] may not require full coordination. This arguably makes the German version of demanding federal loyalty more plausible. Yet the obligations in the mainstream German view may only apply "whenever appropriate."[68] The scope of federal loyalty remains unclear. As it stands, federal loyalty is used to apply to a range of duties from "'[h]ard,' confrontational rules on conflict resolution such as supremacy, pre-emption and duties of abstention" to "'softer,' more cooperative duties of conflict prevention such as duties of consideration and coordination."[69] Deciding which of these are truly required by federal loyalty, and when, remains difficult. Even a principle for deciding which duties are appropriate when is difficult to parse. One candidate is that governments should not pass legislation that "is unreasonable and likely to paralyze institutional mechanisms."[70] This leaves ample room for interpretation and may not explain the whole legal phenomenon. For instance, many non-cooperative, let alone uncoordinated, actions will not produce 'paralysis.'[71]

Given the issues with each interpretation, I remain agnostic between accounts of federal loyalty's demands. I believe that a non-trivial, non-overdemanding federal loyalty principle requires that each level of government in a federal system make meaningful efforts to ensure non-interference with the jurisdiction of the other. But I need not detail this definition: again, as I explain below, the inherence claim is problematic on *any* definition of federal loyalty.

66 Miglio, *supra* note 4 at 481-83; Klamert, *supra* note 29.

67 See e.g., Klamert, *supra* note 29 at 14-15.

68 Arban, *supra* note 4 at 248-49 and sources therein.

69 Klamert, *supra* note 29 at vii.

70 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 71.

71 Whether Swiss federal loyalty requirements qualify as a 'demanding' or 'median' is debatable, but difficulties with determining how to understand the Swiss test are emblematic of deficiencies with median federal loyalty. Per *Swiss*, *supra* note 25, art 44, the "Confederation" and "Cantons" are bound to "support each other in the fulfilment of their duties" and "owe each other a duty of consideration and support" that requires that they "provide each other with administrative assistance and mutual judicial assistance." Both of these requirements are clear. Yet the further duty to coordinate is qualified by a statement that it "generally" applies and the duty to resolve matters through negotiation or mediation only applies "wherever possible." Depending on how one reads these qualifications, Switzerland could provide an example of demanding federal loyalty or a version of median federal loyalty that raises questions about when the obligations ought to apply. In both cases, the contours of the principle remain difficult to parse. Belgium may also challenge claims about the extent to which South Africa should be understood as an outlier.

Conceptually Dividing Federal Loyalty and Federalism: An Analytical Defense

Several theoretical, legal, and practical issues undermine the inherence claim. I will address six of these issues.

i. 'Federalism' Does Not Entail Any Plausible Federal Loyalty Principle

First, and most importantly from a theoretical perspective, no version of federal loyalty follows directly from either plausible definition of federalism. Ideological federalism faces a clear problem here. Ideological federalists committed to federal loyalty must either specify the correct combination of unity and diversity demanded by their view — which has proven impossible to date and can only be done at the expense of the kind of ecumenicism ideological federalism is designed to accommodate — or admit that federal loyalty is normatively inert and/or trivial. This is hardly what can be expected of an 'inherent' constitutional principle worth discussing in detail.

Nothing about the combination of unity and diversity as such requires the kind of substantive obligations required by demanding or median federal loyalty. While many argue that a commitment to diversity requires some sense of respect for others, the *amount* of diversity that must be accommodated in a federal system remains unclear in ideological federalism.[72] No one has established that the level of diversity required entails the kind of substantive obligations seen in demanding or even median federal loyalty in a non-question-begging manner. It is unclear how such an argument *could* be adduced. Stating that any recognition of diversity minimally requires respect between diverse actors may seem like a plausible ideological position. But this requirement then seems trivial and unenforceable as a constitutional legal norm. The nature of the respect remains opaque. Federal loyalty is thus inapplicable to some combinations of unity and diversity or applicable in a way that leaves federal loyalty undefined and potentially trivial.

Moreover, to the extent that one can establish that the proper combination of unity and diversity requires the kind of substantive entitlements that would make federal loyalty non-trivial, this finding comes at the expense of the kind of institutional ecumenicism ideological federalism is supposedly designed to provide. Ideological federalism's consistency with many institutional arrange-

72 For example, the quantum is lacking in sources in note 44, above.

ments is its hallmark feature. Yet if demanding federal loyalty is inherent in ideological federalism, many institutional forms that ideological federalism is supposed to recognize as 'federal' are not federal after all. Even dualist and/or otherwise uncooperative federat*ions* no longer qualify. Where dualist federations — including the United States of America (USA) and Canada — are representative modern federations, this is a great explanatory loss. Dualism remains a combination of unity and diversity even if one values diversity more. It is hard to explain why dualist states should not qualify as federalist on the ideological schema.

Federal loyalty faces a similar problem in institutional federalism: it is either demanding enough to make many paradigmatic cases non-federal or it is trivial. Even median loyalty may not be descriptively adequate for institutional federalists and its collection of duties may be ad hoc in any case. Institutional federalism's definition of federalism is built on descriptive phenomena. Yet while some level of cooperation is sometimes said to be part of the "skeleton" of institutional federalism,[73] the obligations imposed by demanding and median federal loyalty are, again, not part of the architecture of paradigmatic federations. Even the USA may not qualify on this approach.[74] It is implausible that an empirically-grounded institutional federalism can accommodate the view that dualist federations without loyalty principles are not federations.

Dualism's commitment to exclusivity and the possibility of non-cooperation seems at odds with anything beyond trivial federal loyalty, which remains opaque, inapplicable, and ultimately normatively inert. Inherence claim advocates take a lack of fit with dualism to be a benefit of loyalty, championing its ability to overcome the strictures of dualism since "federal loyalty acts at a deeper level as it is inherent to federalism, irrespective of the abstract model, be it cooperative or competitive, a given federation is deemed to reflect."[75] Yet dualist states exist and one need not promote a return to 'watertight compartments'[76] of exclusive jurisdiction to recognize that sovereignty should allow for non-cooperation and non-coordination. This is why Canadian case law continues to effectively state that there is no duty of loyalty in Canada even as Canada moves from full dualism to a more cooperative model: even where two exclusive zones of jurisdiction overlap, your own exclusive jurisdiction should

73 Palermo & Kössler, *supra* note 6 at 39.

74 Aroney & Kincaid, *supra* note 44.

75 Gaudreault-DesBiens, "Cooperative," *supra* note 8 at 14.

76 See e.g., Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225 on paradigmatically dualist Canada.

be exercisable even if it will have a negative impact on others.[77] To say anything less is to deny your exclusive competence.[78]

ii. Federal Loyalty Is Inconsistent with Important Features of Federalism

Indeed, one should also deny the inherence claim because, second, the claim fits uneasily with a variety of federal phenomena we should want federalism to accommodate. Failure to accommodate these phenomena is descriptively and normatively problematic.

Federal loyalty is not only not required by plausible federal theories, but at best fits uneasily with federalists' recognition and incorporation of phenomena that should be conceptually available to them, and that there may be reason for many federal jurisdictions to adopt. Dualist federalism is just one example. While dualism is, perhaps, being replaced by cooperative federalism in many states, dualism remains a common phenomenon.[79] There are also normative reasons to allow it, including its presence in the range of reasonable combinations of unity and diversity, the legitimacy of constitutional processes that recognize it, and its status as an institution that fits the institutional form of many federations and can fulfill aims, like efficiency, that institutional federalists take to be acceptable ends of federalism.[80]

The inherence claim also fits uneasily with other constitutional principles. Inherence claim proponents are committed to the existence of unwritten constitutional principles. Constitutional principles are meant to be read in light of one another.[81] While the principles can be in tension with one another, they

77 *Québec*, *supra* note 37.

78 Dualism and federal loyalty are not, of course, formally inconsistent. After all, Belgium recognizes both principles, see Palermo & Kössler, *supra* note 6 at 249. Yet, as noted below, Belgium is the only state that combines them and its combination appears to come at the expense of some of federal loyalty's purported benefits. One idiosyncratic combination surely cannot be evidence of the inherence of federal loyalty even in dualist states. The Belgian choice should be viewed as a choice. The default view of sovereignty should remain in place absent such a choice — and there is reason to question the value of Belgium's choice given the lack of easy fit between these principles. To be fair, however, a more positive discussion of the Belgian case appears in Anne Catherine Rasson, "Le principe du «vivre ensemble» belge : une épopée constitutionnelle" (2014) 1 Chroniques Dr Public 25. Cyr, *supra* note 10's argument that sovereignty requires a form of "positive autonomy" that entails a form of cooperative federalism even in seemingly dualist states then rests on a very controversial view of autonomy.

79 Even Palermo & Kössler, *supra* note 6 at 46 recognize this much, though they attempt to undermine dualism.

80 See notes 11, 50-51, and 53, above, and surrounding.

81 *Secession*, *supra* note 41 at para 29.

should be capable of being rendered consistent with each other; otherwise, they will likely fail to properly guide constitutional action.[82] Some federal states may be unable to render federal loyalty consistent with their other constitutional principles. For instance, while federal loyalty is said to follow from federal solidarity,[83] its connection to the legal solidarity principle is difficult to parse[84] and federalism can undermine moral solidarity.[85]

Parliamentary sovereignty, though controversial, also sits uneasily with federal loyalty. A majority of the SCC explicitly denied that the cooperative obligations characteristic of plausible accounts of federal loyalty existed in Canada because recognition of those principles would undermine Parliamentary sovereignty.[86] Yet such sovereignty is a strong candidate for a principle of federalism.[87] If there are domains of exclusive jurisdiction, actors within them should be able to exercise them alone. This is what it means to be sovereign in one's jurisdiction. This not only requires the conceptual possibility of dualism with respect to the division of powers between state and sub-state bodies. It also requires that legislators be able to act free from judicial interference in some cases. More demanding forms of federal loyalty appear inconsistent with this requirement. Making all legislative action subject to judicial review for proper coordination or consultation, for instance, is a significant restraint on a 'sovereign.'[88]

82 An anonymous reviewer suggests that reading constitutional principles as in tension with one another can have positive benefits and offers Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart, 2014) as evidence that such a reading has proved fruitful in the Canadian context. I take Webber's point about tension to apply at a higher level of analysis insofar as the 'constitutional positions' he discusses appear to speak to more comprehensive views of the constitutional order. I am focused on basic principles, but tensions between worldviews can produce tensions between principles and I can see how Webber's point can apply equally to constitutional principles in any case. It remains the case that constitutional orders are, at least doctrinally, supposed to offer consistent guidance and the principles of at least Canadian constitutional law are supposed to be co-constitutive within that order such that 'tension' can only go so far and consistency must remain possible. Whether the tensions here qualify as inconsistencies is, of course, debatable. But the possibility that they could render the constitutional order less coherent plausibly suffices to question whether federal loyalty is 'inherent' to federalism.

83 Gaudreault-DesBiens, "Experiment," *supra* note 3 at 122 and Cyr, *supra* note 10 discuss them interchangeably.

84 Arban, *supra* note 4 views them as differing, making loyalty non-redundant.

85 Weinstock, *supra* note 47 at 79.

86 *Québec*, *supra* note 37 at para 20.

87 *Ibid*. See also e.g., John McGarry, "The Principle of Parliamentary Sovereignty" 32:4 (2012) LS 577.

88 *Québec*, *supra* note 37. For a longer explanation, history, and defense of Parliamentary sovereignty, which also highlights the many criticisms thereof, see Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Oxford University Press, 1999).

Even if accepting Parliamentary sovereignty as 'inherent' to federalism begs the question at issue, its recognition as a constitutional principle in paradigmatically federal states raises a problem for those who respect a broader range of unwritten constitutional principles and/or the constitutional text. In short, it is not clear that federal loyalty can be read as consistent with other principles already clearly recognized in many constitutional systems. Parliamentary sovereignty is in other constitutions and/or recognized as inherent to other constitutional arrangements.[89] Stating that the Parliamentary sovereignty principle originated largely in Britain and is only distinctive of British colonies accordingly also does not undermine this objection to the inherence claim.[90] Indeed, federal loyalty is similarly only recognized in certain kinds of states.[91] At best, the inherence claim would introduce considerable unease to many jurisdictions.

Federal loyalty also fits uneasily with commitments to flexible intergovernmental relations. Intergovernmental relations are admittedly often based on comity, "especially in countries following the model of administrative federalism. This is because the coordination of national legislation and subnational implementation quite evidently requires a high degree of mutual understanding and cooperation."[92] Yet this model is by no means a uniform model of intergovernmental relations. Many other arrangements exist.[93] While differences could be described as mere 'tokens' "of the respective 'culture of Federalism' put into practice,"[94] not all of them include the kind of substantive obligations required by demanding or median federal loyalty. Federal loyalty must collapse into its trivial version to explain variations in intergovernmental relations in federal states. Yet there is ample reason to think that federalism should allow such variance.[95] For example, it is difficult to see why truly sovereign contracting parties in constitutional negotiations should be required to agree to cooperate, coordinate, etc. in the future or why we should deny the output the title of 'federation' if it otherwise shares all institutional forms and/or shows (non-trivial) commitments to both unity and diversity.

Dualism, Parliamentary sovereignty, and flexible intergovernmental relations are just three constitutional phenomena that at best fit uneasily with fed-

89 See e.g., Goldsworthy, *supra* note 88; McGarry, *supra* note 87.

90 McGarry, *supra* note 87, at least, admittedly focuses mostly on Britain.

91 See "There Are Practical Reasons to Deny the Inherence Claim," below.

92 Palermo & Kössler, *supra* note 6 at 249.

93 Johanne Poirier, Cheryl Saunders & John Kincaid, eds, *Intergovernmental Relations in Federal Systems: Comparative Structures and Dynamics* (Oxford: Oxford University Press, 2015).

94 Gamper, *supra* note 2 at 170.

95 Poirier, Saunders & Kincaid, *supra* note 93.

eral loyalty and federalist states should nonetheless be able to and do incorporate while remaining federalist on any plausible definition.[96] It is, then, not only the case that plausible definitions of federalism do not require non-trivial versions of federal loyalty. Non-trivial federal loyalty may even create conflicts with other constitutional forms, principles, and tools that should remain available to federalists.

None of this means that federal loyalty is incompatible with federalism or other principles thereof. It may fit well with autonomy and subsidiarity, as Cyr claims, and/or with democracy, which Paul Daly views as loyalty's companion principle in arguments for cooperative federalism.[97] The relationship between subsidiarity and federalism is, perhaps, more complex than many suppose, so hanging the inherence of loyalty on the inherence of subsidiarity strikes me as suspect.[98] Moreover, Cyr's argument for autonomy as a principle of federalism requiring a cooperative understanding thereof posits a form of 'positive' autonomy that is likely to remain highly contentious and Daly does not even link democracy and loyalty so much as he shows that both could support cooperative federalism.[99] Yet I remain open to the possibility that these principles can form a coherent whole. Federal states can adopt a federal loyalty principle without becoming non-federal. Doing so may help promote other principles of federalism and/or federalism-adjacent principles. It is, however, worth noting that Cyr and Daly's arguments both aim to promote cooperative federalisms in any case.[100] Even if one accepts their collection of principles as a consistent whole, they only show that federal loyalty can be part of a collection of principles that support *cooperative* federalism. Some options above may still be off the federal 'table.' The main point here is merely that federal loyalty is in tension with some federalist and/or federalism-adjacent principles and this undermines the

96 For another example, forms of federal loyalty that require exhausting other remedies before taking an issue to judiciary also seem inconsistent with the existence of abstract review in many federations. Of course, as an anonymous reviewer notes, Parliamentary sovereignty, for one, could be an even less plausible candidate principle of federalism than federal loyalty. I need not settle that issue here. Even if that is so, considerations in the text around notes 88-90, above, would still challenge the inherence claim. Parliamentary sovereignty is a clear principle in many federal states.

97 Daly, *supra* note 9; Cyr, *supra* note 10.

98 As NW Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018) c 7 notes, 'subsidiarity' and 'federalism' are distinct and severable principles. Subsidiarity is just one way to allocate powers in a state. Federalism's institutional and, I suspect, even ideological commitments do not obviously require subsidiarity.

99 Daly, *supra* note 9; Cyr, *supra* note 10. Cyr's claim at 29 that subsidiarity requires that different levels of government help each other is more contentious still. Even if one could vindicate it, doing so would not show that federal loyalty is inherent to federalism if subsidiarity and federalism are severable as Barber, *supra* note 98 suggests.

100 Daly, *supra* note 9; Cyr, *supra* note 10.

inherence claim and raises questions about whether adopting federal loyalty is wise where one values other principles.

iii. The Case for the Inherence Claim Is Lacking on Its Own Terms

One should also deny the inherence claim because, third, the positive reasons offered in its favour are unpersuasive. One of the best defenses of the inherence claim grounds its case for federal loyalty as an inherent feature of federalism in the:

> (1) fact that intergovernmental organizations are constitutionally protected;[101]
>
> (2) fact of vertical distribution of powers; and[102]
>
> (3) need for effective functioning of the federation.[103]

The first approach is unpersuasive and not empirically uniform. The same is true of the related claim that all federal states recognize something like federal loyalty.[104] Not all nations recognize the principle's analogues. Moreover, the best empirical case here requires making 'federal loyalty' equivalent to other phenomena, like 'cooperative federalism' and 'solidarity.'[105] These concepts are non-reducible to one another and should remain different in constitutional theory.[106]

The second approach is more compelling, but under-described. Per Gamper, "a constitution would not willingly allocate powers at different levels without safeguarding that powers are exercised in a manner that does not violate the other."[107] It must accordingly protect against overzealous use of one's own powers and explicit infringements of another's.[108] Yet the scope of these requirements is unclear. They may not require 'loyalty.' Leave aside the difficult issue of deciding what qualifies as 'overzealous' use. Exclusive competences can still be adequately protected absent coordination or pre-judicial conflict resolution. Abstract judicial review may provide the *best* protection of a division of powers. Might 'overzealous' use also be possible without cooperation agreements? The

101 Gamper, *supra* note 2 at 169.
102 *Ibid*.
103 *Ibid* at 161.
104 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 53.
105 *Ibid*.
106 Arban, *supra* note 4. A similar concern applies to Cyr, *supra* note 10's solidarity-based view, though charity demands that I accept them as equivalent when assessing his other arguments that may not rely on an equivalence.
107 Gamper, *supra* note 2 at 169.
108 *Ibid*.

empirical case that violations are more common in dualist states has not been made. The case for non-trivial substantive federal loyalty requirements thus seems underdeveloped. Avoiding violations of others' legislative competence is, in turn, a core judicial function in any state with judicial review.[109] Empirically, it does not seem like a federal loyalty principle is necessary for judges to fulfill this role.

The third approach arguably does not provide a normative case for federal loyalty. Gamper grounds this line of defense for the inherence claim in

> the *pactum foederis*: unless all tiers cooperate in a federal state, an effective functioning of that state will not be possible. … [T]he idea of the covenant … stands behind both types of loyalty, namely a pre-constitutional covenant that legitimizes the foundation of a state, and a covenant between the constituent states that legitimizes the federal state. Loyalty, in both cases, does not go without legitimacy [derived] from the … peoples, [though potentially] mediated by a constitutional convention.[110]

This approach has substantial flaws as a normative theory. Its emphasis on 'the people' as the source of legitimacy is controversial at best. It also relies on a questionable understanding of the methods of instantiating federalism. Per Gamper, "federal loyalty means that the territorial entities of a compound state oblige themselves to respect each other due to their agreement to found the compound state."[111] Yet it is unlikely that all federalist states must be 'compounds' — viz. states formed through the joint decision of pre-existing entities to form a larger state — from an ideological federalist perspective. Those who decouple federal*ism* and its institutional structures explicitly state that only some manifestations are compounds.[112] Institutionalists must then recognize that not all federal structures are meant to be compound states. The relation between harmony and loyalty is likewise empirically unvalidated, undermining the claim.

Cyr offers a potentially more compelling argument for federal loyalty, but it too is unlikely to support the inherence claim. Cyr rightly notes that federal entities are part of the same state and the constituents of each entity are co-citizens. He then argues that this entails that each entity should refrain from "hurting" other entities:[113] "[h]urting federal partners amounts to hurting the

109 Ethiopia and, to some extent, Switzerland are outliers, see Aroney & Kincaid, *supra* note 44 at 488-89.

110 Gamper, *supra* note 2 at 161.

111 *Ibid* at 162.

112 See e.g., Elazar, *supra* note 56.

113 Cyr, *supra* note 10 at 30-31.

shared body politic."[114] Each entity should also "positively assist" the others.[115] Each level of government must "protect and promote the interests" of that shared body politic.[116] The federal government, for example, owes duties to all citizens and should not frustrate the interests of those citizens when they are being further by provincial bodies and vice versa. Powers should accordingly be interpreted in ways that "sustain the common body politics."[117]

Respectfully, however, a duty not to 'hurt' other federal entities also requires specification and it is unclear why any specification should require non-trivial federal loyalty. For instance, while Cyr specifies it partly in terms of a duty not to create negative externalities, he also notes that federal constitutions create specific allocations of powers to avoid externalities drafters deem unacceptable.[118] I then fail to see why one must 'read in' another principle to avoid externalities. Moreover, Cyr's argument seems to presuppose an understanding of citizens' interests independent of politics and/or reflected equally in each level's politics. Yet policies enacted by democratically elected governments at all levels plausibly further the identified interests of the 'body politic.' Citizens empower each level of government to act *within its mandate* to further interests they identify democratically. Adopting strong or even median federal loyalty could undermine furtherance of those interests, even requiring a government to go against its own interests. A weaker federal loyalty would raise other problems above and below.

iv. The Inherence Claim Cannot Explain Plausibly Justified Constitutional Law

Moving to the legal sphere, fourth, the inherence claim cannot explain the seemingly justified constitutional law of many states. This point can be addressed on a case-by-case basis and at the structural level. The case-by-case analysis is difficult to complete without begging important questions, but there are at least compelling independent reasons to support cases that do not adopt federal loyalty. *Québec* actually offers an example.[119] While that case remains controversial, the federal case for sovereignty over the data it collected has some merit. Judicial unanimity on this point remains notable. While many were not satisfied with the result, the provincial alternative requiring that the federal

114 *Ibid* at 21.
115 *Ibid* at 31.
116 *Ibid* at 21.
117 *Ibid* at 31.
118 *Ibid* at 31-32. Daly, *supra* note 9 use of 'hurt'-based language is likewise problematic.
119 Recall notes 38-41, above, and surrounding, suggesting that it could support the inherence claim.

government act against its own policy interest is also potentially problematic given the analysis above.[120] Indeed, regardless of what one thinks about that case, a principle under which purported sovereigns are required to act against their interests is at least prima facie disconcerting. This is plausibly true even when realizing the interests will negatively impact others. For instance, respecting various provincial interests negatively impacted federal plans to create a national security regulator, but judicial decisions not to require even *negotiations* for national securities regulation appear justifiable to many.[121]

Regardless of what one thinks about any case, the inherence claim also, and more importantly, cannot explain why some states explicitly recognize the principle in their constitutional texts and others choose not to. This is a structural problem. Explicit recognition of federal loyalty raises questions about the inherence claim. Belgium, Switzerland, South Africa, and the EU enshrine the principle.[122] Yet explicit constitutional provisions requiring federal loyalty in given federal jurisdictions are at best redundant if the inherence claim is true. While explicitly incorporating inherent principles could, in theory, be valuable for other reasons,[123] the fact that states explicitly choose not to recognize the principle provides further reason to question the federal loyalty principle's purported 'inherence.' States know that they can recognize it and choose not to do so. Assuming that they incorporated principles that they knew others explicitly recognized and did not explicitly recognize themselves violates the basic constitutional rule of interpretation under which drafters' choices are intentional.[124] Where drafters know that they could explicitly incorporate a principle and do not do so, saying they assumed it was inherent is at best challenging from a legal point of view. It is even more challenging where courts in some states

120 Thank you to an anonymous reviewer for highlighting this point.

121 See e.g., *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [*Securities*].

122 Gaudreault-DesBiens, "Cooperative," *supra* note 8 at 2; Arban, *supra* note 4 at 250-51; Klamert, *supra* note 29.

123 Belgium recognized federal loyalty pre-enshrinement; *Canton de Berne c Canton du Jura*, TF, 1ère Cour de Droit Public (1992) (Belgium). One might think that other constitutional principles predate their enshrinement. Gamper, *supra* note 2 at 167 suggests that states enshrine the principle because they do not want to leave loyalty "up to courts." But little evidence that this motivated relevant actors is provided there or in other texts on federal loyalty.

124 Both the 'originalist' who interprets the constitutional text predominantly based on the framers' intent and the proponent of 'purposive' interpretation who views legislative intent as a mere indicium of constitutional purpose should be able to agree on this much. 'Textualist' approaches to unwritten norms may be more complicated still. My favourite text on 'purposive' interpretative, which contrasts it with other approaches, remains Aharon Barak, *Purposive Interpretation in the Law*, translated by Sari Bashi (Princeton: Princeton: University Press, 2005). Like Barak, I believe that any plausible purposive interpretation must view the constitutional text as an essential component in identifying its purpose. We may disagree on how to weigh the relative value of text, though a full analysis of this is beyond the present inquiry.

have identified a set of unwritten federal principles that does not include federal loyalty.[125] Authorities in those states arguably already identified the principles they take to be 'inherent.'

While there is reason to question federal loyalty's application in some cases, then, the problem here is not primarily case-based. We simply cannot impute an assumption that inherent principles will be recognized to drafters who know that not all courts recognize federal loyalty as inherent. It is more plausible and consistent with constitutional norms to assume intentional desires not to recognize the principle. Recognizing it as inherent to the system then undermines the original constitutional agreement. Amendment more legitimately remedies past 'errors.'

v. The Inherence Claim Cannot Permit Varied Relationships Between Constitutional Texts and Constitutional Principles in Existing Federations

Fifth, the rule of law in such states does not allow recognition of federal loyalty as an underlying principle. Once more, either many seemingly federal states are not really federal, federal loyalty is not inherent to federalism, or federal loyalty can be invoked to overrule the constitutional text in violation of the rule of law. I described my issues with the first lemma of this problem above. The third not only leads to a violation of the rule of law, but also of the nature of constitutional principles. Some states are explicitly dualist.[126] The rule of law requires attending to the text. To go from explicit dualism to 'cooperativism' in such states violates the constitutional text. Unwritten principles are not supposed to be able to do that. While 'purposive' theories of interpretation suggest that the text can be interpreted in different ways over time to reflect how that purpose can be realized differently in different eras — and some states adopt this approach to constitutional interpretation — even those theories are limited by the constitutional text. One cannot simply read a dual set of exclusive competences as necessarily entailing cooperation, and states seem to recognize this.[127] Even

125 For example, Canada does not include federal loyalty in its constitutional principles in *Secession*, *supra* note 41.

126 Even Gaudreault-DesBiens & Poirier, *supra* note 18 recognize this at 398.

127 The majority judgment in *Québec*, *supra* note 37, especially at paras 17-20 is again notable here. Canadian constitutional law has subscribed to a "living tree" doctrine for nearly a century, see *Edwards v Canada (AG)*, [1930] AC 124, [1929] UKPC 86. Yet the majority in *Québec* at para 18 rightly noted that "the primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework" and that neither a principle of cooperative federalism many would like to read into the constitutional text — perhaps on purposive grounds — or cooperative actions between levels of governments could alter the basic dualist structure of Canadian federalism.

saying that the principle is 'subordinate' to written text, as it is in Germany,[128] presents a similar problem: either texts that explicitly disavow federal loyalty are not federalist or the principle is not inherent as claimed. Denying the inherence claim is preferable, especially given other reasons to question it.

While courts can recognize unwritten constitutional principles on several theories of interpretation and can do so as a matter of legal doctrine in many states, adding a principle that would change the fundamental structure of the division of powers within a more fundamental constitutional text should require amendment. Agreements to deviate may be rational,[129] but remain deviations. No plausible understanding of 'principles' justifies deviations from the text. Constitutional loyalty may accordingly, contra Gamper, *require* deviation from federal loyalty.[130] The practice of intergovernmental relations in dualist states may often include ample de facto cooperation.[131] Yet we should want governments there and elsewhere to be able to say 'no' to certain cooperative arrangements if we truly value diversity. The SCC thus allows provinces to opt out of cooperative schemes and stresses this possibility as a feature that allows such constitutionality.[132] Still other jurisdictions explicitly chose not to go the integration route. The rule of law and 'nature' of constitutional principles require allowing them that much.

vi. There Are Practical Reasons to Deny the Inherence Claim

There are, moreover and sixth, practical reasons not to accept the inherence claim. Some may justify decisions not to adopt federal loyalty in some federal states. Federalism's aforementioned ability to undermine moral solidarity is one example. For another, related to issues above, constitutionalizing federal loyalty may create practical problems in intergovernmental relations. Even if federal loyalty were a component of some ideal form of intergovernmental relations and constitutional drafters should commit to its basic tenants, there would still be reason not to adopt the inherence claim if it entailed that federations must constitutionalize the principle. Flexibility is a benefit of intergovernmental relations in one dominant tradition.[133] Constitutionalizing any principles of such relations can thus be problematic. There is reason to keep them more infor-

128 Palermo & Kössler, *supra* note 6 at 250.
129 Bednar, *supra* note 53.
130 See also Aroney & Kincaid, *supra* note 44.
131 Gamper, *supra* note 2. See also Gaudreault-DesBiens & Poirier, *supra* note 18.
132 *Securities*, *supra* note 121.
133 Watts, *supra* note 43.

mal.[134] Recognizing the inherence claim may thus create practical problems in some states.

Federal loyalty also tends to be recognized in certain types of states, undermining its claimed necessity. At least Germany, South Africa, and Switzerland are all proponents of "administrative federalism where subnational entities execute the bulk of national legislation"; this usually correlates with "vertical cooperation regarding the implementation phase" of legislation.[135] This should not surprise us: so-called 'integrative' federalisms modelled on German federalism are more likely to recognize *any* values as inherent to constitutionalism than alternatives.[136] The same is true of federal loyalty-recognizing states. Yet the fact that the principle generally appears only in particular kinds of systems provides reason to question the inherence claim.

The Practical Benefits of Conceptual Division

There is, then, reason to think that 'federalism' and 'federal loyalty' are conceptually severable and one cannot derive a principle of federal loyalty from the fact that one has a federal state alone. A global constitutional norm of federal loyalty is thus difficult to procure. Harmonization of federal constitutional arrangements cannot follow from theory alone.

Happily, the practical benefits of this conceptual division suggest that the forgoing finding is not a loss for global constitutionalism. The inherence claim could have negative repercussions. Two representative issues make this clear. The first follows from the final practical fact in the last section. Federal loyalty's historical appearance in certain kinds of federal states alone leaves us uncertain about how it will operate in other kinds of federal states. Norms of action under uncertainty then provide at least prima facie reason not to recognize the principle in all federal states. Scholars often attribute federal loyalty to Rudolph Smend.[137] Yet Smend's work described a particular federal arrangement: the *monarchical* federal state.[138] While we have seen it operate in other kinds of systems, only certain kinds of integrative federations tend to recognize it.[139] Civil law jurisdictions, in turn, are more likely to formally recognize any principle

134 Poirier, Saunders & Kincaid, *supra* note 93.
135 Palermo & Kössler, *supra* note 6 at 248.
136 Aroney & Kincaid, *supra* note 44 at 512-15.
137 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 63-64.
138 Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany*, translated by Thomas Dunlap (Chicago: University of Chicago Press, 1998) at 89, n 3.
139 Palermo & Kössler, *supra* note 6 at 248.

of intergovernmental relations in their constitutions.[140] We lack evidence of the impact that an unwritten federal loyal principle will have in, for instance, traditionally dualist or common law states. Negative impacts are a distinct possibility we should avoid.

Evidence of how federal loyalty operates in some states actually provides reason to question whether it will always have its intended *positive* impacts. Belgium appears to be alone in adopting dualism and "comity."[141] There is reason to question whether persons in that state want to remain together.[142] Unity can appear lacking. Moreover, even if one takes the formal unity of Belgium as sufficient, explicit constitutional recognition of federal loyalty has not led to actual cooperation in South Africa but to domination by a single party federal government.[143]

Federal loyalty, in other words, may not be fulfilling its positive aims in many jurisdictions and we really do not know what it will look like in many other jurisdictions. This provides reason to question whether we should even want conceptual analysis that requires it in all federations.

The second practical reason to favour conceptual division is that the inherence claim may create incentives to deviate from the federal division of powers. These incentives undermine the commitment to exclusive spheres of jurisdiction that is supposed to make federal loyalty 'inherent to federalism.' Wide latitude for interpretation creates incentives to deviate from the division of powers in any constitutional text.[144] The claimed concurrency of federalisms that require federal loyalty arguably presupposed wider spheres of jurisdiction and could now incentivise attempts to broaden those spheres to more concurrent areas. Federal loyalty then itself admits of a wide number of interpretations and may introduce opportunities for argument about the scope of powers. Actors must address the scope before going to the neutral arbiter of the judiciary that also present opportunities to introduce new interpretations of heads of power. The inherence claim produces many opportunities to deviate from the original division of powers that may also serve as incentives to do so. If the latter is so, the inherence claims is self-defeating: it is anchored in, but ultimately undermines, the exclusivity of constitutional powers.

140 Gaudreault-DesBiens & Poirier, *supra* note 18 at 395.

141 Palermo & Kössler, *supra* note 6 at 249.

142 Aroney & Kincaid, *supra* note 44 at 519.

143 Nico Steytler, "Co-operative and Coercive Models of Intergovernmental Relations: A South African Case Study" in Tom Courchene et al, eds, *The Federal Idea: Essays in Honour of Ronald L Watts* (Montreal: McGill-Queen's University Press, 2011) 413.

144 Bednar, *supra* note 53.

Implications for Legal 'Transplants'

Adopting federalism, then, does not entail adopting federal loyalty. A further 'transplant' of the concept of federal loyalty is necessary if some federal states, including the USA and Canada, want to adopt a principle of federal loyalty. If the forgoing is correct, moreover, then judicial recognition of a federal loyalty principle is inapt, at the very least in countries that do not have the same constitutional and factual circumstances as Germany and/or those that explicitly acknowledge constitutional rules or principles that fit uneasily with federal loyalty.

None of this means that federal states cannot adopt federal loyalty, but it sets independently valuable limits on how incorporation should take place. The above reasons to question whether adopting federal loyalty is *always* a good thing are non-dispositive of whether a state should adopt it. But a non-inherent principle must — or at least should — be incorporated into constitutional arrangements through normal constitutional amendment processes if a state wants to recognize it. This is actually another benefit of my proposal: it protects the separation of powers in federal states. Making the incorporation of federal loyalty into the constitution a matter of amendment puts control over the content, rather than the interpretation, of the constitution in the hands of the executive and/or legislature, not the judiciary. This not only protects the divisions of powers in many states but keeps the separation of powers intact in all states.

Objections and Replies

Given the inherence claim's transnational support, objections surely remain. I will very briefly address three of the most pressing and representative criticisms I have faced to date. My responses are, in turn, representative of my general strategies for lingering objections. The three that I will address focus on my 'formalism,' the prevalence of the inherence claim, and my use of dualism.

i. The Argument Against Formalism

First, Gaudreault-DesBiens states that explanatory issues like those raised above only arise if one adopts the "formalistic legalism" used by the SCC, rather than his "principle-based view of federalism."[145] Some may argue that I am likewise too formalistic. Yet even if my legal arguments above are too formalistic, this objection misses the mark by leaving questions about *which* principles federa-

145 Gaudreault-DesBiens, "Ethos," *supra* note 3 at 78.

tions should use open. Making federal loyalty an analytic requirement of a 'principle-based' approach to federalism begs the question. I just presented several reasons to question non-analytic claims that the 'principles' of federalism must include 'federal loyalty.'

ii. The Strawman Charge

Second, one may argue that no one adopts the inherence claim. Perhaps those who discuss the principle being 'inherent' to federalism do not mean that it is a necessary component of federal views. They mean something weaker, like that it is part of all 'well-constituted' or 'principled' federal systems. Scholars who discuss federal loyalty as being inherent to federalism admittedly sometimes talk about it as a feature only of functioning or principled constitutions.[146]

Two truths blunt the force of this objection: (1) the inherence claim is often also made in an unqualified fashion and we can read appeals to 'functioning' or 'principled' constitutions as further arguments for federal loyalty to support why the inherence claim is a good, and (2) the arguments above also undermine these weaker versions of the case for federal loyalty in all federal systems. We should take scholars at their word when they make the inherence claim, but the arguments above undermine their claims even if we adopt the principle of charity and qualify the inherence claim as only discussing features of 'functioning' or 'principled' federations.

iii. The Anti-Dualism Objection

Finally, one may argue that I miss the point by highlighting the importance of dualist federations. After all, part of the point of the inherence claim is to establish an account of federalism that goes beyond those traditional distinctions.[147] Insights here may be 'deeper' than the dualist federalism-cooperative federalism debate and any inconsistency between the inherence claim and the existence of dual federations should be resolved in loyalty's favour.

Yet this objection raises the same kind of problem that occurs throughout this piece. Either federal loyalty is so undemanding that it is effectively trivial and non-justiciable and so not a good candidate for the underlying norm of federalism, or it is so demanding that many paradigmatic federations that appear unable to adopt the principles due to the formal structure of their system and/or other principles that they adopted are not real federalist states. I doubt

146 *Ibid*.
147 Recall e.g., Gaudreault-DesBiens, "Cooperative," *supra* note 8 at 3.

proponents of the inherence claim want it to apply to trivial federal loyalty alone. But we have been given little reason to think that a more substantive federal loyalty is the kind of underlying norm that should be the core 'principle' of federalism. So, there is ample reason not to adopt the second lemma and say that states that do not adopt it are not 'federal.' Finding a stopping place between these polls, as in median federal loyalty, must itself be done in a principled manner. But even if, contrary to historical trends, we could find such a principle, that would mean federal loyalty is not our normative bedrock after all. The inherence claim will remain a dubious proposition.

Conclusion

Ultimately, no non-trivial specification of federal loyalty is a necessary component of any plausible understanding of federalism. There are reasons not to adopt it in some federal states. Federal loyalty is thus a poor candidate for the underlying norm of federalism and should not be a harmonizing principle in global constitutionalism. Each federal state must instead decide whether to adopt it through regular amendment procedures. The variety of goods served by non-loyalty-compliant forms of federalism outlined above may provide reason to question the search for harmony, but a full analysis of the desirability of harmony is beyond the scope of this work. The implications of this work for global constitutionalism are narrower than a full-scale analysis of the benefits of harmonization could provide. Yet those seeking harmony across federal states must look elsewhere: federal loyalty is not inherent in the idea or institutions of federalism.

On the Limits of Proportionality

*Iryna Ponomarenko**

The apparent consensus among the proponents of proportionality, as Stephen Gardbaum has recently pointed out, is that the 'triumphantly successful' constitutional law framework has few, if any, normative limits. Central to such broad understanding of proportionality is the assertion that almost any type of normative claim — whether instantiated in a legal order as an individual right or a public interest — can be fed into the algorithmic-like formula of proportionality with a view to obtain a clear and definitive answer as to which claim should take precedence. So understood, proportionality reasoning is an empty vessel, a doctrinal machine for processing normative judgements — something of a normative 'omnivore.'

The primary purpose of the present paper is to contest this received wisdom. It argues that proportionality is a content-sensitive doctrinal framework that does have inherent limitations. In particular, it can only achieve its declared goals of enhancing legitimacy, rights priority, and rationality of judicial reasoning when applied to constitutional concerns conceived as negative injunctions — i.e. concerns that in the Kantian tradition operate as "paradigmatically enforceable claims to independence from others." Conversely, when applied to positively conceived values — that is, values that entitle their holders to the provision of some services or goods — proportionality not merely remains neutral towards the foregoing triumvirate of goals, but actively undermines them. This paper explains how and why this is the case.

Le consensus apparent parmi les partisans de la proportionnalité, comme l'a fait remarquer récemment Stephen Gardbaum, est que le cadre de droit constitutionnel qui « a remporté un succès triomphal » a peu de limites normatives, sinon aucune. Au centre d'une telle interprétation générale de la proportionnalité est l'affirmation que presque tout type de revendication normative — qu'elle soit formulée dans un ordre juridique comme un droit individuel ou un intérêt public — peut être introduit dans la formule algorithmique de la proportionnalité en vue d'obtenir une réponse claire et définitive quant à la revendication qui devrait avoir la priorité. Vu ainsi, le raisonnement de la proportionnalité est un récipient vide, une machine doctrinale pour traiter les jugements normatifs, une sorte « d'omnivore » normatif.

L'objet principal de cet article est de contester cette idée reçue. L'auteure soutient que la proportionnalité est un cadre doctrinal sensible au contenu avec des limites inhérentes. En particulier, elle peut uniquement réaliser ses buts déclarés d'améliorer la légitimité, la priorité des droits et la rationalité du raisonnement judiciaire lorsqu'elle s'applique à des préoccupations constitutionnelles conçues comme des injonctions négatives, c.-à-d. des préoccupations qui, dans la tradition kantienne, opèrent comme des « revendications applicables sur le plan paradigmatique à l'indépendance par rapport aux autres ». Inversement, lorsqu'elle s'applique à des valeurs conçues comme positives — c'est-à-dire des valeurs qui donnent droit à la prestation de biens ou de services à leurs tenants — non seulement la proportionnalité reste neutre à l'égard du susdit triumvirat d'objets mais elle les sape activement. L'auteure explique comment et pourquoi il est ainsi.

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Introduction

The apparent consensus among the proponents of proportionality, as Stephen Gardbaum has recently pointed out, is that the 'triumphantly successful'[1] constitutional law framework has few, if any, normative limits.[2] Central to such broad understanding of proportionality is the assertion that almost any type of normative claim — whether instantiated in a legal order as an individual right or a public interest — can be fed into the algorithmic-like formula of proportionality with a view to obtain a clear and definitive answer as to which claim should take precedence.[3] Understood this way, proportionality reasoning is an empty vessel, a doctrinal machine for processing normative judgements — something of a normative 'omnivore.'

Such a content-agnostic account of proportionality largely comports with the practice and history of the principle's application within the traditional domain of constitutional law. Notably, Robert Alexy, one of the major authorities on proportionality, famously argues that proportionality specifically rejects the possibility of having a substantive account of constitutional rights.[4] In a similar vein, the European Court of Human Rights posits that the structural proper-

1 Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) at 2.

2 Stephen Gardbaum, "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?" in Vicki C Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges* (Cambridge: Cambridge University Press, 2017) 221 at 221-22 [Gardbaum, "Frontier"].

3 Admittedly, a limited body of the proportionality literature does explore the possibility of imposing some deontological restrictions on rights analysis; however, such literature mostly focuses on the need to screen out some normatively suspect public ends balanced against individual rights. In contrast, the idea that proportionality-based review may be incompatible with certain *structural* features of normative considerations that are being fed into its framework is seldom, if ever, explored. For some suggestions on how proportionality can accommodate some deontological commitments of the liberal democratic rights traditions, see e.g. Alan Brudner, *Constitutional Goods* (Oxford: Oxford University Press, 2004) at 22 (Brudner suggests that only goods "necessary for a life sufficient in dignity," as opposed to goods understood as the "socially optimal satisfaction of preferences," can override constitutional rights); Mattias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" in George Pavlakos, ed, *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy* (Portland, Or: Hart, 2007) 131 (Kumm argues that any plausible structure of rights should be able to accommodate anti-perfectionist, anti-collectivist, and anti-consequentialist ideas); Mattias Kumm & Alec D Walen, "Human Dignity and Proportionality: Deontic Pluralism in Balancing" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 67 at 88-89 (according to Kumm and Walen, in *certain* cases that mandate the sacrifice the rights claimant's life, physical integrity, or other fundamental interests, human dignity can insist on a "nearly absolute right not to be required to make himself an instrument for the use of others (a means to another's end)").

4 Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002) at 11 [Alexy, *Theory*]. Importantly, Alexy's famous "weight formula" contains no structural or deontological constraints on the type of normative considerations it purports to process.

ties of the colliding considerations at hand — such as whether the claimant is invoking a positive or negative state obligation — has no bearing on the balancing — or proportionality[5] — principles applicable to the case.[6] Some commentators go even further arguing that, with the advent of new developments in the public law doctrine and with the increasing complexity of the normative dynamic between the individual and the state, proportionality will inevitably have to accommodate some novel types of constitutional considerations, which include but are not restricted to positive[7] and horizontal rights.[8]

The primary purpose of the present paper is to contest this received wisdom. As will be evinced below, proportionality is a content-sensitive doctrinal framework that does have inherent normative limitations. In particular, proportionality can only achieve its declared goals of enhancing legitimacy, rights priority, and rationality of judicial reasoning when applied to constitutional concerns conceived as negative injunctions, such as concerns that in the Kantian tradition operate as "paradigmatically enforceable claims to independence from others."[9] Conversely, when applied to positively conceived values — that is, values that entitle their holders to the provision of some services or goods — proportionality does not merely remain neutral toward the foregoing triumvirate of goals, but actively undermines them. Importantly, the proper logic of proportionality is compromised no matter whether positively conceived values enter the scene at the level of defining a right — such as through positively conceived rights — or at the level of justifying a limit on a constitutional right — such as through positively conceived public policies — or both. The rest of this paper explains how and why this is the case.

5 As Kai Möller maintains, while the European Court of Human Rights often adjudicates rights violations by employing what it calls the 'fair balance' test, any difference between the 'fair balance' test and proportionality "is largely terminological," see Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012) at 180 [Möller, *Global Mode*].

6 For instance, as the court emphasized in *Von Hannover v Germany (No 2)*, No 40660/08, [2012] I ECHR 399 at para 99, "[t]he boundary between the State's positive and negative obligations . . . does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests."

7 Katharine G Young, "Proportionality, Reasonableness, and Economic and Social Rights" in Jackson & Tushnet, *supra* note 2, 248 [Young, "Proportionality"].

8 Kai Möller, "US Constitutional Law, Proportionality, and the Global Model" in Jackson & Tushnet, *supra* note 2, 130 at 146. Horizontal rights are rights that, whether directly or indirectly, bind private actors, see Gardbaum, "Frontier," *supra* note 2 at 237.

9 Ariel Hernán Zylberman, *The Relationship of Right: A Constitutive Vindication of Human Rights* (PhD Dissertation, University of Toronto, 2013) at 5, online (pdf): *University of Toronto Library* <tspace.library.utoronto.ca/bitstream/1807/43766/3/Zylberman_Ariel_H_201311_PhD_Thesis.pd> [perma.cc/RF5A-A8WM] [Zylberman, *Relationship*].

That something is rotten in the proportionality kingdom — that proportionality is not a normative omnivore as conventionally believed — should not come as a complete surprise. Many commentators, including Stephen Gardbaum and Katharine Young, have pointed out the fact that most courts around the globe, which have embraced proportionality, largely eschew it when adjudicating positive and horizontal rights cases.[10] Similar observations abound, and a convincing explanation as to why the actual practice of proportionality does not fit its 'omnivore' reputation has yet to emerge.[11]

This paper takes this curious 'deficiency' of proportionality as its starting point and expands it into a broader claim, arguing that almost all of proportionality's supposed deficiencies — such as incommensurability,[12] rights inflation,[13] judicial policy-making,[14] irrationality,[15] epistemic uncertainty,[16] etc. — can be attributed to the improper application of the proportionality test to positively conceived concerns. Conversely, all the foregoing deficiencies disappear if proportionality is applied solely to collisions of considerations that operate as negative injunctions. All the more so because, as the historical reconstruction of proportionality demonstrates, the original version of the test as designed in eighteenth century Prussian administrative law was not meant to deal with positively conceived values; such an 'upgrade' is rather an innovation of the twentieth century and its desire to overstretch proportionality on a Procrustean bed of the ever-growing administrative state.

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10 Gardbaum, "Frontier," *supra* note 2 at 221; Young, "Proportionality," *supra* note 7.

11 Möller, for instance, argues that proportionality is incompatible with the broad positive conception of right "because in almost all circumstances the realization of those rights requires scarce resources; therefore any limitation will always further the legitimate goal of saving resources and will always be suitable and necessary to the achievement of that goal." As such, all but the very last step of the proportionality framework — proportionality *stricto sensu* — would become redundant, see Möller, *Global Mode*, *supra* note 5 at 179.

12 See e.g. Timothy Endicott, "Proportionality and Incommensurability" in Huscroft, Miller & Webber, *supra* note 3, 311; Virgílio Afonso da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31:2 Oxford J Leg Stud 273; Jeremy Waldron, "Fake Incommensurability: A Response to Professor Schauer" (1994) 45:4 Hastings LJ 813; Fred D'agostino, *Incommensurability and Commensuration: The Common Denominator* (London: Routledge, 2003).

13 See e.g. George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007).

14 See e.g. Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017).

15 See e.g. Jacco Bomhoff, "Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law" (2008) 31:2 Hastings Intl & Comp L Rev 555.

16 See e.g. Robert Alexy, "On Balancing and Subsumption: A Structural Comparison" (2003) 16:4 Ratio Juris 433; Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16:2 Ratio Juris 131; Matthias Klatt & Johannes Schmidt, "Epistemic Discretion in Constitutional Law" (2012) 10:1 Intl J Constitutional L 69.

Before proceeding, a caveat is in order. This paper argues that proportionality, contrary to the mainstream assumption, does indeed have some non-negotiable normative limits, and consequently can accommodate only certain structural accounts of constitutional rights and corresponding interests. In particular, I argue that proportionality should conceive of constitutional rights as presumptive shields against governmental interference and only allow for such shields to be pierced when the right-bearers purport to use their rights as swords against others.[17] However, such a conclusion does not license the inference that other structural accounts of rights — such as rights that have positive and horizontal dimensions — are misguided or doctrinally flawed per se. All it means is that the normative framework of proportionality cannot properly process such structural accounts of rights, and that the question of their justifiable limitation ought to be dealt with within the parameters of other argumentative techniques such as reasonableness. To impose proportionality on the structural accounts of rights that are ill-suited for such considerations is to erode even the basic protection of civil liberties that proportionality may otherwise afford. As an old proverb reminds us, he who runs after two hares catches neither. Proportionality that seeks to protect too much, protects, as a matter of fact, nothing.

One may be quick to object that such proposition is counter-factual and that the evidence of the practical application of proportionality around the globe does not bear it out. If anything, the actual application of proportionality analysis in most jurisdictions suggests that in the conflict between constitutional rights and public interests the balance frequently tilts towards rights. Yet as an increasing number of constitutional commentators admonish, this phenomenon should be credited not to the superior qualities of proportionality as a doctrinal technique, but solely to the benevolence and high moral ground held by the sitting constitutional judges, especially in the wake of the atrocities of World War II.[18]

17 Kantian theory of the justifiable state coercion captures this sentiment quite well: what justifies a coercive act of the state, according to Kant, is the necessity of "hindering . . . a hindrance to freedom," see Kant, *The Metaphysics of Morals*, cited in Alec Stone Sweet & Eric Palmer, "A Kantian System of Constitutional Justice: Rights, Trusteeship, Balancing" (2017) 6:3 Global Constitutionalism 377 at 382. For more on Kant's theory of negative autonomy maximization as a proper model for the structure of rights, see Rainer Forst, "The Justification of Basic Rights: A Discourse-Theoretical Approach" (2016) 45:3 Netherlands J Leg Philosophy 7; Frederick Rauscher, "Kant's Social and Political Philosophy" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (1 September 2016), online: *Stanford* <plato.stanford.edu/entries/kant-social-political/#FreBasSta> [perma.cc/3GSD-X9PV].

18 As András Sajó & Renáta Uitz explain, "[w]ithout a strong underlying commitment to uphold freedom in the face of limitations, proportionality analysis would not favour rights. In Germany, the balance was tipped in favour of fundamental rights by the political-constitutional commitment to be friendly

Part I. The 'Omnivore' Account of Proportionality

1. The Mechanics of Proportionality Review

Proportionality is normally defined as a set of rules determining the necessary and sufficient conditions for a law's limitation of a constitutional right to be constitutionally permissible. The principle is intrinsic to, and logically follows from, the bifurcated approach to judicial review. The latter differentiates between a question of whether a right has been infringed upon and an inquiry into whether the limit is reasonable.[19] Such bipartite framework is typically contrasted with the more categorical approaches to rights reasoning, such as that employed in the US jurisprudence, whereby the limits of the fundamental right is built into the right's definition.

Wherever proportionality is employed, the analysis typically begins with the assessment of the rights violation and proceeds to the four-part evaluation of the impugned governmental scheme:

Q1 *Legitimacy*. Is the measure adopted to pursue a legitimate aim?

Q2 *Suitability*. Can it serve to further that aim?

Q3 *Necessity*. Is it the least restrictive way of doing so?

Q4 [*Balancing*]. Viewed overall, do the ends justify the means?[20]

Notably, the four-part proportionality analysis is purely formal in the way it functions. Its main goal is to establish a conditional relation of precedence between the individual constitutional right and the interests of public well-being "in the light of the circumstances of the case."[21] In order to reach a conclusion about the relative weight of public and private interests that are being balanced against each other — and to "achieve a precise and complete analysis of the structure of balancing"[22] — Robert Alexy proposed his famous "weight

to individual rights after Nazi tyranny. Lacking such a strong commitment, the balance easily tips the other way, leaving liberty behind," in András Sajó & Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017) at 410-11.

19 Janet L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montréal: McGill-Queen's University Press, 1996) at 6.

20 Michael Fordham & Thomas de la Mare, "Identifying the Principles of Proportionality" in Jeffrey Jowell & Jonathan Cooper, eds, *Understanding Human Rights Principles* (Oxford: Hart, 2001) 27 at 28 [emphasis in original].

21 Alexy, *Theory*, *supra* note 4 at 52.

22 *Ibid* at 873.

formula,"[23] which entails balancing the concrete — as opposed to abstract — weight of the individual right and countervailing public interest.

Again, it is worth repeating that the orthodox proportionality formula contains no additional restrictions as to the structural features of public and private interests that can be subjected to calculation. Thus, Alexy's "weight formula" — and, indeed, all proportionality tests currently applied by constitutional tribunals worldwide — appear to be 'omnivorous': they contain no structural limitations when it comes to the types of normative considerations that can be fed into proportionality analysis. And therein, as will be demonstrated below, lies the problem.

2. Why Does Proportionality Need Justification?

In order to evince an incompatibility between the 'omnivore' account of proportionality and the proportionality's traditional justification, it may be helpful to ask the logically antecedent question of why we need to justify proportionality in the first place. Admittedly, the answer is not immediately apparent.

Indeed, the language of proportionality is so inextricably imbricated into the constitutional texture of most modern democracies that it is ingrained in its logic and its constitutional vernacular. As Alec Stone Sweet and Jud Mathews aptly observe, we tend to take the test entirely for granted.[24] The existence of the courts' settled practice of applying proportionality to cases of human rights limitations, however, does not license the inference that proportionality is a correct, or even desirable, constitutional doctrine. As David Hume warned us almost three hundred years ago, that something *is* the case does not translate into a proposition that it *ought* to be the case.

Even in jurisdictions where proportionality is a well-established doctrine, it is seldom spelled out in the text of the constitutional documents. This is particularly so when it comes to such proportionality colossi as Germany and Canada, from which the modern iteration of proportionality 'diffused' to the rest of the globe.[25] Furthermore, per salient observation of Luc Tremblay, even in some rare instances whereby the constitutional text mentions the principle of

23 Robert Alexy, "Proportionality and Rationality" in Jackson & Tushnet, *supra* note 2, 13 at 16-18.

24 Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47:1 Colum J Transnat'l L 72 at 76.

25 Jud Mathews & Alec Stone Sweet, "All Things in Proportion? American Rights Review and the Problem of Balancing" (2011) 60:4 Emory LJ 797 [Matthews & Stone Sweet, "In Proportion"]; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 143.

proportionality, "it does not explicitly require balancing rights and non-rights values."[26] If anything, it is open to debate as to how to adequately interpret constitutional stipulations that require the limitation of a right to be reasonable or proportionate.[27]

One prominent line of arguments contends that proportionality is conceptually necessary or even unavoidable as a matter of constitutional adjudication.[28] Although such arguments may be attractive in the abstract, they nonetheless fall apart when subjected to closer scrutiny on the ground. Indeed, the actual practice of constitutional adjudication around the globe does not bear these arguments out: not all constitutional courts which espouse a deep commitment to constitutional rights are willing to endorse proportionality.[29]

Hence, in most constitutional jurisdictions which apply proportionality, the test itself is a textual orphan. As such, like all judge-made doctrines, proportionality is *prima facie* illegitimate and requires justification.

3. The Normative Justification of Proportionality

In most constitutional jurisdictions there are no plausible textual justifications for the invocation of a four-prong doctrinal framework of proportionality, and, as explained above, the claims about the conceptual necessity of proportionality do not withstand scrutiny.[30] Thus, the justification for the practice of pro-

26 Luc B Tremblay, "An Egalitarian Defense of Proportionality-Based Balancing" (2015) 12:4 Intl J Constitutional L 864 at 871 [Tremblay, "Egalitarian"].

27 Carlos Bernal Pulido, "The Migration of Proportionality Across Europe" (2013) 11:3 New Zealand J Public & Intl L 483 at 508.

28 As Bernal Pulido explains, this line of reasoning suggests that "wherever and whenever there are constitutional rights, judges will apply them by using proportionality," *ibid* at 504. Robert Alexy, for instance, claims that proportionality is conceptually necessary because "there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right," see Alexy, *Theory*, *supra* note 4 at 74. Similarly, David Beatty posits that "[p]roportionality is a universal criterion of constitutionality" and "an essential, unavoidable part of every constitutional text," see David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 162.

29 In fact, some regimes prefer bright-line rules to fuzzy tests in rights adjudication. The famous example, of course, is that of the United States, see Barak, *supra* note 25 at 207. While some authors contend that proportionality has some roots in American constitutional jurisprudence in general — see e.g. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019) at 97 [Stone Sweet & Mathews, *Balancing*] — the adjudication of American fundamental rights nonetheless largely relies on categorization-based review. For a detailed explanation on how *ad hoc* balancing inherent in proportionality is different from interpretive balancing in categorical review, see Barak, *supra* note 25 at 502-22.

30 For more on why proportionality is not an inescapable element of constitutional adjudication, see e.g. João Andrade Neto, *Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil* (Cham, CH: Springer, 2018) at 49-50, 65.

portionality, if there is one, must be normative. If proportionality offers the best means to reach certain normative goals in a manner that accommodates other constitutional meta-principles, then its application in a putative legal system is justified.[31] Thus, in the words of Luc Tremblay, our analytical point of departure here should be an inquiry into proportionality's purpose: "[w]hat values, if any, does its model serve?"[32]

While opinions on this issue vary,[33] there are certain normative goals that appear to gain the support of an overlapping scholarly and curial consensus. Robert Alexy, one of the most prominent advocates of proportionality, postulates that proportionality can be derived from the claim to correctness; more specifically, he argues that "the test produces effects that are intrinsically rational and prevent the sacrifice of fundamental rights."[34] A helpful explication of the same ideas can be found in the works of Bernal Pulido. As the author observes, the abstract justification of the use of proportionality is normally associated "with the possibility of giving a positive answer to three questions: rationality, legitimacy and priority."[35] As Bernal Pulido explains, from a theoretical perspective we can justify the use of proportionality "if there can be a rational and legitimate way of applying this standard which simultaneously preserves the priority of constitutional rights."[36]

The remainder of this section will seek to put some theoretical flesh on the conceptual bones of Bernal Pulido's approach to proportionality review. Rationality, legitimacy, and priority of rights — with particular emphasis being placed on the rationality-enhancing function of proportionality — will also guide the analysis for the rest of the paper.

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31 *Ibid* at 63-64.

32 Luc B Tremblay, "Le Fondement Normatif du Principe de Proportionnalité en Théorie Constitutionnelle" in Luc B Tremblay & Grégoire Charles N Webber, eds, *La limitation des droits de la Charte: Essais critiques sur l'arrêt R c Oakes/The Limitation of Charter Rights: Critical Essays on R v Oakes* (Montréal: Les Éditions Thémis, 2009) 77 at 87 [translated by author].

33 Tremblay himself, for instance, seeks to anchor the normative justification for proportionality in the idea of "moral equality of persons in the context of pluralism and cultural diversity," see Tremblay, "Egalitarian," *supra* note 26 at 865. Others sometimes justify proportionality as one of the necessary incidents of the culture of justification, see Kai Möller, "Justifying the Culture of Justification" (2019) 17:4 Intl J Constitutional L 1078. Stephen Gardbaum offers a democratic justification for proportionality, see Stephen Gardbaum, "A Democratic Defense of Constitutional Balancing" (2010) 4:1 L & Ethics Human Rights 77.

34 Andrade Neto, *supra* note 30 at 67-68. Similarly, Alec Stone Sweet and Jud Mathews argue that "[t]he duty of a constitutional court is to maximize the effectiveness of the charter of rights," see Stone Sweet & Mathews, *Balancing*, *supra* note 29 at 31.

35 Bernal Pulido, *supra* note 27 at 486.

36 *Ibid*.

A. Rationality

Perhaps the most common argument invoked as part of the functional defence of proportionality is that it helps to structure and rationalize otherwise opaque deliberation about constitutional rights. Proportionality, its defenders maintain, assists in translating otherwise cumbersome constitutional provisions — "what does it mean for a right limitation to be reasonable?" — into a clear, transparent, and impartial analysis. Simply put, proportionality is supposed to enhance the rationality of constitutional argumentation.

The logical corollary of this proposition is that, by structuring the judicial reasoning and channeling the ultimate interest balancing into the last stage of the review process, proportionality is supposed to reduce arbitrariness and human bias, hence reaffirming and amplifying the common perception that the courts' decisions are made according to the rule of law, and not its antithesis — the rule of men.

Furthermore, as Mattias Kumm observes, by focusing public actors on the elements of proportionality review, the test can have a "disciplining effect on public authorities and help foster an attitude of civilian confidence among citizens."[37] Indeed, by pushing public authorities to constantly justify their actions under the constitution — the process Kumm famously terms "Socratic contestation" — proportionality is destined to improve the outcomes of constitutional adjudication "because such contestation effectively addresses a number of political pathologies that even legislation in mature democracies is not immune from."[38]

These disciplining properties are achieved not only through a more coherent approach to individual rights cases, but also through bringing together aspects of the current multiple analytical approaches in a way that allows full consideration of both the individual rights and the social values present in each and every case.[39] In any particular instance, it may or may not lead to a different outcome than the currently used tests, such as reasonableness or categorization. But it avoids significant interests downplayed, if not ignored, by the tests.

This leads us to the main functional virtue of proportionality: its ability to enhance the transparency of the major trade-off the court is making as part

37 Mattias Kumm, "Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review" (2007) 1:2 European J Leg Studies 153 at 170.

38 *Ibid.*

39 Donald L Beschle, "No More Tiers: Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases" (2018) 38:2 Pace L Rev 384 at 385.

of its right limitation assessment. As Matthias Klatt and Moritz Meister posit, proportionality "clearly lays open the moral discourse indispensable in balancing, and shows us which propositions exactly a court has to justify in order to arrive at a rational judgment."[40] Even more powerfully, Stavros Tsakyrakis suggests that the reasoning of a court is clearer "the more explicit the moral considerations of a case are made."[41] Importantly, this is achieved through moving otherwise opaque interest balancing to the last prong of the proportionality test.

Implicit in this observation is yet another quality of proportionality that elevates it above all other frameworks for constitutional adjudication such as American categorization or administrative law reasonableness: once the infringement of the right has been established, proportionality has the ability to shift the burden of producing evidence from the claimant to the state. As Aharon Barak emphasizes, if we are interested in providing constitutional rights "with the proper treatment," it is 'necessary' that the state that has limited the constitutional right shoulders the burden of proof.[42] This is because "the state enjoys much better access to the information that any party claiming that their right has been limited."[43]

Of course, the claim that proportionality *enhances* rationality of constitutional decision-making does not mean that proportionality somehow renders the process completely neutral and devoid of any human element whatsoever. Indeed, as Matthias Jestaed opines, "[t]he precision of the balancing process, as well as our ability to render it logical, are highly limited. These limits are obscured rather than illuminated by the balancing formula."[44] Thus, the tenable proposition — the one this paper endorses — is that, rather than turning constitutional adjudication into a quasi-computerized exercise, proportionality works to enhance the rationality of judicial decision-making as compared to other types of constitutional doctrines.

40 Klatt & Meister, *supra* note 1 at 55.

41 Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla" (2010) 8:2 Intl J Constitutional L 307 at 310.

42 Barak, *supra* note 25 at 447.

43 *Ibid* at 448.

44 Matthias Jestaedt, "The Doctrine of Balancing — Its Strengths and Weaknesses" in Matthias Klatt, ed, *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012) 152 at 163.

B. Legitimacy

As much as rationality is a desired condition, reason alone, as Ely aptly reminds us, "can't tell you anything: it can only connect premises to conclusion."[45] Thus, our second preoccupation shall be with the constitutional foundation which legitimizes proportionality as a constitutional doctrine.

In particular, proportionality can be legitimately applied by a constitutional tribunal if its application would epistemically cohere with the other meta-principles of constitutional law, such as the notions of constitutionalism, the rule of law, democracy, and the separation of powers. In other words, if proportionality would fit within a particular normative arrangement in a constitutional system. João Andrade Neto captures this idea even more aptly: the adoption of proportionality is justified once it is demonstrated that, as far as a putative jurisdiction is concerned, proportionality is "non-prohibited."[46] In other words, instead of looking into positive reasons militating *in favour of* proportionality — like we did with the 'rationality' justification — this argument seeks to make sure that no major reasons can be summoned counselling *against* it.

Thus, to the extent proportionality is to be 'non-prohibited,' it should not undermine or frustrate other meta-principles of constitutional law. Again, it is logical to surmise that if *any* derivative or non-interpretive legal doctrine defeats or significantly compromises any of these principles, it would be *illegitimate*.

C. Priority

Lastly, and related to the above, any plausible justification of proportionality must enhance, or at least not erode, the effectiveness of constitutional rights.[47] Indeed, it is a commonsensical proposition that an acceptable model of constitutional adjudication cannot obviate the normative force of constitutional guarantees. Thus, the use of proportionality as a standard of review can only be justified if, in the words of Bernal Pulido, it "enables courts to preserve the priority of constitutional rights within the legal system."[48]

45 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 56.

46 Andrade Neto, *supra* note 30 at 16.

47 *Ibid* at 23.

48 Bernal Pulido, *supra* note 27 at 486. For an explanation of why in a liberal democracy rights should have lexical priority over all other values, see e.g. John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).

Notably, the requirement of the rights priority doubles as a functional twin of the requirement of legitimacy. The latter suggests that the adoption of a legal doctrine is justified only if it is found to be not prohibited by other constitutional meta-principles, such as, for instance, the principle of constitutionalism. In a system genuinely committed to the principle of constitutionalism, constitutional rights should normally assume priority over other policy considerations not only by virtue of their superior normative status, but also due to their higher status in the hierarchy of legal norms in the legal system. As Francisco J. Urbina explains:

> Human rights are commonly enshrined in norms of the highest legal hierarchy, as in a written constitution or in a norm of constitutional status. As such they enjoy a specifically legal priority over most other requirements imposed by the legal system, and this priority is commonly *strict*. Different jurisdictions have different ways of ensuring that this kind of priority is respected in the day-to-day operation of the legal system. Some legal systems are more aggressive in their methods for ensuring that this priority is respected, some are less.[49]

Part II. Why the 'Normative Omnivore' Account of Proportionality Undermines the Very Case for Proportionality

As explained earlier, the 'omnivore account' of proportionality presupposes the absence of any structural restrictions on the types of normative considerations that can be subjected to the cost-benefit proportionality analysis. More specifically, the 'omnivore account' does not differentiate between positively and negatively conceived constitutional values. As far as proportionality is concerned, either would do. Yet, as will be evinced below, in so far as proportionality aspires to be rational and legitimate, the incorporation of positively conceived values into an analysis is inimical to the promotion of such goals.

1. What are Positively Conceived Constitutional Considerations?

On most accounts, positive conceptions of rights are emblematic of the particular structure of rights — what Frederick Schauer describes as seeing rights as "ability-connected"[50] entitlements. According to Schauer, a right to X is vindicated when a right-holder has or does the notional X. Consequently, as

49 Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 225 [emphasis in original].

50 Frederick Schauer, "A Comment on the Structure of Rights" (1993) 27:2 Ga L Rev 415 at 426 [Schauer, "Structure"].

Schauer explains, "insofar as the right-holder cannot [do or have whatever the right entitles them to], then the right-holder's right has been infringed."[51] Given that the right to X is only fully effectuated when a right-bearer 'does' or 'has' X, and not when they are merely shielded from other's interference while 'doing' or 'having' X, it means that someone else should have a correlative duty to provide assistance in the right-bearer's project to 'do' or 'have' X.[52] Wesley Hohfeld famously called such entitlements rights-claims, or "rights in the sense of claims."[53]

From the practical perspective, if someone has a positive right to speak and they are not provided the 'opportunity to speak' or 'support for speaking,'[54] it follows that their positive right to speak is violated.

Public policy considerations that are fed into the proportionality analysis can also be — and, in fact, frequently are — positively conceived considerations: instead of seeking to prevent imminent harm, they are looking to achieve some positive societal goals or generate some good consequences. To use Schauer's parlance, they are ability-connected. Structurally, this means that positively conceived public interests in some notional Y — be it the enhancement of public health, commitment to social justice, or promotion of cultural and group identity — is not realized unless this same Y can be said to have been achieved. While this seems pretty emblematic of how various proportionality courts around the globe frame their analysis, accepting such views as proportionality-friendly should be viewed as premature. The rest of this paper will seek to flesh this intuition out.

2. Positively Conceived Considerations Render Proportionality Irrational

It is important to reiterate that the traditional case in favour of proportionality is that it outperforms any other forms of rights reasoning by helping to identify the exact interests the court is to balance as part of its rights limitation analysis and, subsequently, by making such analysis more rational and transparent compared to otherwise 'holistic' or 'definitional' reviews that engage interest balancing.[55] More specifically, this means that, by funneling all norma-

51 *Ibid* at 427.

52 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed by Walter Wheeler Cook (New Haven: Yale University Press, 1917) at 92.

53 *Ibid* at 73.

54 Frederick Schauer, "Hohfeld's First Amendment" (2008) 76:4 Geo Wash L Rev 914 at 915-16.

55 Pursuant to the reigning sentiment in the literature, no single framework for rights analysis can escape interest balancing. The traditional standard of reasonableness, for instance, engages in an unstructured

tive considerations into one set of interest balancing located at the very end of the proportionality test, it structures and disciplines judicial decision-making. This ability to bring interest balancing out of the epistemological 'black box' of holistic reasoning into the bright spotlight of structured analysis is not only proportionality's main claim to fame, but also a necessary condition of proportionality's legitimacy.

Yet, as the rest of this section explains, the only instance when proportionality can actually discipline judicial reasoning is when it is applied to constitutional considerations framed as negative injunctions. Conversely, by feeding into the framework positively conceived values, the reasoning becomes *even more* irrational in comparison to all proportionality's competitors, such as categorization or reasonableness.

Two phenomena associated with positively conceived values are particularly conducive to this outcome. First, the invocation of positively conceived considerations leads to multifurcation of interest balancing as part of the right-limitation analysis. Second, positively conceived considerations tend to inject the unjustifiable amount of epistemic uncertainty in constitutional adjudication. These two phenomena will be explained in turn.

A. Multifurcation of Balancing

To properly do its job, as Aharon Barak explains, all interest balancing inherent in rights limitation should be 'housed' within the last stage of the proportionality test — proportionality *stricto sensu*.[56] Yet the consequence of applying proportionality to positively conceived considerations is that balancing starts to multifurcate — it becomes Hydra-headed.

In order to articulate this latter intuition properly, it helps to recall that, prior to becoming doctrinally meaningful, all positively conceived rights should undergo definitional limitation. As an illustrative example, consider a right to health.

A positively conceived right to health is normally defined as "the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."[57] Note that the substantive en-

balancing exercise; conversely, the American categorization test engages in interest balancing during the creation of legal categories. For an exhaustive overview of the various forms of interest balancing in rights reasoning and their structural manifestations, see e.g. Barak, *supra* note 25 at 493-527.

56 Barak, *supra* note 25 at 347.

57 UNECOSOC, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 8.

titlements granted by the right to health are not coextensive with the colloquial definition of the term 'health': indeed, they are substantially narrower. As the United Nations Committee on Economic, Social and Cultural Rights emphasises time and again, "the right to health is not to be understood as a right to be *healthy*."[58] Instead, it takes into account "both the individual's biological and socio-economic preconditions and a State's available resources."[59] Consequently, the beneficiary of a positively conceived right to health cannot avail themselves of the highest standard of health, but only of the highest *attainable* standard of health.

Implicit in this example is the idea that the positive conception of rights cannot proceed without incorporating some methods of the definitional limitation of substantive entitlements guaranteed by rights; something that, in the words of Aharon Barak, would outline the normative boundaries of rights.[60]

As Jamie Cameron explains, a definitional limitation of the rights "assumes that the guarantees are themselves qualified by political, social and cultural values."[61] In Alan Brudner's words, "instead of defining the scope of a right … independently of considerations of common welfare and then allowing those considerations to override the right to the extent necessary to achieve a certain goal, the judge or theorist allows the common welfare to define the scope of the right."[62]

While such a take on the definition of a positively conceived right is perfectly reasonable per se, it is nonetheless absolutely incompatible with proportionality-based review. This is because such an approach would allow the courts to limit the scope of the right at *two* different stages of analysis by resorting to the same reasons for justification:[63] at the right-definitional stage *as well as* at the right-limitational stage.[64] As Stone Sweet and Mathews pointedly observe

58 *Ibid* [emphasis in original].

59 *Ibid* at para 9.

60 Barak, *supra* note 25 at 347.

61 Jamie Cameron, "The Original Conception of Section 1 and Its Demise: A Comment on *Irwin Toy Ltd v Attorney-General of Quebec*" (1990) 35:1 McGill LJ 253 at 260.

62 Brudner, *supra* note 3 at 286. It is worth noting that Brudner openly calls such definitional limitation "definitional balancing."

63 Such considerations normally pertain to some common welfare considerations, for instance, cost-effective management of scarce resources, or some variation thereof.

64 Admittedly, some qualified constitutional rights — such as the right not to be subjected to cruel and unusual punishment — do necessitate definitional balancing in order to establish their normative scope. However, as explained in greater detail in Section III.2 of this paper, below, such interest balancing would engage different normative considerations than the considerations effectuated at the stage of proportionality review.

with respect to the dangers of definitional balancing, "[p]ushed out the front door, balancing comes in through the back, where it is used to create ever more nuanced rules and exceptions."[65] Similarly, Klatt and Meister admonish that the definitional balancing always "relies on the hidden sort of balancing" which, in turn, "promotes judicial arbitrariness."[66] Hence, the Hydra-headed balancing would allow the judges to obfuscate the real considerations behind the outcome of the case and, in so doing, twist and manipulate the meaning and application of constitutional provisions.

Furthermore, not only would such 'double-dipping' compromise the advantages of proportionality as a transparent principled framework — as the courts would be able to engage in interest balancing twice, with the first set of balancing happening inside an epistemological 'black box' — but it would also run contrary to the traditional proportionality posture that the onus of proving the justifiable limitation of the scope of the right should fall exclusively on the government.[67]

B. Enhanced Epistemic Uncertainty

(i) Epistemic Uncertainty and (Ir)Rationality.

The appreciation of the pernicious import of positively conceived considerations on proportionality reasoning would not be complete without mentioning their negative effects at the stage of justifying a limitation of a constitutional right, not just the level of defining the scope of the right. In particular, positively conceived public policies tend to transform *legal* constitutional disputes into *political*[68] disputes wherein, more often than not, the right-claimants bear the risk of *intractable empirical uncertainty*. This phenomenon is particularly glaring in cases where the court has to balance enumerated constitutional rights against the long-term robustness of large-scale polycentric public policies, most of which are created "under conditions of imperfect information."[69] One Irish commentator went as far as to consider the epistemic uncertainty inherent in such disputes "[*t*]*he* central difficulty with navigating the tension between rights and governmental autonomy."[70]

65 Matthews & Stone Sweet, "In Proportion," *supra* note 25 at 869.

66 Klatt & Meister, *supra* note 1 at 22.

67 There are, of course, some exceptions to this conventional view. For a suggestion to recognize a presumption of proportionality whereby the burden of demonstrating disproportionality would rest on the right-holder at least in certain circumstances, see e.g. Julian Rivers, "The Presumption of Proportionality" (2014) 77:3 Mod L Rev 409.

68 For more on this phenomenon, see e.g. Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 at 524.

69 *Ibid* at 504.

70 Alan DP Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012) at 20 [emphasis added].

In order to illustrate this point one should go no further than the landmark Canadian case of *Chaoulli v Quebec (AG)*,[71] whereby the Supreme Court eventually struck down a provincial ban on private health insurance. The claimants in this case argued that the delays resulting from waiting lists in the public system, in conjunction with the inability to obtain private health insurance, violated their rights to life, liberty, security, and personal inviolability. Admittedly they had a point. The Court in *Chaoulli* recognized that some patients "die as a result of long waits for treatment in the public system when they could have gained prompt access to care in the private sector."[72] Indeed, were it not for the ban, they could buy private insurance and stay alive.[73]

The declared objective of the impugned legislation was the achievement of a positively conceived social goal: "to promote health care of the highest possible quality for all Quebeckers, regardless of their ability to pay."[74] Consequently, as part of its proportionality analysis, the Court had to assess whether the prohibition on private insurance had a rational connection with the declared objective and whether, all things considered, there were less restrictive ways to promote high-quality healthcare in the province. However, as numerous commentators pointed out, the Court was presented with evidence that was inconclusive at best and seriously conflicting at worst.[75] Out of the two most comprehensive studies on the impact of a parallel private health care on public health care, one, the Kirby Committee, concluded that — *maybe* — privatization of healthcare would be relatively harmless, whilst the other, the Romanow Commission, suggested that — *maybe* — preserving the one-tier public system is a better solution.[76] The Court had no other choice than to shoot in the dark.

Putting aside some dubious moral grounds on which the case was predicated,[77] the fact-finding process in *Chaoulli* perfectly demonstrates how empirical disagreement that accompanies long-term public policy programs

71 2005 SCC 35 [*Chaoulli*].

72 *Ibid* at para 37.

73 *Ibid.*

74 *Ibid* para 49.

75 Choudhry, *supra* note 68 at 533.

76 Howard Chodos & Jeffrey J MacLeod, "Examining the Public/Private Divide in Healthcare: Demystifying the Debate" (2005), online (pdf): *Canadian Political Science Association* <cpsa-acsp.ca/papers-2005/MacLeod.pdf> [perma.cc/AN2J-VT9H].

77 As Patrick J Monahan observes, "any healthcare system which deliberately and systematically imposes pain or even death on innocent individuals in the name of improving healthcare provided to others cannot be justified either morally or legally, since it fails to treat all individuals as equally deserving of concern and respect," see Patrick J Monahan, "Chaoulli v Quebec and the Future of Canadian Healthcare" (17 January 2007), online: *The Court* <www.thecourt.ca/chaoulli-v-quebec-the-future-of-canadian-health-care/> [perma.cc/5T9C-D46V].

can often make or break the outcome of the whole case. This means that even on the most charitable interpretation, what judges are engaging in when trying to 'predict' the outcomes of various governmental policies for many decades ahead is not a rational analysis but something approximating "a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society."[78] This is a far cry from a rational and reasoned analysis that the proponents of proportionality are trying to portray as proportionality's main allure. If anything, such analysis is *tout court* irrational; it boasts no more scientific precision than flipping a coin.

This of course begs the question whether framing a public policy as a negatively conceived, as opposed to a positively conceived concern, would make any difference. The nature of a negatively conceived policy is that it is not seeking to effectuate the entitlement of the members of the society to a particular social good, such as, for instance, an efficacious healthcare system. Rather than fostering some external good consequences far away in the future, it seeks to prevent some immediate negative harm emanating from a known source, for example, to ensure the immediate physical safety of the citizens. Structurally, it operates as a negative, as opposed to positive, injunction.[79] Now, the reason why the public objective in *Chaoulli* has created so much empirical disagreement is because it was a *positively* framed objective: it sought to "promote health care of the highest possible quality," which means that the government tried to generate some good consequences in the (fairly remote) future. This, in turn, means that the Court had to assess how such a nonlinear system as public health care with multiple interdependencies and complex ecology would react — 10, 20, or 30 years from now — to a potential intervention: a task that requires an intimate understanding of multiple sets of causal associations within the system as well as sound appreciation of the series of potential cascading side effects. In short, it set the Court an impossible task.[80]

78 *McKinney v University of Guelph*, [1990] 3 SCR 229 at 304, 76 DLR (4th) 545.

79 Kant would conceive of the negative injunction against harming others as part of "a system of reciprocal limits on coercion," see Arthur Ripstein, "Kant on Law and Justice" in Thomas E Jill Jr, ed, *The Blackwell Guide to Kant's Ethics* (Chichester, UK: Wiley-Blackwell, 2009) 161 at 172. Indeed, in Kantian theory, every person has a right to be independent from the state coercion, unless the state needs to exercise its coercive power to protect the weaker parties from the coercion of others. Ripstein contends that the clearest example of this is the state's policy of prohibiting and punishing crime.

80 As Nassim Nicholas Taleb postulates, "[c]omplex systems are full of interdependencies — hard to detect — and nonlinear responses. … In such environments, simple causal associations are misplaced; it is hard to see how things work by looking at single parts," see Nassim Nicholas Taleb, *Antifragile: Things That Gain from Disorder* (New York: Random House, 2012) at 7. As Taleb further explains, "[m]an-made complex systems tend to develop cascades and runaway chains of reactions that decrease, even eliminate, predictability and cause outsized events" (*ibid*).

In contrast to positively conceived considerations, negatively conceived policy considerations are more empirically robust: whenever dealing with them, the court only needs to assess one set of causal associations. For instance, the court may have to ask if there is "cogent and persuasive"[81] evidence that the claimants' attempt to vindicate their rights would inflict direct and tangible harm on other participants in the system. This inquiry is structurally simpler and more elegant than the previously adumbrated one: all the court is required to examine is a simple cause-and-effect connection, something courts are routinely doing already as part of their criminal or torts trials.[82]

A skeptical reader may wonder if the empirical predicament in *Chaoulli* may be described as a mere aberration — a drop in a jurisprudential bucket of otherwise perfectly functional proportionality cases engaging positively conceived policies. Unfortunately, this is far from being the case. The problem of empirical uncertainty attending complex polycentric 'public good' policies reaches far beyond mere failures of judges to properly interpret the statistical findings of number-driven social science evidence,[83] which is a serious problem in its own right. If anything, the very ability of social sciences to yield empirically robust findings and predictive insights in the field of nonlinear systems with multiple interdependencies — such as 'public good' policies — must be called into question.

For one thing, uncritical judicial reliance on prognostic social science literature may be problematic due to what is known as a modern 'replication crisis' in social science and medicine. John Ioannidis decries the disconcerting state of scientific affairs in his own biomedical field, stating that "the high rate of nonreplication (lack of confirmation) of research discoveries is a consequence of the convenient, yet ill-founded strategy of claiming conclusive research findings solely on the basis of a single study assessed by formal statistical significance."[84] The current situation in the social science field is equally disconcerting.[85]

81 *R v Oakes* [1986] 1 SCR 103 at 138, 26 DLR (4th) 200 [*Oakes*].

82 Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Oxford: Hart, 2018) at 70-75.

83 For more on this issue, see e.g. *ibid*.

84 John PA Ioannidis, "Why Most Published Research Findings Are False" (2005) 2:8 *PLoS Medicine* 696 at 696.

85 For a comprehensive overview of the problem, see e.g. Fiona Fidler & John Wilcox, "Reproducibility of Scientific Results" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (3 December 2018), online: *Stanford* <plato.stanford.edu/archives/win2018/entries/scientific-reproducibility> [perma.cc/4NAU-FAE9].

And for another thing, as Ronald Dworkin argued, it is wrong to condition the analysis of constitutional rights on causal inferences derived from observations of behavioural patterns — something that social sciences routinely do — because the latter can undergo rapid transformation. In Dworkin's own words: "[c]orrelations of social phenomena are fragile in the sense that the data, the behaviour which forms the correlation, can change very quickly."[86]

The above discussion, of course, does not suggest that all causal judgements must be banished from constitutional analysis. Dworkin himself provides a helpful distinction between physics and similar sciences that can provide "some notion of the mechanics that translate the cause to the effect"[87] — judgements yielded by such sciences are, according to Dworkin, allowed to enter constitutional adjudication — and social science, which "usually is only able to provide correlations without the mechanics."[88] The latter, according to Dworkin, must be deplored whenever "constitutional rights are at stake."[89]

Thus, the forward-looking public policies that rely on complex judgements of social science — such as positively conceived policies — must be contrasted with empirically robust 'negative' policies that require the court to examine a simple cause-and-effect connection within a known 'mechanical model.' The latter can be accommodated by the proportionality test because it would not inject an unjustified amount of empirical uncertainty into the analysis. Indeed, the prevention of a concrete harm is more empirically robust than the achievement of an abstract good.

Thus, paradoxically, David Beatty was both right and wrong when it comes to his unalloyed trust in facts:[90] facts are *making* proportionality analysis in cases of negatively conceived values and *breaking* it when dealing with positively conceived ones.

(ii) Epistemic Uncertainty and Deference.

One may wonder, of course, whether the problem of empirical uncertainty engendered by positively conceived policies is indeed as intractable as this article portrays it to be. True, the argument goes, navigating the treacherous waters of

86 Ronald Dworkin, "Social Sciences and Constitutional Rights — The Consequences of Uncertainty" (1977) 6:1 JL & Educ 3 at 6.
87 *Ibid* at 5.
88 *Ibid.*
89 *Ibid* at 6.
90 Beatty, *supra* note 28.

conflicting scientific evidence is not easy;[91] however, the courts have ostensibly mastered this task by consistently relying on a sophisticated and well-established doctrine of curial deference.[92]

We shall see, however, that deference provides a dubious solution to the issue of epistemic uncertainty. Not only is it manifestly problematic from the doctrinal point of view, but it also introduces its own degree of uncertainty and unpredictability into adjudication. Guy Davidov calls this phenomenon one of deference's main paradoxes: by trying to provide an answer to the problem of subjective judicial reasoning and judicial overreach, deference in fact "only exacerbate[s] the problem and lead[s] to more subjectivity."[93] Thus, as far as the problem of uncertainty in adjudication is concerned, it is no exaggeration to say that the medicine of deference has been worse than the disease it purported to cure.

Unfortunately, in order to solve the problem described above, it would not be enough to jettison the practice of deference altogether. Deference is a mere symptom of the underlying institutional conflict between the courts and the legislature pertaining to the allocation of the risk of factual uncertainty in policy-laden constitutional disputes.[94] Hence, the root cause of the problem needs

91 As has been established earlier, the reviewing courts seeking to analyse the long-term robustness of the large-scale polycentric public policies that circumscribe constitutional protections inevitably run into the problem of intractable epistemic uncertainty, because most, if not all, public good policies are created under the conditions of imperfect information. Furthermore, it is not immediately apparent whether it is unelected generalist judges, as opposed to democratically elected legislatures, that should be entrusted with the task of handling such epistemic uncertainty and, in so doing, shaping the contours of various public policies for many years ahead. See e.g. Cora Chan, "A Preliminary Framework for Measuring Deference in Rights Reasoning" (2016) 14:4 Intl J Constitutional L 851 at 854; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 108-09; TRS Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Cambridge LJ 671 at 672.

92 The notion of deference in constitutional adjudication serves as an umbrella term for a variety of rhetorical schemes and methodologies that determine the degree of judicial restraint on the part of the court in overseeing the decisions of the legislature whose acts are impugned as contrary to the Constitution. In short, deference operates by lowering the legal standards that the government would otherwise have to satisfy in seeking to uphold rights violation. See e.g. David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279 at 286; Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory*, (Cambridge: Cambridge University Press, 2008) 184 at 188; Lawrence David, "Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection According to the McLachlin Court" (2015) 73:1 UT Fac L Rev 35.

93 Guy Davidov, "The Paradox of Judicial Deference" (2001) 12:2 NJCL 133 at 147.

94 In the apt summary of Sujit Choudhry, the "central question" of proportionality jurisprudence today is "how the Court should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information," see Choudhry, *supra* note 68 at 503-04.

to be fixed: judges should not apply proportionality to positively conceived policies as it is the only way to ensure that the epistemic uncertainty inherent in constitutional disputes does not reach an intolerable degree, meaning that the very need for deference would be obviated.

For a taste of how problematic the practice of deference can become, consider the application of curial deference in Canada, the jurisdiction which is the poster-child for the migration of proportionality worldwide.[95] "Deference may be appropriate," the Supreme Court reasoned in *Canada (AG) v JTI-MacDonald Corp*,[96] in cases of epistemic uncertainty, such as cases whereby "the outcome may not be scientifically measurable" and where there is "room for debate about what will work and what will not."[97]

Two points merit note here. First, the idea that courts should be willing to afford more weight to the government's arguments if such arguments are evidentially problematic is constitutionally suspect. Indeed, if courts adopt a deferential posture in the face of conflicting or uncertain empirical evidence, the practical implication of such a move would be effectively ceding constitutional ground to the thinly justified governmental positions.[98] Relatedly, the practice of rewarding poor evidentiary input creates a perverse incentive for the government to underplay, underreport, or even deliberately obfuscate empirical foundations underlying its policy choices because, as far as the government is concerned, the muddier the evidentiary waters get, the better.

Second, the growing body of the Supreme Court's deference jurisprudence has made clear that judges had been unable to stick to any single 'deferential' category of cases carved out in the proportionality framework. Moreover, as numerous exceptions to the original categories of deference proliferated, so did the actual instances of judicial extension of deference to the legislative decision-making.[99] As a result, under the current deference framework in Canada it is

95 *Ibid* at 502.

96 2007 SCC 30 at para 41.

97 *Ibid.* According to *Thompson Newspapers v Canada (AG)*, [1998] 1 SCR 877, 159 DLR (4th) 385, which outlines the current Canadian framework for curial deference in proportionality cases, empirical uncertainty is one of the four contextual factors militating in favour of judicial restraint in proportionality cases.

98 According to Ronald Dworkin, deference is a form of judicial self-restraint in which "political institutions other than the courts are responsible for deciding which rights are to be recognized," see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 138

99 For instance, back in 1991 Don Stuart decried "a clear trend of judicial deference to legislative choices," see Don Stuart, "Will Section 1 Now Save Any Charter Violation? The Chaulk Effectiveness Test Is Improper" [1991] 2 CR (4th) 107 at 108. For an observation that there had been a 'tendency' of increasing the level of judicial deference in resource allocation cases under the McLachlin Court, see

virtually impossible to predict the outcomes of proportionality cases.[100] Such fractured jurisprudential landscape threatens not only the *rationality* of proportionality review, but the integrity of the Canadian constitutional rights regime *as a whole*.[101]

Arguably, such unprincipled body of jurisprudence — as well as the matrix of perverse incentives whereby a weak argument for infringing rights may be strengthened by the absence of a good evidentiary record — would less likely be created under the regime of proportionality review which would only admit of negatively conceived policies. In such a regime, the doctrine of deference would simply not be needed.

I do not want to be misunderstood on this last point. There is no real doubt that epistemic uncertainty attends absolutely all public policies, positive and negative alike. However, the difference is in degree. The general uncertainty associated with the negatively conceived policies — e.g., the need to prevent some negative consequences by, for instance, protecting the public from some immediate and present harm[102] — normally allows the government to tender evidence that would meet the traditional civil standard of proof.[103] Conversely, the causal hypotheses underlying the 'public good' policies — such as the abovementioned reform of the healthcare system — normally cannot meet the traditional civil standard of proof because the analysis of their far-reaching effects amounts to nothing more than predictions and speculations.

David, *supra* note 92 at 39. On the Court becoming more and more deferential in election law cases, see Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2014) 32 NJCL 173.

100 For some pertinent discussion, see e.g. David Kenny, "Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland" (2018) 66 Am J Comp L 537 at 559; Danielle Pinard, "Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence" (2004) 25:1 SCLR (2d) 213 at 221; Andrew J Petter & Patrick J Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988) 10 SCLR (2d) 61 at 95.

101 For some poignant criticism of the Canadian doctrine of deference and its negative implications for the system of rights review, see e.g. Alyn James Johnson, "Abdicating Responsibility: The Unprincipled Use of Deference in *Lavoie v Canada*" (2004) 42:2 Alta Law Rev 561; Choudhry, *supra* note 68; Thomas MJ Bateman, "Legal Modesty and Political Boldness: The Supreme Court of Canada's Decision in *Chaoulli v Quebec*" (2005) 11:2 Rev Const Stud 317; Dawood, *supra* note 99; Stuart, *supra* note 99.

102 Such protective policies are 'negatively conceived' because they can be reconceptualised as the negative injunctions towards the rights-holders to abstain from using their rights entitlements in order to harm others.

103 *Oakes*, *supra* note 81 at 138. Elsewhere the court uses the term "a preponderance of probability … applied rigorously" (*ibid* at 137).

C. There is Irrational and There is Irrational

The foregoing discussion demonstrates that incorporation of positively conceived considerations into proportionality analysis renders the latter liable to various deviations from the standard of rationality, such as an increased epistemic uncertainty and double-balancing. One might — justifiably — object, however, that a mere deviation from the standard of rationality is of little import in and of itself; after all, as emphasized in the section on Rationality (Section I.3.A), no single rights framework can be completely rational and devoid of subjectivity.

It would seem, therefore, that in order to bring home the point that the 'omnivore' account of proportionality undermines its own justification, one needs to show that it renders proportionality not simply *irrational*, but *more* irrational than other types of constitutional doctrines, such as reasonableness or categorization. Yet is it necessarily so? What is it about proportionality's major rivals that makes them structurally immune to, or at least normatively compatible with, positively conceived considerations?

A sensible point of departure for thinking about this issue is the observation that all analytical frameworks designed to resolve issues of rights adjudication — whether proportionality-based or not — are predicated on interest balancing. The difference is in the way such balancing is operationalized. Generally, as Aharon Barak explains, two recurrent alternatives are available: one is *ad hoc* interest balancing, operationalized though proportionality and reasonableness frameworks, the other is interpretive balancing.[104] The latter is often described as a categorical method, whereby interest balancing "operates at the interpretive level determining the scope of the categories in question and their boundaries."[105] For instance, in order to determine the boundaries of the right to freedom of speech, one would need to engage in interest balancing that would lead to "taking a stand on the question of whether the right to freedom of speech may cover instances of racist speech or obscenity."[106] Similarly, in order to establish what falls within the ambit of the positive right to healthcare, one would need to balance the interests of the citizens in maintaining and ameliorating their health against the natural ability of the state to indulge such needs.

104 Barak, *supra* note 25 at 508. See also Kathleen M Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing" (1992) 63:2 U Colo L Rev 293 at 293.

105 Barak, *supra* note 25 at 508.

106 *Ibid* at 508-09.

Now, from the methodological standpoint, it is crucial that the normative trade-off between the principles underlying the right and the principles opposing it — the latter normally taking the shape of the public interest — would only be effectuated once. Otherwise not only would the disciplining effects of the rights framework dissipate, but the reviewing courts would end up chipping away at the constitutional guarantees twice, without any principled account of it, and often without even realising it.

Naturally, for such a problem of double-balancing to afflict a rights framework, the putative framework would have to be characterised by a bifurcated review model of judicial scrutiny, with the court first establishing whether the impugned provision has the rights-infringing effect and, if so, whether the infringement can be upheld. Only proportionality review fits such a model. Other frameworks — such as a holistic reasonableness test or categorisation — are predicated on the 'single-laned' model of review and therefore are by default structurally immune to double-balancing.

As for epistemic uncertainty, it would appear that other approaches, too, are structurally less prone to succumb to its ill effects. Consider categorization. By relying on the creation of predetermined legal categories[107] — the boundaries of which are established in advance by engaging in interpretive balancing[108] — categorical review is inherently more conservative and circumspect with respect to what policy considerations it is willing to entertain in order to set the boundaries of such categories. Again, once the definitional boundaries of each particular category are set, policy considerations cannot be 're-examined.'[109] In the words of Alec Stone Sweet and Jud Matthews, this approach seeks to determine, "once and for all, on which side of a line a particular class of cases falls, or where to draw the lines separating rules from exceptions in the first place."[110] This stands in sharp contrast to a flexible, adventurous *ad hoc* balancing built-in into proportionality.

This paper speculates that it is no coincidence that most policy considerations used in American jurisprudence to determine the scope of fundamental rights are, as will be demonstrated below, negatively conceived. Such considerations are more empirically robust than the positive ones, which is a great advantage when creating inflexible predetermined categories which are very hard to revisit.

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107 *Ibid* at 504.
108 *Ibid.*
109 *Ibid.*
110 Stone Sweet & Mathews, *Balancing*, *supra* note 29 at 123.

Take for instance freedom of speech. The full measure of First Amendment protection in the United States typically does not extend to a relatively limited list of such negatively conceived and, hence, empirically robust considerations as protecting the public against fighting words,[111] obscenity,[112] or advocacy of imminent lawless action.[113] The court cannot 'rebalance' values and interests underlying these qualifications to freedom of speech without having to replace one relatively rigid hierarchy with another,[114] so it has to choose wisely before creating each qualification. Not only does such approach narrow the evidentiary demands on constitutional cases, but it also ensures some degree of stability and predictability in adjudication. Conversely, as Stone Sweet and Matthews observe, "proportionality balancing has an uneasy, still unsettled, relationship with notions of precedent."[115]

It is worth repeating, as argued throughout this article, that proportionality performs worse than its major doctrinal rivals only when applied to positively conceived considerations. Conversely, when applied to negatively conceived interests, proportionality outperforms all other frameworks: it enhances the rationality of judicial decision-making, allows the judges to make sure that no significant normative or empirical consideration has escaped the analysis, and overall "usurps the role of the legislator less than proportionality's main alternatives."[116]

Part III: Negatively Conceived Values and Proportionality: A Step (Back) in the Right Direction?

1. What Does One Have by Virtue of Having a Negative Right?

Having repudiated the ability of the 'omnivore' account of proportionality to enhance — or at least not undermine — the traditional justificatory goals of proportionality — namely, rationality, legitimacy, and priority of rights — it may be prudent to demonstrate how these goals are in fact fostered by applying proportionality to the conflicts between negatively conceived values. Before delving into the pertinent analysis, however, it may be worthwhile to ask what one can have by virtue of having a negative interest. Let us start with negatively conceived rights.

111 *Chaplinsky v New Hampshire*, 315 US 568 (1942).
112 *Roth v United States*, 354 US 476 (1957).
113 *Brandenburg v Ohio*, 395 US 444 (1969).
114 Stone Sweet & Mathews, *Balancing*, *supra* note 29 at 51.
115 *Ibid* at 40.
116 *Ibid* at 108.

Frederick Schauer outlines the formal-structural properties of such rights by contrasting them with positive rights, arguing that what we commonly view as a right to X, is not actually a right *to* X, but rather a right not to have the ability to X "infringed without the provision of a justification of special strength."[117] From the perspective of Hohfeldian incidents, we can frame the negatively conceived right to X as a legal right-claim against the government to abstain from interfering with X. It follows, thus, that the government, who is to abstain from interference, "is under a correlative duty to do so."[118] By springing from the principle that every person has a basic claim right to independence,[119] negatively conceived rights operate like negative injunctions and give rise to categorical duties.

At first blush, such architecture of rights may appear counterintuitive as it does not anchor a putative right to X in an external interest of actually having or doing X, like other rights theories do. However, as Schauer explains, removing the ability to X from the right to X is far from making the right hollow,[120] "[r]ather, this reconception now sees rights as *shields* against governmental interests."[121] Situating this proposition in the context of proportionality review, one can observe that the government cannot pierce these shields unless it has a very compelling justification which it is willing to publicly demonstrate. In other words, the government is normally prohibited from trespassing onto the compartments of personal liberties framed as constitutional rights unless it has a good reason to do so.

2. Negatively Conceived Interests and Elimination of Double-Balancing

The outlined structural construal of constitutional rights has a number of advantages over the one explored earlier. Foremost among them is its ability to enable the courts to differentiate between normative propositions that should give rise to actual rights entitlements and those that should not without engaging in double-balancing, that is, balancing of the same normative considerations at the definitional *and* justificatory stages of the analysis. Double balancing is pernicious to principled rights reasoning because it fosters an unbridled normative analysis during a definitional limitation of a right and does not contain

117 Schauer, "Structure," *supra* note 50 at 429.
118 Nikolai Lazarev, "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights" (2005) 12 Murdoch UEJL 7.
119 Ariel Zylberman, "Why Human Rights? Because of *You*" (2016) 24:3 J Political Philosophy 321 at 322.
120 Schauer, "Structure," *supra* note 50 at 430.
121 *Ibid* [emphasis in original].

any principled restraints upon whatever personal preferences judges may wish to channel through their preferred definitions.

Consider the claim that negative construal of rights allows us to avoid double-balancing.[122] If we reject the idea according to which a constitutional right is grounded in some entitlement to external intelligible good, then it follows that a right and its grounding value must co-entail each other.[123] This would shun the need to adopt a definition of the right that would include a built-in interest balancing at the definitional stage of analysis, thus halting an unconstrained normative analysis during a definitional limitation of a right and imposing some principled restraints upon whatever normative choices judges may wish to channel through the seemingly neutral language of definitional analysis. Grégoire Webber explains the advantages of viewing rights as negative injunctions as opposed to positively conceived entitlements, that is, rights 'to' abstract things, in the following way:

> [T]he negative injunctions help *define* the right in a way that formulations of rights to abstract things do not. This is not to deny that the meaning of 'torture' or 'cruel and unusual punishment' or 'servitude' is open-ended in some respects. It is. But the interpretive exercise proceeds on the understanding that the right has been defined by the terms in need of interpretation.[124]

On this account, an unqualified interpretation of any given word or any given collocation of words incorporated into the Constitution would be exhaustive of the sphere of freedom secured by such right. If, for example, the Constitution guarantees the freedom of 'speech,' a carved out sphere of autonomy fixed within a constitutional fabric by such guarantee would be coextensive with everything that falls within the ambit of 'speech,' however trivial or controversial it may be. Thus, in an important respect, proportionality is conducive to what is known as "the broad understanding of rights."[125]

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122 Admittedly, such double-balancing would only be avoided if the text of the constitutional right itself does not contain definitional limitations, such as the constitutional prohibition of *unreasonable* search and seizure, or the prohibition of cruel *and unusual* punishment. Yet even if the text itself would prompt the court to engage in the interest balancing, such balancing would be of a different nature than the one the courts normally deal with as part of proportionality analysis. Rather than balancing the individual and public interests, such balancing would presuppose different relational categories, for example in the context of the cruel and unusual punishment, the balance would have to be struck between the severity of the individual punishment and the gravity of the individual offence, not between public and individual interests.

123 Zylberman, *Relationship*, *supra* note 9 at 60.

124 Grégoire Webber, "Proportionality and Absolute Rights," in Jackson & Tushnet, *supra* note 2, 75 at 78 [emphasis in original].

125 Möller, *Global Mode*, *supra* note 5 at 4.

One could easily envision an objection to such broad and general understanding of rights, arguing that it is unjustifiably abstracted from all particular circumstances of the constitutional order — that is, that it is *acontextual*. However, as Friedrich Hayek has famously retorted, that is precisely the point. According to him, the only way constitutional freedoms can be meaningfully cultivated in any given society is by being abstract, general, and acontextual; that is exactly what distinguishes "abstract rules that we call 'laws'" from "specific and particular commands."[126] As Hayek explains, the conception of freedom under the law "rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free."[127] In other words, the only way to forestall arbitrary exercise of power, which as Hayek explains is rather an "instrument of oppression,"[128] is to make sure that "the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it," with the judge's coercive will, of course, being no different than that of a legislator.[129]

From this, the main benefit of a broad negative understanding of a right is that, as mentioned above, the *prima facie* definition of a right can be incorporated into proportionality analysis as is, without any definitional limitations, because it would be already intelligible and, more often than not, capable of immediate effectuation to the full extent of its scope. This logic stands in sharp contrast with the idea to conceive of the right in positive terms, wherein the putative entitlement — for instance, the aforementioned right to health — would have to be qualified on a number of grounds even prior to reaching the proportionality stage of analysis. The difference is telling.

Admittedly, a counter-argument may be summoned according to which the right-as-a-negative-freedom paradigm is not a panacea against the evils of double-balancing. This point is brought into sharp relief in the context of the so-called 'qualified rights.' Qualified rights are constitutional guarantees, either negatively or positively conceived, that have "built-in qualifications which facilitate dialogue between the judicial and legislative branches of government."[130] Take, for example, the right to protection against 'cruel and unusual punish-

126 Friedrich A Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978) at 149.
127 *Ibid* at 153.
128 *Ibid* at 155-56.
129 *Ibid* at 153.
130 Peter W Hogg & Ravi Amarnath, "Understanding Dialogue Theory" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1053 at 1058.

ment.' The inclusion of the term 'cruel and unusual' suggests that the right in question is qualified — that is, it does not guarantee protection against *any* punishment, but only punishment which has been defined as 'cruel and unusual.' Now, the determination of what constitutes 'cruel and unusual' is ineluctably context-dependent and, as such, requires a balancing exercise of its own. However — and this is crucial for the purposes of analytical clarity — such definitional balancing would engage a different set of conflicting interests than balancing at the right limitation stage.

For instance, in order to determine what qualifies as 'cruel and unusual punishment,' the reviewing court would have to balance the severity of the punishment imposed against the gravity of the crime committed; conversely, at the rights limitation stage of the analysis, the constitutionally protected interests of the accused would have to be balanced against the actual interests of the community, for example, imminent safety needs of the public. This trade-off would arise, for instance, in the context of preventive detention of dangerous offenders.

As is evident from this discussion, the need to engage in interest balancing twice does not necessarily entail double-balancing of the *same* normative considerations. And in situations when it does, the court is advised against using proportionality. The issue, however, is that very few negative rights are qualified rights, and even fewer negative rights would have to be *both* defined *and* limited by resorting to identical public interests considerations. In contrast, *all* positive rights are necessarily qualified rights that engage the same public interest considerations at both the definitional and the limitational stages of analysis — such considerations normally pertaining to the just allocation of scarce resources.

3. The 'Shield-Sword' Theory

Yet another example of the superior performance of negatively conceived considerations in the context of proportionality can be summoned. Not only does framing constitutional rights and public policies in negative terms[131] helps to avoid double-balancing and narrow the evidentiary demands on constitutional cases, but it does so in a way that preserves rights' resistance to consequentialist trade-offs.

131 That is, as negative injunctions against the state qualified only by negative injunctions against the right-holders to use their rights as means to visit harm on others.

Allow me to elaborate. On a negative categorical account, the use of force on another is normatively impermissible unless such force is used proportionately to the force of the attack, such as in self-defence. So understood, the theory of proportionality proposed here equips rights with categorical normative force and blocks any trade-offs of constitutional rights against other important positive values, such as the abstract bettering of the society. For instance, it would preclude the government from hastening "the death of a terminally ill patient" if a doctor can save "the lives of three or four others by way of transplanting the organs of the terminally ill person to those others."[132]

The 'shield-sword' metaphor encapsulates the idea. In particular, proportionality conceives of constitutional rights as presumptive shields against governmental interference and only allows for such shields to be pierced when the right-bearers purport to use their rights as swords against their fellow right-bearers.

The explanatory power of this 'shield-sword' theory should not be underestimated. For instance, one of the most often used illustrations in the literature on the non-absolute character of constitutional rights is Justice Holmes's famous injunction against falsely shouting "fire" in a crowded theater. In this hypothetical, the right-holder, by discharging their rights in a manner that treats other persons as a means inflict on these persons serious harm. It is exactly the same rationale that can also vindicate the proportionate limitation of constitutional freedoms in situations whereby the right-holder engages in harmful defamatory speech. In such instances, the state should be justified in foreclosing the right-holder's opportunity to avail themselves of the benefits of their freedoms because they purport to use what is supposed to be a 'shield' against the state as a 'sword' against their fellow citizens.

4. The Shield-Sword Theory and the Historical Origins of Proportionality

It is important to note that historically, the conceptual parameters of proportionality followed the 'shield-sword' theory fairly accurately. The doctrine of proportionality emerged in the nineteenth century German administrative law "as a reason for overturning coercive measures that excessively limited individual rights"[133] and was originally used to curb the otherwise untrammelled

132 Kumm & Walen, *supra* note 3 at 71. As Kumm and Walen explain, the standard analytical framework of proportionality, employed without adding any extra deontological restrictions, would permit such a trade-off (*ibid* at 70-71).

133 Bernal Pulido, *supra* note 27 at 492.

police search power, though soon expanded onto the broader administrative landscape.

In that context, the courts mostly engaged in the business of balancing negative — as opposed to positive — considerations, as is evident from the early case law on the subject. For instance, Moshe Cohen-Eliya and Iddo Porat document an important administrative court decision in which proportionality was used to strike down a Berlin ordinance that banned the construction of buildings that blocked city views of a national monument, with a conclusion that the government could only act to prevent danger to public safety — a negatively conceived consideration — and could not impose its own aesthetic judgement — a positive concern.[134] In a different decision, the same court ruled that the government was not justified in violating the citizens' right to assemble and demonstrate, unless the need for such violation was "based on concrete facts" that could demonstrate a 'real,' as opposed to remote and speculative, "danger to public order."[135]

Thus, the original version of proportionality permitted restrictions of individual liberties in situations where the exercise of such liberties could have been proven to result in an actual damage to other individuals. In other words, it imposed a negative injunction on the rights-holders who sought to use the protective shields afforded to them by their rights as swords against their fellow citizens.

Conclusion

This paper argues that proportionality, contrary to the orthodox view, is content-sensitive to the types of normative considerations it can accommodate. While the proportionality test is amenable to processing negatively conceived considerations, it appears to be in irreconcilable tension with positively conceived ones. Why so? What is that about positively conceived considerations that makes them unamenable to proportionality review?

First, positively conceived considerations — understood as furthering some abstract public good goals and values — carry an inextricable risk of definitional overbreadth. Methodologically, such definitional overbreadth can only be salvaged by multiple sets of interest balancing being administered in the course of one proportionality-based review: such as a built-in interest balancing

134 Moshe Cohen-Eliya & Iddo Porat, "American Balancing and German Proportionality: The Historical Origins" (2010) 8:2 Intl J Constitutional L 263.

135 *Ibid* at 273.

at the definitional stage in conjunction with a balance of interests analysis as part of proportionality *stricto sensu*. Such double-dipping, however, enfeebles the very point of proportionality review whose main 'claim to fame' is pushing the balancing exercise to the end of the analysis and, in so doing, making such balancing as transparent and principled as possible.

Consequently, the injection of positively conceived considerations into proportionality reasoning fails one of the necessary conditions of proportionality's legitimacy as an unwritten constitutional principle — namely, the supposition that proportionality enhances the rationality of rights deliberation in constitutional tribunals. If anything, not only does the multifurcation of interest balancing disrupt the traditional allocation of the burden of proof in constitutional adjudication, but it also removes the much-needed structure, predictability, and the appearance of doctrinal constraint, thereby making the standard of review *even less rational* if compared to other rule-based or standard based methods of right limitation.

Secondly, and related to the first, the irrationality of the 'omnivore' version of proportionality is particularly pronounced at the level of constitutional fact-finding. Specifically, epistemic uncertainty that accompanies most positively conceived long-term public policy programs renders proportionality reasoning unamenable to rational formulation and profoundly alters the scope of constitutional rights in an *ad hoc* manner.

The way out of this 'irrationality conundrum' is to construe rights and competing public objectives not in positive terms — as non-relational categories operating in the service of some laudable *external* goals such as the right 'to' something, or the interest 'in achieving' something — but to ground rights and their limitations in the relational considerations[136] *internal* to rights. Such deontologically conceived rights would be amenable to reasonable limitations not by virtue of such limitations 'emanating' from elsewhere — for example, from the will and interests of the broader public — but because such limitations would be intrinsic to the deontological parameters of the constitutional rights themselves.

On this account, to say that one, structurally, has a right, would be to say, following Frederick Schauer, that one is equipped with "*shields* against governmental interests,"[137]meaning a licence to be free 'from' government interference. In this regard, a public interest claim would be able to pre-empt a claim

136 Zylberman, *Relationship*, *supra* note 9 at 3.
137 Schauer, "Structure," *supra* note 50 at 429.

of right only when the right-claimant would purport to use what is supposed to be a normative 'shield' as a 'sword' — that is, to vindicate their rights in order to inflict a tangible harm onto the public. Perhaps the most paradigmatic examples of this would be falsely shouting "fire" in a crowded theatre or practicing human sacrifice under the pretence of promoting one's religious freedom. In this respect, the reason why one would not be able to avail themselves of constitutional protections in such cases is not because one would be attenuating some governmental policies by doing so — which they, of course, would — but due to the fact that the putative bearer of rights would be weaponizing their constitutional safeguards against the public at large in a manner that is clearly disproportionate to the normative value of the interests they would seek to vindicate.

The debate can be shifted into the higher philosophical register by pointing out that, on a broader constitutional plane, proportionality as a structured analytical template has a limited application within the realm of constitutional adjudication and has any redeeming values solely when applied within the liberal democratic — as opposed to teleological — models of constitutionalism.

On a concluding note, it appears that both proponents and opponents of proportionality were correct in their respective praise and criticism of the test. When proportionality is used to arbitrate positively conceived considerations, it does indeed display all the typical weaknesses for which it is commonly criticized, such as irrationality, incommensurability, epistemic uncertainty, and the loss of rights. Conversely, when applied to negatively conceived considerations, proportionality improves, as opposed to impairs, constitutional adjudication. It is fair to infer that, in the apt observation of Franz Kafka, sometimes correct understanding of something and misunderstanding of the same thing are not entirely mutually exclusive.[138]

138 Franz Kafka, *The Trial*, translated by Mike Mitchell (Oxford: Oxford University Press, 2009) at 156.

References, Law, and Political Decision-Making: A Review Essay on Carissima Mathen's *Courts Without Cases: The Law and Politics of Advisory Opinions*, and Kate Puddister's *Seeking the Court's Advice: The Politics of the Canadian Reference Power*

Emmett Macfarlane*

Reference opinions are among some of the most important and scrutinized decisions in Canadian law. From the famed Persons case on the eligibility of women to be appointed to the Senate,[1] to landmark *Charter* rights[2] and language rights decisions,[3] to questions concerning the future of the country itself,[4] a multitude of so-called 'advisory' opinions are at the core of constitutional law in Canada. While some reference opinions are undoubtedly more important than others, many of these decisions receive intense media and academic scrutiny. *Reference re Secession of Quebec* is perhaps the most significant example, and the reference context was not lost on commentators and critics of that decision.[5]

The reference power as employed in Canada is unique among countries that share its system of government or exercise of robust judicial review. Many other common law systems refuse to permit the use of advisory opinions on

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1 *Reference re Meaning of the Word "Persons" in s 24 of British North America Act*, [1928] SCR 276, 4 DLR 98. The opinion of the Supreme Court was appealed to the Judicial Committee of the Privy Council in *Edwards v Canada (AG)* [1930] AC 124, 1929 UKPC 86.

2 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536; *Reference re Same-Sex Marriage*, 2004 SCC 79.

3 *Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1.

4 *Re: Resolution to Amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1 [*Amend Reference*]; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

5 Alan C Cairns, "The Quebec Secession Reference: The Constitutional Obligation to Negotiate" (1998) 10:1 Const Forum Const 26; Robert A Young, *The Struggle for Quebec: From Referendum to Referendum?* (Montreal: McGill-Queen's University Press, 1999); Robin Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80:1 Can Bar Rev 67; Patrick J Monahan, "The Public Policy Role of the Supreme Court of Canada in the Secession Reference" (2000) 11 NJCL 65.

the basis that they are not a proper function of the judiciary.[6] The High Court of Australia's refusal to entertain references was based on this reasoning.[7] The Supreme Court of the United States reportedly refused through informal communication between the justices and President Washington in 1793, based on the "cases" and "controversies" requirements under the judicial function outlined in Article III of the constitution.[8]

Despite the historic and ongoing magnitude of references in the Canadian context, we have gone without a systematic analysis of the reference power since its creation in 1875. The publication of two recent books remedies this lacuna. Carissima Mathen's *Courts Without Cases: The Law and Politics of Advisory Opinions*[9] and Kate Puddister's *Seeking the Court's Advice: The Politics of the Canadian Reference Power*[10] each manages to provide a superb and comprehensive analysis of the development, evolution, and purposes of the reference power. Especially useful for scholars and students of the constitution is the fact that the two books so wonderfully complement each other. The disciplinary strengths of the two authors — Mathen, a legal scholar, and Puddister, a political scientist — shine through, both in terms of the framing of the questions they ask and their high quality analysis. Both ably recount the history and development of the reference procedure, and the myriad challenges that arise from its use, especially for the separation of powers. References often mean that courts get drawn into the policy-making process in a context that usually does not include a traditional adjudicative function with litigants and a trial. It is difficult to see how the two books could complement each other better than if the authors had actually coordinated their efforts. Nonetheless, there are also some common threads, and shared gaps, in the two works. In what follows, I analyze each in turn.

Advisory in Name Only?

Mathen's *Courts Without Cases* provides a splendid jurisprudential analysis of major reference opinions across a host of categories. Organizing such a volume was likely a challenging task, but following a historical set of chapters Mathen separates the substantive chapters along the following lines: federalism issues in

6 Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 88 [Macfarlane, *Governing*].

7 *Re Judiciary and Navigation Acts* (1921), 29 CLR 257.

8 Macfarlane, *Governing*, *supra* note 6 at 207, n 78.

9 Carissima Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Oxford: Hart, 2019).

10 Kate Puddister, *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (Vancouver: UBC Press, 2019).

chapter 5, the mega-constitutional politics cases — including the patriation[11] and Québec veto references,[12] and the upper house reference[13] — in chapter 6, rights in chapter 7, and institutional decisions — the secession reference and the Senate reform[14] and Supreme Court Act references[15] — in chapter 8. This portion of her book ought to be considered mandatory reading not only for students of the reference power but also of constitutional law generally.

Mathen largely retains a detached, analytical voice throughout her exploration of these decisions, but this is not presented in staid legal prose. Despite the clear disciplinary focus on legal reasoning throughout her exploration of the decisions, Mathen is acutely aware of the broader stakes surrounding them, and she consistently reminds the reader that these are "highly contested disputes that were inescapably political."[16] Most of the critical analysis of individual decisions are deftly woven in via citations to other commentators rather than reflecting her own normative viewpoint, an issue to which I will return. Chapter 8 in particular is a masterclass of concision and readability. Mathen provides excellent coverage of the political context surrounding decisions and illuminates the uncertain ground the Supreme Court often finds itself on, even if the justices sometimes display a mindboggling confidence in the correctness of their own pronouncements.

The Court's decision in the secession reference became an obvious target for critics. Indeed, it reads more like a political essay than a judicial decision. This is a product of the fact that, despite the core issue before it — can the province of Québec unilaterally secede from Canada — the justices avoided engaging with the amending formula, which from a strictly constitutional view would govern any actual secession process. Instead, the Court relied on unwritten constitutional principles to invent a "duty to negotiate" on the part of Parliament and the other partners to Confederation in the event a clear majority of Québécois people voted to leave when presented with a clear question on secession. The decision has received praise and harsh criticism.[17] Notably, the Court disavowed itself of any responsibility to oversee the negotiations its newfound rule would mandate. Mathen astutely notes that this perhaps "signalled the Court's awareness that it was on less-than-solid constitutional ground,"

11 *Amend Reference*, *supra* note 4.

12 *Re: Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 SCR 793, 140 DLR (3d) 385.

13 *Re: Authority of Parliament in Relation to the Upper House*, [1980] 1 SCR 54, 102 DLR (3d) 1.

14 *Reference re Senate Reform*, 2014 SCC 32.

15 *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21 [*Supreme Court Act Reference*].

16 Mathen *supra* note 9 at 158.

17 See note 5, above.

and that this apparent caution flew in the face of the fact that the Court has evinced a willingness to engage in precisely these sorts of political questions in the past.[18]

Mathen is similarly sharp on the other cases examined throughout the book. In the context of federalism disputes, she brings nuance and clarity to fundamental issues relating to the securities reference,[19] which dealt with whether Parliament could establish a national securities regulator. She correctly notes that "one might have expected the Court to focus on the inability of the provinces to achieve what it could vis-à-vis effective control over the securities market, and the negative repercussions of such inability."[20] Instead, the Court viewed the federal proposal as a threat to provincial authority over regulation writ large. She notes the decision "is redolent of an older approach to federalism. It showed a court more invested in policing jurisdictional boundaries than permitting legislative powers to adapt to fit current contexts and needs."[21] This is a crucial point that less perceptive analysts might miss given the Court's emphasis in its opinion that "cooperative federalism" would allow the federal government to achieve in concert with the provinces what the Court would not permit it to do unilaterally. Yet the Court's plea for cooperation came at the end of a decision that jealously guarded provincial authority, almost to the neglect of the policy context at stake. The decision ultimately had real-world policy implications, and Canada remains the only major federation in the world without a national regulator, a social fact that the Court would likely have considered more carefully in other contexts.

One of the core questions at the heart of *Courts Without Cases* concerns the extent to which the technically advisory opinions are treated as binding, not only by courts but by other political actors as well. Mathen provides evidence for this throughout the book but delves deeply into the issue in the final chapter. Indeed, she notes the Court itself has imposed remedies in references in the same way it would ordinary cases.[22] For example, the remedial power of the suspended declaration of invalidity emanates from the Manitoba language rights reference, which saw the Court suspend the application of its decision, in effect invalidating all law in the province for failing to enact laws in both official languages. This remedial invention emerged despite the nominally advisory nature of the reference, a context that Mathen takes pains to emphasize.

18 Mathen *supra* note 9 at 163-64.
19 *Reference re Securities Act*, 2011 SCC 66.
20 Mathen *supra* note 9 at 102.
21 *Ibid* at 103.
22 *Ibid* at 228.

Suspended declarations have become routine practice in normal *Charter* cases, a phenomenon some scholars, including Mathen herself, sharply criticize.[23]

The Court has also occasionally refused to answer the questions posed to it. In the same-sex marriage reference this was in part on the fear that its decision would cause legal confusion in light of otherwise authoritative appellate court decisions on the issue in several provinces, highlighting the uncertainty around the binding nature of references in practice.[24] Similarly, the Court made the effort in the *Bedford* case,[25] striking down laws indirectly prohibiting prostitution, to distinguish its reasoning from the prostitution reference[26] over twenty years earlier, despite that decision's formal status as an advisory opinion. These patterns are a product of the legislative and executive branches unfailingly treating references as having the same authority as regular constitutional cases. Mathen attributes this to "fidelity to a special idea. A constitutionally ordered society is bound by a higher law. Actors should *care* about whether their actions (generated either at the level of a democratic formal assembly or by a single executive actor) are consistent with the Constitution."[27]

It remains, to some degree, an open question how much all actors do care about or maintain this notion of fidelity, or the extent to which we ought to treat the courts as having the exclusive and final word about the meaning of the constitution and its limits, *especially* in the reference context where judges are often dealing with abstract rather than concrete questions of higher law. One immediately sees how Mathen's book serves as a jumping off point for a host of questions that have preoccupied constitutional scholars without the benefit of a systemic inquiry into the reference context, including the separation of powers, dialogue theory, judicial power, and coordinate interpretation.[28]

23 *Ibid* at 231; Emmett Macfarlane, "Dialogue, Remedies, and Positive Rights: *Carter v Canada* as a Microcosm for Past and Future Issues Under the *Charter of Rights and Freedoms*" (2017) 49:1 Ottawa L Rev 107; Bruce Ryder, "Suspending the Charter" (2003) 21 SCLR (2d) 267; Kent Roach, "Principled Remedial Discretion Under the Charter" (2004) 25 SCLR (2d) 101.

24 Mathen, *supra* note 9 at 217.

25 *Canada (AG) v Bedford*, 2013 SCC 72.

26 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123, 109 NR 81.

27 Mathen *supra* note 9 at 231.

28 Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation* (Montreal: McGill-Queen's University Press, 2010); Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue Between Courts and Legislatures: (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Emmett Macfarlane, "Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights" (2013) 34:1 Intl Political Science Rev 39; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (Oxford: Oxford University Press, 2000).

Decision Calculus and Political Strategy

In *Seeking the Court's Advice*, Puddister presents an excellent social scientific analysis of the reference power. Drawing on a database of every reference decision rendered in Canadian history — notably, both by provincial appellate courts and the Supreme Court — she deftly traces trends and the broader evolution of the use of advisory opinions. In chapter 2, she uncovers facts that may have been intuitive but for which we never had systemic evidence. For example, Puddister finds a shift from federal to provincial in terms of which governments use the power more frequently. She also identifies historical peaks of intensity in the use of the power, for example in the 1930s, decisions involving the New Deal and Alberta Social Credit legislation, and in the 1980s a series of mega-constitutional decisions.

Puddister's analysis is also able to provide comprehensive evidence for something Mathen examines qualitatively: courts do not alter their behaviour in the reference context relative to normal cases. In chapter 3, for example, she notes that in over a third of reference decisions legislation is invalidated, something that aligns with the general statistical trend in regular constitutional cases. Further, there is only slightly lower levels of unanimity, and high third party participation rates.

Puddister also draws on interview research to further delineate the ways politics and strategy, unsurprisingly, play a huge role in governments' decision-making calculus over whether to pose advisory questions. This is a particularly illuminating section of the book. She finds that governments will use the reference power to deal with hot potato issues — opening the door to allowing them to engage in blame-shifting strategies — freeze the politics around an issue for a time, force negotiations between governments, or seek assurance — not just constitutional or legal assurance about proposed policies but political legitimization. There is also acknowledgment by former attorneys general of the benefits of abstract review, including the ability to frame questions broadly and to try to craft them to wield influence over the proceedings for a positive outcome. Few interviewees apparently saw any major drawbacks to references. Puddister's thorough discussion here is invaluable, and the clear disciplinary perspective — a degree of emphasis on politics and strategy — highlights important ways of thinking about and understanding the reference power that may not be possible in the context of an exclusively legal lens of analysis. In chapter 5, she also examines reasons governments may choose *not* to refer questions to the courts, including issues relating to political popularity or concerns over national security.

Seeking the Court's Advice closes with a superb analysis of the reference power through the frame of delegation. In short, references are the act of governments delegating policy-making power to courts. They also allow governments to leverage power in the context of disputes or uncertainty. Puddister notes how Québec's decision to refer the question of Senate reform in light of the Harper government's proposals to institute term limits and consultative elections for the Senate delayed the legislation and even forced the federal government to refer its own questions to the Supreme Court. The legislation was defeated and Québec's interests in the federation defended.

Puddister's analysis also elaborates on the implications of the reference power for judicial power and judicial independence, with the judiciary's role, while sometimes antagonistic to the executive or legislative branches in performing its counter-majoritarian function of judicial review, complicated by the reference procedure. There is a 'friendly' relationship of referral by the executive to answer what are often deeply political questions. Puddister writes that "[w]hen using a reference to seek assurances or to take advantage of the institutional legitimacy of the courts, a government is anticipating that an authoritative judicial decision will help to insulate its policy making from future challenges — both political and legal."[29] Her analysis thus might further our understanding of regime theory, positing a symbiotic relationship between the judiciary and existing governing regime and that brings temporality into broader analyses of judicial power and activism.[30] Indeed, Puddister cites Ran Hirschl on the important point that judicial and political elites often hold similar preferences.[31] She notes that the reference power also has implications for debates about the concentration of power in the executive,[32] given that it essentially provides a form of agenda-setting tool. Like Mathen's book, Puddister's comprehensive assessment of the reference power serves as a brilliant launching pad for new considerations across a host of issues ranging from the separation of powers to institutional relationships and the locus of power under the constitution.

29 Puddister, *supra* note 10 at 190.

30 Emmett Macfarlane, "'You Can't Always Get What You Want': Regime Politics, the Supreme Court of Canada, and the Harper Government" (2018) 51:1 Can J Political Science 1.

31 Puddister, *supra* note 10 at 187-89, citing Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

32 See Donald J Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); Peter Aucoin, Mark D Jarvis & Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government* (Toronto: Emond Montgomery, 2011).

The Dangers of the Reference Power: A Recipe for Judicial Overreach?

The Canadian scholarly literature now benefits from two rich, detailed accounts of the reference power. The two books complement each other incredibly well, a partial result of the distinct disciplinary frames animating each study. Readers of either book will absorb fine accounts of the history, development, and practice of advisory opinions. Where Mathen's book provides an unparalleled jurisprudential account of the most salient reference decisions, Puddister's analysis generates a systematic empirical picture of the reference power in practice, especially as it relates to governmental decisions to employ it.

If there is something missing from both accounts of the reference power it is, somewhat ironically, a specific account of an aspect of what makes reference opinions *distinct* from ordinary cases. Indeed, both books pay so much attention to what makes advisory opinions so similar in practice to regular cases, be it in terms of outcomes, remedies, and authority — their treatment by all actors as binding — that the degree to which the reference context produces a distinct mode of judicial reasoning does not always seem apparent.

Yet there are many high profile references that suggest the reference context enables or somehow encourages a form of judicial activism, overreach, or creativity in decision-making. Sometimes this might be the result of the questions posed to the Court. For example, the patriation reference asked the Court directly whether there exists a constitutional convention regarding provincial consent to amendments affecting their interests. The Court for the first time identified and recognized constitutional conventions, something it historically avoided for good reason: conventions are not legally enforceable, and judicial recognition of them arguably brings the Court too far into the political sphere. Indeed, the Court has been rightly criticized for this aspect of the patriation reference.[33]

References have also been the site of outright judicial invention of constitutional rules based on the unwritten principles of the constitution, decisions that arguably amount not to judicial interpretation of the constitution but judicial amendment.[34] As noted above, the Court effectively amended the constitutional amending formula itself by creating the 'duty to negotiate' in the secession reference. An even more stark example, given the judiciary's self-interest

33 Adam M Dodek, "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the *Patriation Reference*" (2011) 54 SCLR (2d) 117.

34 Emmett Macfarlane, "Judicial Amendment of the Constitution" Intl J Constitutional L [forthcoming].

at stake, comes from the judicial remuneration reference.[35] In that decision, a majority of the justices mandated "independent compensation commissions" for judges based on the unwritten principle of judicial independence, grounded in part in the preamble to the *Constitution Act, 1867* of "a Constitution similar in Principle to that of the United Kingdom" and an analysis of section 11(d) of the *Charter*. Nothing in the constitutional text supported the idea of such a process let alone the preamble itself. It is a decision that appears to receive scant attention in either book.

Along similar lines, the Court effectively entrenched itself in the constitution in the *Supreme Court Act Reference*, where it found that at least parts of the Act — including the eligibility requirements for appointment to the Court — were constitutionally protected by virtue of the amending formula's reference to the "composition of the Supreme Court." On its own, this conclusion was certainly plausible, but the decision itself goes much further by implying the Court was effectively entrenched even before the amending formula was itself established in 1982.[36] Mathen discusses many important criticisms of the decision, but ends her otherwise excellent discussion by emphasizing that although "it was criticised on a number of bases, those bases did *not* include the fact that it was merely an advisory opinion."[37] Thus while she concludes the reference "is surely one of the oddest advisory opinions" and that it "morphed into a high-stakes battle over the power and legacy of the Court itself"[38] implicit in the way she concludes the discussion is that this is *despite* its status as an advisory opinion and not at least in part *because* of it. Similar sorts of criticisms can and have been directed at other references, including the Senate reform reference[39] and the Motor Vehicle reference.[40]

This is not to say that judicial creativity or 'activism' are absent in ordinary constitutional cases. Yet something about the style of judgment produced in many high profile references seems to reflect a judicial willingness for pronouncements less grounded in precedent and less rooted to the constitutional text, a phenomenon that warrants more attention. It is clear that there remain open avenues for future research, including empirical work, on the nature of judicial decision-making in the context of advisory opinions. Scholars have

35 *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3, 150 DLR (4th) 577.

36 *Supreme Court Act Reference*, *supra* note 15 at paras 85-87.

37 Mathen *supra* note 9 at 179 [emphasis in original].

38 *Ibid.*

39 See Emmett Macfarlane, "Unsteady Architecture: Ambiguity, the *Senate Reference*, and the Future of Constitutional Amendment in Canada" (2015) 60:4 McGill LJ 883.

40 See FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview, 2000) at 45.

had a lot of difficulty attempting to identify nebulous concepts like judicial activism,[41] but there may be ways to devise measures of the breadth or tenor and style of decisions, the nature of remedies, or the invention of new (unprecedented) rules.

One possible explanation for the omission of any deep appraisal of references as a site for what I might call 'adventurous' judicial logic is that both Mathen and Puddister refrain from engaging in normative appraisals of the reference power altogether. Their books are steadfastly empirical projects, even while Mathen incorporates extant commentary and criticism of aspects of the jurisprudence or Puddister investigates the various motives and strategic choices by political actors. Ultimately, this is not a criticism. Given the extant lack of systemic inquiry into the Canadian reference power that sparked the creation of these two books, the decision not to engage in protracted discussions about whether this is all 'a good thing' should be viewed as welcome and appropriate. Indeed, each book illuminates and provides an empirical grounding in the evolution of references that will serve scholars for generations to come. To that extent, the strict empirical focus is a breath of fresh air. Both books provide a foundation for understanding the important advisory function and contribute tremendously to our broader understanding of Canadian constitutionalism.

41 See, for example, the following debate: Sujit Choudhry & Claire E Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v NAPE" (2003) 48:3 McGill LJ 525; Christopher P Manfredi and James B Kelly, "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49:3 McGill LJ 741.