# Rights and Federalism: Rethinking the Connections

*Johanne Poirier & Colleen Sheppard**

*Canadian federalism and rights are frequently portrayed as being in tension with one another. The entrenchment of rights in the* Charter of Rights and Freedoms *is often understood as affirming pan-Canadian uniform values and norms, putting provincial diversity and the plurinational character of the federation at risk. Federalism, however, also allows for forms of local innovation and experimentation that have proven critically important for advancing rights and freedoms. Multi-layered protection offers multiple venues and instruments for securing rights that may have a positive cumulative effect. In the judicial domain, some federalism cases include an assessment of underlying policy and justice concerns usually associated with rights. While some pathbreaking constitutional rights rulings affirm pan-Canadian protections, others complicate this picture. They do so by conceptualizing entitlements to governance, democratic participation, and empowerment — concerns at the core of federalism — as integral components of constitutional rights. In some contexts, judges recognize how rights may be enhanced by decentralized and multiscalar governance. Thus, while federalism and rights may sometimes be at odds, they may also be allies. Rethinking the traditional dichotomy between conceptions of federalism and constitutional rights generates a more nuanced and complex understanding of both*

*Le fédéralisme canadien et les droits de la personne sont souvent décrits comme étant en tension l'un avec l'autre. L'enchâssement des droits dans la* Charte canadienne des droits et libertés *est souvent compris comme l'affirmation de valeurs et de normes uniformes pancanadiennes, mettant en péril la diversité provinciale et le caractère plurinational de la fédération. Cependant, le fédéralisme permet également l'innovation et l'expérimentation locales, qui se sont avérées d'une importance capitale pour l'avancement des droits et libertés. Les protections offertes par plusieurs ordres de gouvernement offrent de multiples lieux et instruments pour garantir les droits, cela pouvant avoir un effet cumulatif positif. Dans le domaine judiciaire, certaines décisions rendues en matière de fédéralisme incluent une réflexion sur des préoccupations sous-jacentes de politique et de justice habituellement associées aux droits et libertés. Alors que certaines décisions pionnières en matière de droits de la personne assurent des protections pancanadiennes, d'autres compliquent le tableau. Elles le font en conceptualisant les droits à la gouvernance, à la participation démocratique et à l'habilitation – des préoccupations au cœur du fédéralisme – comme des composantes intégrales des droits constitutionnels. Dans certains contextes, les juges reconnaissent que les droits peuvent être renforcés par une gouvernance décentralisée*

* Johanne Poirier, Peter MacKell Chair in Federalism, Faculty of Law, McGill University; Colleen Sheppard, Professor, Faculty of Law, McGill University. Both authors wish to sincerely thank Emma Brown for superb research assistance. We also thank Jesse Hartery as well as two anonymous reviewers for insightful suggestions, and we acknowledge the financial support of the Social Sciences & Humanities Research Council.

*the jurisdictional dimensions of justice and the justice dimensions of jurisdiction.*

*et multi-scalaire. Ainsi, si le fédéralisme et les droits de la personne peuvent parfois être en conflit, ils peuvent aussi être alliés. Repenser la dichotomie traditionnelle entre le fédéralisme et les droits de la personne génère donc une compréhension plus nuancée et complexe des liens qui existent entre ceux-ci.*

## Contents

## I. Introduction

Canadian federalism and rights are frequently portrayed as being in tension with one another. The entrenchment of rights in the *Canadian Charter of Rights and Freedoms*[1] is understood as affirming pan-Canadian uniform values and norms, putting provincial diversity and the plurinational character of the federation at risk. Federalism, however, also allows for local innovation and experimentation, both of which have proven critically important for advancing rights and freedoms. Multi-layered protection offers multiple venues and instruments for securing rights that may have a positive cumulative effect. In the judicial domain, some federalism cases include an assessment of underlying policy and justice concerns usually associated with rights. While some constitutional rights rulings affirm pan-Canadian protections, others complicate this picture. They do so by conceptualizing entitlements to governance, democratic participation, and empowerment — concerns at the core of federalism — as integral components of constitutional rights. In some contexts, judges also recognize how rights may be enhanced by decentralized and multiscalar governance.

The study of the theory and practice of constitutional rights in Canada's federal system, therefore, tells a story that is both more complex and more engaging than the traditional "federalism versus rights" narrative suggests. On the one hand, federalism does not necessarily undermine rights, but may also enhance them. On the other hand, recognition of the significance of human rights and freedoms does not necessarily undermine the diversity that federalism implies.

To unravel the interface between rights and federalism, this article focuses on their relationship in the context of the Canadian *Charter*.[2] The article then invites a rethinking of the traditional dichotomy between federalism and rights by reflecting on the virtues and pitfalls of multiscalar rights protection, and by examining how these issues emerge in constitutional cases regarding both jurisdictional and rights issues.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 While our reflections have some echoes with the interface between state and Indigenous rights, the scope of our paper does not allow for a full analysis of the complexities, challenges, and potential of federalism, rights, and shared sovereignties in the Indigenous context.

## II. Surveying the Connections Between Federalism and Rights in Canada

To understand the complex and dynamic connections between rights and federalism, this section begins with their historical configuration prior to the *Charter*, and then explores how the *Charter* was woven into the existing complex rights regime in the Canadian federation.

### A. The Pre-*Charter* Relationship

The architects of the 1867 constitutional settlement had multiple motivations to opt for a federal regime. At least one of them — if not the most determinative — was a concern for some form of recognition and accommodation of certain linguistic and religious minorities.[3] As the Supreme Court of Canada states in the *Reference re Secession of Quebec*:

> The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments.[4]

Citing one of the founders of Confederation, George-Étienne Cartier, the Court explains that Canada would not be based on a homogeneous ethnic, religious, linguistic, or cultural national identity. Rather, Confederation created a new "political nationality" — one that includes diverse religious, linguistic, and ethnic communities. Thus, as told by the Supreme Court of Canada, from its inception, federalism was viewed as a "political mechanism by which diversity could be reconciled with unity."[5]

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3 See e.g. Johanne Poirier & Alain-G Gagnon, "Canadian Federalism: The Impact of Institutions on Key Political and Societal Actors" in Alain-G Gagnon & Johanne Poirier, eds, *Canadian Federalism and Its Future: Actors and Institutions* (Montreal: McGill-Queen's University Press, 2020) 3; Samuel V LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996) at 31-48.

4 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 43, 161 DLR (4th) 385 [*Secession Reference*]. We might question the use of the word "nation" in the context of what is — for us — undeniably a multinational federation. See Alain Noël, "Recognition and New Arrangements: The Challenges of a Multinational Federation" in Charles Breton, ed, *A Resilient Federation? Public Policy Challenges for the New Decade* (Montreal: Institute for Research on Public Policy, 2020) 11, online: <centre.irpp.org/research-studies/recognition-and-new-arrangements-the-challenges-of-a-multinational-federation> [perma.cc/396F-HCVR]; Félix Mathieu & Dave Guénette, eds, *Ré-imaginer le Canada : vers un État multinational?* (Québec: Les Presses de l'Université Laval, 2019).

5 *Secession Reference*, *supra* note 4. See also LaSelva, *supra*, note 3; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 48-49 [*Greenhouse Gas References*].

By guaranteeing provincial powers over local matters, the rights of diverse provincial communities could be safeguarded while the federal order would, for its part, ensure a degree of pan-Canadian cohesion. In this regard, the federal project turned part of the French-Canadian (Catholic) minority into a majority on the territory of Quebec, and other French-Canadians became double minorities, both within Canada and within every one of the other constitutive units.[6] In other words, it was territorial federalism that allowed for the structural protection of the Francophone community in Quebec, and that led to the eventual strengthening of a partially multinational conception of the federation.[7]

We say "partially," of course, since Indigenous nations were entirely excluded from this project and transformed into "objects" of federal legislation rather than constitutional actors.[8] Despite their recognition as self-governing peoples in the *Royal Proclamation, 1763*, Indigenous peoples were completely excluded from the constitutional negotiations leading up to Confederation and were subjected to over a century of overt policies of domination and assimilation.[9]

In addition to the structural approach outlined above, the *Constitution Act, 1867* included limited constitutional recognition of certain minority rights. For example, Catholics and Protestants were granted entitlements to denominational schools in provinces in which they formed a minority,[10] and bilingual-

6 Linda Cardinal & Pierre Foucher, "Minority Languages, Education, and the Constitution" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 553 [Cardinal & Foucher].

7 Sébastien Grammond, "Consensual Constitution? Contractual Thinking in the Interpretation of the Canadian Constitution" in Gagnon & Poirier, *supra* note 3, 168. It is important to note that neither the Acadians, nor other Francophones outside Quebec benefit from any tools of "self-governance" in the new federal deal. See Johanne Poirier, "Francophone Minorities in Canada: Trapped Between the New/Old Minority Categories" in Roberta Medda-Windischer, Caitlin Boulter & Tove Malloy, eds, *Extending Protection to Migrant Populations in Europe: Old and New Minorities* (New York: Routledge, 2020) 37 at 47-51 [Poirier, "Francophone Minorities in Canada"].

8 John Milloy, "Indian Act Colonialism: A Century of Dishonour, 1869-1969" (2008) Research Paper for the National Centre for First Nations Governance, online (pdf): *Centre for First Nations Governance* <http://www.fngovernance.org/ncfng_research/milloy.pdf>.

9 See Canada, Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Royal Commission on Aboriginal Peoples, 1996), online (pdf): <publications.gc.ca/collections/collection_2017/bcp-pco/Z1-1991-1-6-eng.pdf>. See also John Borrows, "Creating an Indigenous Legal Community" (2005) 50 McGill LJ 153 at 157-166; The Truth and Reconciliation Commission of Canada, *They Came for the Children* (Winnipeg: Truth and Reconciliation Commission of Canada, 2012) at 5-20, online (pdf): <publications.gc.ca/collections/collection_2012/cvrc-trcc/IR4-4-2012-eng.pdf>.

10 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 93, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*]. This protection of (some) religious diversity did not extend to the protection of minority language schools. This limitation is what allowed provinces to curb (or even deny) access to

ism requirements in the federal and Quebec legislatures and courts were constitutionalized.[11] This provided limited recognition of the Francophone minority at the pan-Canadian level and more substantial recognition of the Anglophone minority in Quebec.[12]

Beyond these selective minority protections, the *Constitution Act, 1867* did not expressly guarantee fundamental rights and freedoms. Despite the relative absence of constitutional rights in the *Constitution Act, 1867*, a few innovative cases protected rights at the interstices of jurisdiction. For example, in *Union Colliery*, a British Columbia statute prohibiting Chinese persons from working underground in mines was held to be an unconstitutional encroachment on federal jurisdiction over "Naturalization and Aliens."[13] Race-based discrimination was thus contested on division of powers grounds.

Subsequent decisions, however, limited the reach of this early case with more constrained interpretations that sustained the constitutionality of overtly racist legislation.[14] That said, these cases nevertheless provide early illustrations of the connection between rights and jurisdiction. In the post-World War II period, the timid emergence of an "implied bill of rights," which could potentially restrain both federal and provincial powers, involved a similar intermingling of rights and the federal division of powers.[15]

Thus, the pre-*Charter* era offered very limited pan-Canadian constitutional protection for fundamental rights and freedoms, which were primarily secured through provincial, territorial, and federal legislation that aligned with respective jurisdictional boundaries.[16] However, in 1947, Saskatchewan enacted a Bill

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French schools in provinces other than Quebec. See *Ottawa Separate Schools Trustees v Mackell*, [1917] AC 62, 32 DLR 1 (PC).

11 *Constitution Act, 1867*, *supra* note 10, s 133. These constitutional obligations were extended to Manitoba when it joined Confederation in 1871 (and much later, in 1993, to New Brunswick). See *Reference Re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1.

12 The Anglophone minority in Quebec was also granted some guaranteed representation in the Senate, which Francophone minorities elsewhere did not receive. This was done through the provision of electoral divisions. See the *Constitution Act, 1867*, *supra* note 10, ss 22, 23(6).

13 *Union Colliery Co of British Columbia v Bryden*, [1899] AC 580, [1899] UKPC 58.

14 See e.g. *Cunningham v Homma*, [1902] UKPC 60, [1903] 9 AC 151; *Quong-Wing v The King*, [1914] 49 SCR 440, 18 DLR 121.

15 *Switzman v Elbling and AG of Quebec*, [1957] SCR 285 at 328, 7 DLR (2d) 337 (Abbott J). The idea of an implied bill of rights was never overtly accepted by a majority of the Supreme Court before the advent of the *Charter*. For more recent discussions, see Jeremy Webber, *The Constitution of Canada: A Contextual Analysis*, 2nd ed (New York: Hart Publishing, 2021) at 169. See also *Secession Reference*, *supra,* note 4 at para 62; *Toronto (City) v Ontario (AG)*, 2021 SCC 34 at para 169 (Abella J, dissenting).

16 See *Canada (AG) v Ontario* (AG) [1937] UKPC 6, [1937] AC 326 [*Labour Relations Reference*] (affirming that international treaty obligations must be legislatively implemented in accordance with the federal-provincial division of powers).

of Rights, which included protections for fundamental freedoms (i.e. expression, religion, association), voting rights, and numerous provisions prohibiting discrimination (in employment, education, access to public services, and property ownership).[17] This pathbreaking initiative was followed by additional quasi-constitutional human rights enactments by other provincial, territorial, and federal legislatures.[18] While most of these instruments focused on anti-discrimination, Quebec's *Charter of Human Rights and Freedoms* recognized some social, economic, and cultural rights in addition to civil and political ones, and Quebec was the first jurisdiction to prohibit discrimination based on sexual orientation in 1977.[19]

In addition, from the 1960s on, there has been sustained social and political mobilization for legislative protection of social and economic rights. In 1961, Saskatchewan was again in the vanguard when it introduced legislation to provide publicly funded health insurance.[20] In a hallmark example of "laboratory federalism,"[21] this provincial initiative was soon duplicated elsewhere, with the federal government legislating to generalize what has since become a fundamental feature of Canada's social welfare state and national identity.[22] Far from being an isolated example, such instances of provincial and territorial legislative innovation in advancing rights have continued to be a feature of federalism in the post-*Charter* era.[23]

There have also been important moments of "provincial resistance" to the reach of federal criminal law that have had rights-affirming consequences.

17 *The Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35, s 1.

18 See e.g. *Canadian Bill of Rights*, SC 1960, c 44; *Charter of Human Rights and Freedoms,* CQLR c C-12 [*Quebec Charter*]; *Canadian Human Rights Act*, RSC 1985, c H-6. For an overview of the development of human rights laws in Canada, see Colleen Sheppard, "The Principles of Equality and Non-discrimination, a Comparative Law Perspective — Canada" (26 November 2020), online (pdf): *European Parliamentary Research Service* <www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)659362> [perma.cc/4THK-3KKT]. [Sheppard, "Principles of Equality"]. See also Johanne Poirier, "Legal Proceedings available to Individuals before the Highest Courts: A Comparative Law Perspective — Canada" (6 October 2017) at 35-47, online (pdf): *European Parliamentary Research Service* <www.europarl.europa.eu/RegData/etudes/STUD/2017/608733/EPRS_STU(2017)608733_EN.pdf> [perma.cc/9V7Z-R8J7] [Poirier, "Legal Proceedings"].

19 See *Quebec Charter*, *supra* note 18, Part I, Chapter IV (Economic and Social Rights), as amended by SQ 1977, c 6, s 1 (to add sexual orientation).

20 *The Saskatchewan Medical Care Insurance Act, 1961*, SS 1961(2), c 1 (which came into force in 1962).

21 See Francesco Palermo & Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford & Portland, OR: Hart Publishing, 2017) at 318-320.

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

23 See e.g. Sheppard, "Principles of Equality", *supra* note 18 at 11-16 (provincial legislative innovations in pay equity, disability accessibility, and prevention of sexual violence).

The most telling example occurred when local juries consistently reached non-guilty verdicts in trials against Dr Henry Morgentaler for his performance of abortions contrary to Criminal Code provisions prior to their invalidation under the *Charter*. In the wake of these acquittals, the Quebec Attorney General decided to stop prosecuting Morgentaler, despite the fact that abortion was only decriminalized in 1988.[24]

Hence, prior to the entrenchment of the Canadian *Charter*, rights were protected through a patchwork of overlapping and divergent federal, provincial, and territorial measures. This dissymmetry applied to civil and political rights, as well as to social, economic, and cultural ones. In this regard, while the *Charter* changed the constitutional fabric of the country, it was woven into a tapestry of a particularly decentralized federation which generated multiple regimes of rights protection.[25] This tapestry has not disappeared, even if it seems less visible to the public — and judicial — eye. It still forms part of the federation's multiscalar rights protection regime to which Part III of this article will turn.

## B. The Post-*Charter* Relationship

As the previous discussion makes clear, there was a growing panoply of legislative initiatives to protect human rights in all orders of government prior to the Canadian *Charter*. Nevertheless, the constitutional entrenchment of fundamental rights and freedoms in 1982 provided a significant additional layer of protection.

On its face, the *Charter* appeared to provide a form of pan-Canadian constitutional protection. Through the *Charter*, individuals and groups were accorded a common set of fundamental rights and freedoms, generating the contested idea that *Charter* rights "are held by virtue of the citizen's membership in the whole Canadian community, and are to be protected by a national institu-

24 See Wade K Wright, "Canada's 'Constitution Outside the Courts': Provincial Non-enforcement of Constitutionally Suspect Federal Criminal Laws as Case Study" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 103. See also Rachael Johnstone & Emmett Macfarlane, "Public Policy, Rights, and Abortion Access in Canada" (2015) 51 Intl J Can Studies 97.

25 In many ways, the Canadian federation is decentralized (notably in terms of the fiscal capacity of provinces). But this decentralization is by no means systematic, as features of the unitary nature of the original blueprint in the *British North America Act, 1867* remain (nomination of judges or Senators by the federal executive, for instance). What matters for our purposes is that the division of powers in Canada does allow the federal order and the constitutive units to adopt their own legislation-based rights regimes. On the contested debate on (de)centralization, see Gordon DiGiacomo & Maryantonett Flumian, eds, *The Case for Centralized Federalism* (Ottawa: University of Ottawa Press, 2010); Ruth Hubbard & Gilles Paquet, eds, *The Case for Decentralized Federalism* (Ottawa: University of Ottawa Press, 2010).

tion, the Supreme Court."[26] This vision of the *Charter* as a marker of a common Canadian identity was certainly part of Pierre Elliott Trudeau's decade-long campaign to have a bill of rights entrenched in Canadian law.[27] However, it was also denounced by some Quebec intellectuals as a tool of "anglo-conformity."[28]

In some landmark decisions, the Supreme Court indeed adopted an interpretation of the *Charter* that reinforced a pan-Canadian view of human rights. In so doing, these Supreme Court rulings superseded provincial governmental preferences,[29] while a level of pan-Canadian standardization was cultivated through the development of interpretative frameworks for *Charter* rights that were subsequently applied to parallel provisions in provincial human rights instruments (and vice versa).[30] This type of pan-Canadian standardization has been further reinforced by Canada's judicial structure, with the Supreme Court sitting as the final interpreter not only of the Constitution but also of all federal and provincial laws, including quasi-constitutional provincial human rights laws.[31] Furthermore, through the effect of *stare decisis*, a ruling from the Supreme Court on the conformity of a provincial law with the *Charter* will generally apply to all provinces.[32]

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26 Richard E Simeon, "Criteria for Choice in Federal Systems" (1983) 8:1/2 Queen's LJ 131 at 138.

27 *Ibid.* See also FL Morton, "The Effect of the *Charter of Rights* on Canadian Federalism" (1995) 25:3 Publius 173; Peter H Russell, "The Political Purposes of the *Canadian Charter of Rights and Freedoms*" (1983) 61:1 Can Bar Rev 30; Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017).

28 Fernand Dumont, *Raisons communes* (Montréal: Boréal, 1995) at 45, discussed in Jean-François Gaudreault-DesBiens, "La *Charte canadienne des droits et libertés* et le fédéralisme : quelques remarques sur les vingt premières années d'une relation ambiguë" (2003) 63.5 (Numéro spécial) R du B 271 at 278. See also Eugénie Brouillet, *La négation de la nation : L'identité culturelle québécoise et le fédéralisme canadien* (Sillery: Septentrion, 2005).

29 See *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*]; Danielle Pinard, "Une malheureuse célébration de la Charte des droits et libertés de la personne par la Cour suprême du Canada: l'arrêt *Chaoulli*" (2006) 66.5 (Hors-série : La Charte québécoise : origines, enjeux et perspectives) R du B 421 at 446.

30 See e.g. *Chaoulli*, *supra* note 29; *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 40 [*Amselem*]; *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para 68. See also The Honourable Marie Deschamps, "Les tribunaux canadiens et le contrôle constitutionnel des lois : une jurisprudence homogène au sein d'un régime fédératif" in Natalia Bernal Cano et al, eds, *The Cooperation between the Judges and the Independence of their Decisions in Comparative Law,* 1st ed (Venice: European Research Center of Comparative Law, 2013), cited in Poirier, "Legal Proceedings", *supra* note 18 at 34.

31 By contrast, for instance, the US Supreme Court and the German Constitutional Court only have limited jurisdiction over state (or Lander) constitutions, which may provide for distinct human rights regimes. See Palermo & Kössler, *supra* note 21 at 321-341.

32 José Woehrling, "Federalism and the Protection of Rights and Freedoms: Affinities and Antagonism" in Alain-G Gagnon & José María Sauca, eds, *Negotiating Diversity: Identity, Pluralism and Democracy* (Brussels: PIE Peter Lang, 2014) 105 at 121.

The *Charter*'s effects on pan-Canadian uniformity, however, should not be overstated. In a number of cases, the Supreme Court has been responsive to provincial diversity and autonomy. Recognition of asymmetric solutions — adapted to local realities — have been channeled through the interpretation of *Charter* rights.[33] Linguistic rights, for example, are notoriously context specific: they have not given rise to uniform solutions across the country and variation between provinces is the norm.[34] Moreover, recourse to the (controversial) notwithstanding clause[35] and, more frequently, the proportionality analysis in the context of section 1 have also limited the standardization of rights protection across the federation.[36] Section 1, in particular, recognizes a certain "margin of appreciation" to the political branches, including, of course, those of provinces and territories.[37]

Some scholars maintain that "the Supreme Court's interpretation of the *Charter*'s pan-Canadian values seems to have exhibited considerable sensitivity to federalism."[38] For example, James Kelly accepts the "normative assump-

33 See e.g. *R v Turpin*, [1989] 1 SCR 1296, 96 NR 115 (the Court refused to recognize province of residence as an analogous ground of discrimination, thus finding that divergent criminal procedures across Canada, regarding judge versus jury trials, did not violate the *Charter*'s equality clause). See also *R v Advance Cutting & Coring Ltd*, 2001 SCC 70, LeBel J (a plurality of the Court analyzed the specific provincial history of labour relations in Quebec in interpreting the meaning of freedom of association in the *Charter*, with the approval of Justice L'Heureux-Dubé, concurring, on this point).

34 See Cardinal & Foucher, *supra* note 6. This does not, of course, lead to a maximalist protection of linguistic rights.

35 Notably in language rights cases where the protection and survival of the French language has been recognized as a legitimate justification for limiting freedom of expression. See *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577; *Quebec (Education, Recreation and Sports) v Nguyen*, 2009 SCC 47 at paras 38-40.

36 See *Quebec (Attorney General) v A*, 2013 SCC 5 at para 449, McLachlin CJC (Chief Justice McLachlin agreed with the plurality that provisions of the Quebec Civil Code violated s 15(1) of the Canadian *Charter*, but found that this was justified given Quebec's deliberate choice of a distinct social policy). See also Mélanie Samson & Louise Langevin, "Revisiting Québec's *Jus Commune* in the Era of the Human Rights Charters" (2015) 63:3 Am J Comp L 719.

37 McLachlin CJ's reasoning in *Quebec (Attorney General) v A* recognized that legislatures should have "a margin of appreciation on difficult social issues" (*ibid* at para 449). On a comparison between the "margin of appreciation" in the context of the European Convention on Human Rights and Canadian case law, see Marthe Fatin-Rouge Stefanini & Patrick Taillon, "Le droit d'exprimer des convictions par le port de signes religieux en Europe : une diversité d'approches nationales qui coexistent dans un système commun de protection des droits" in *La laïcité : le choix du Québec : Regards pluridisciplinaires sur la Loi sur la laïcité de l'État* (Québec: Governement du Québec, 2021) 529 at 647-667. For a critical assessment of use of the margin of appreciation by the European Court of Human Rights, see Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights" (2018) 18 Human Rights L Rev 495. See also Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford: Oxford University Press, 2012).

38 Jeremy A Clarke, "In the Case of *Federalism v Charter*: The Processes and Outcomes of a Federalist Dialogue" (2007) 36 Intl J Can Studies 41 at 41, citing James B Kelly, *Governing with the Charter:*

tions of the centralization thesis" but notes that the "empirical evidence is less convincing."[39] Similarly, Linda White underscores how provincial and territorial responsibilities result in significant variations in the effective implementation of numerous *Charter* rights.[40] To further complicate this picture, though, Jean-François Gaudreault-DesBiens argues that while *Charter* case law has not generated the feared rejection of provincial diversity, it has arguably had a significant impact on Canada's constitutional culture.[41] This has been achieved through a widespread dissemination of *Charter* values amongst jurists, citizens, and minority groups, in a way that may be less sensitive to what Charles Taylor described as "deep diversity."[42] Moreover, the pre-enactment screening of proposed federal and provincial legislation for conformity with the *Charter* by legislative drafters and other government lawyers also has a potential "preemptive" standardization effect.[43]

In short, a legal culture attentive to pre-*Charter* jurisdictional differences in a plurinational federation has resulted in diverse levels of fundamental rights and freedoms protection. Thus, while it should not be overstated, a degree of sensitivity to federalism provides an important contextual dimension of the meaning and scope of *Charter* rights. The *Charter* has not systematically imposed pan-Canadian uniformity in the protection of human rights and freedoms, but there continues to be an assumption that the *Charter* and federalism are in tension — that the *Charter undermines* federalism and that federalism *undermines* the *Charter*. It is this underlying assumption that this article will question and explore: a task that requires a rethinking of the connection between rights and federalism.

## III. Assessing Multiscalar Rights Protection

In the evocative words of Eva Maria Belser, at first sight, federalism and rights protection seem to be in an "uneasy relationship" of "unrequited attraction." As she explains:

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*Legislative and Judicial Activism and the Intention of the Framers* (Vancouver: University of British Columbia Press, 2005).

39 James B Kelly, "Reconciling Rights and Federalism During Review of the *Charter of Rights and Freedoms*: The Supreme Court of Canada and the Centralization Thesis, 1982 to 1999" (2001) 34:2 Can J Political Science 321 at 324.

40 Linda A White, "Federalism and Equality Rights Implementation in Canada" (2014) 44:1 Publius 157 at 160.

41 Jean-François Gaudreault-DesBiens, "Memories" (2003) 19 SCLR (2nd) 219 at 242.

42 Charles Taylor, "Shared and Divergent Values" in Guy LaForest, ed, *Reconciling Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal & Kingston: McGill Queen's University Press, 1993) 155 at 182, cited in Gaudreault-DesBiens, *supra* note 41 at 242.

43 Morton, *supra* note 27 at 177; Woehrling, *supra* note 32 at 122.

> Proponents of federal power sharing … are convinced that federalism backs constitutionalism, democracy and good governance and see autonomy rights not as a hindrance to the fulfilment of individual rights and freedoms but as a useful contribution to it … However, human rights organisations and advocates … associate collective autonomy with different human rights standards … [and] generally look sceptically at autonomy arrangements.[44]

Yet, as so often is the case, the situation is more complex than the proponents of either side suggest.

## A. The Advantages and Pitfalls of Federalism for Rights Protection

Federalism has both advantages and disadvantages with regard to rights protection.[45] As a mechanism for allocating power, federalism rests on a delicate and always fluid combination of shared-rule and autonomy.[46] Of course, power may be used to abridge individual and collective rights — a risk that constitutionalized rights and judicial review are designed to curtail. However, autonomy — the power to adopt one's own (*auto*) laws (*nomos*) [47] — also implies a capacity for collective action. In a democratic federal system, this means that distinct communities are constitutionally *empowered* to define the contours of the legal, political, cultural, economic, and social rights they wish to promote.[48]

On the one hand, the fragmentation of power through federalism protects liberty by preventing concentrations of power.[49] Dividing power may slow down extreme shifts in policy orientation, in contrast to what may happen in a unitary state. This also increases opportunities for democratic participation and provides multiple venues in which citizens may promote public policy agendas, including rights-enhancement. Furthermore, it allows for policy innovation at

44 Eva Maria Belser, "Why the Affection of Federalism for Human Rights is Unrequited and How the Relationship Could Be Improved" in Eva Maria Belser et al, eds, *The Principle of Equality in Diverse States: Reconciling Autonomy with Equal Rights and Opportunities* (Leiden & Boston: Brill Nijhoff, 2021) 62 at 62.

45 See German Bundesrat, "Roles and Functions: A Constitutional Body Within a Federal System", online: <www.bundesrat.de/EN/funktionen-en/funktion-en/funktion-en-node.html> [perma.cc/4QYK-YAH2]; Palermo & Kössler, *supra* note 21 at 317-422.

46 See Johanne Poirier, "Autonomy and Diversity" in Ronald L Watts & Rupak Chattopadhyay, eds, *Unity in Diversity: Learning from Each Other: Vol 1: Building on and Accommodating Diversities* (New Delhi: Viva Books, 2008) 37 [Poirier, "Autonomy and Diversity"]; Patricia Popelier, *Dynamic Federalism: A New Theory for Cohesion and Regional Autonomy* (New York: Routledge, 2021).

47 Poirier, "Autonomy and Diversity", *supra* note 46.

48 Woehrling, *supra* note 32 at 108-111.

49 This is a classic justification for a federal structure, as argued by the architects of the United States Constitution. See James Madison, "The Federalist No. 10: The Same Subject (the Utility of the Union as a Safeguard Against Domestic Faction and Insurrection) Continued" in Ian Shapiro, ed, *The Federalist Papers* (New Haven: Yale University Press, 2009) 47.

a level where consensus may be more readily achieved, and may lead to diffusion and emulation in other orders of government. In other words: federalism, with its inherent commitment to diversity, facilitates policy-design that is more attuned to local conditions, minority protection, and democratically-grounded preferences.

On the other hand, federalism, with its multiple regulatory frameworks and actors can be complex and difficult to navigate, creating obstacles for marginalized and vulnerable groups. It can be costly and time-consuming, thus taking away from actual policy-making and delivery. It may slow down policy development when consensus is required and constitutive units have veto points. It may also slow down the implementation of international human rights treaties,[50] and local majorities, which may be more homogeneous, may not be adequately attentive to minority rights or may overtly undermine them.[51] Finally, the emergence of distinct policies, or asymmetrical solutions, may create a sense of unfairness — a concern that is particularly acute with regards to fundamental human rights that are understood to be "universal" and to transcend specific political contexts.[52]

Of course, every federation will elicit its own balance between these tendencies — and between uniformity and diversity — through its own blend of multiple layers of intersecting rights regimes. In the Canadian multinational federation, with strong provincial cultures, there is a complex blend of multiple layers of intersecting rights regimes.

## B. Multiscalar Rights Protection

International comparisons show that in most federations, a pan-country bill of rights tends to entrench minimum standards, constituting a "floor" rather than a ceiling.[53] When this is the case, constitutive units, using their "constitutional space,"[54] may adopt instruments that protect additional rights, or expand their

50 Woehrling, *supra* note 32 at 114-115.

51 *Ibid* at 107-109. The current debates regarding Bill 21 in Quebec have raised significant concern about the risk that provincial governments may not adequately protect minority rights. See Rebecca Jones, Nathaniel Reilly & Colleen Sheppard, "Contesting Discrimination in Quebec's Bill 21: Constitutional Limits on Opting Out of Human Rights" (November 2019) Directions 1 (CRRF/FCRR). For a comparative analysis of "margins of appreciation" in the context of limitations on religious freedom, see Fatin-Rouge Stefanini & Taillon, *supra* note 37.

52 Woehrling, *supra* note 32 at 121.

53 See e.g. Legg, *supra* note 37; Catherine Powell, "Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States" (2001) 150 U Pa L Rev 245; Vincent Martenet, "Federalism in Rights Cases" (2019) 67:3 Am J Comp L 551 at 552.

54 G Allan Tarr, "Explaining Sub-national Constitutional Space" (2011) 115 Penn St L Rev 1133.

scope (and several do).[55] This is one of the advantages of the diversity inherent to federal systems. While uniform standards may provide a sense of equality across a federation, they do not necessarily yield the highest degree of protection. Standardization may reflect the lowest common denominator on which the constituent power in a plural and fragmented polity are actually in agreement. In fact, if variations are not allowed, progressive policies will be precluded from developing, and eventually from being emulated by other constitutive units or taken onboard within the federal order itself. In addition, quasi-constitutional and legislative sources of rights protection and implementation are more readily altered than the constitutional text (or even its interpretation). This facilitates their potential modification to adapt to societal changes.[56]

Parallels drawn from other contexts shed light on the cumulative effect of human rights protection mechanisms. For instance, certain rights are understood to be "universal" under international law, but this does not prevent states that are party to international human rights treaties from adopting more protective measures within their domestic legal orders.[57] Paradoxically, in fact, when international organizations deplore the diversity in rights protection that federal regimes can generate, they can encourage a "race-to-the-bottom" in terms of rights protection.[58] In such situations, there is more formal "equality" of rights, but the level of rights protection may actually be weaker than in a less uniform context.

Over the last forty years, our constitutional imagination has been largely captured by the Canadian *Charter*, but it is not the only relevant, nor necessarily the most effective, instrument of rights protection. As noted above, the Canadian human rights landscape rests on a complex normative web that includes federal and provincial codes, statutes, and quasi-constitutional legisla-

55 Palermo & Kössler, *supra* note 21 at 321-345, give the example of the abolition of the death penalty in California, and of the right to subsistence recognized to refugees under cantonal law in Switzerland (then extended by constitutional interpretation to the federal order even in the absence of textual protection). A number of constitutive units have recognized social rights, enforceable of not, including the right to work, to secular — or private — education, to social security, to free kindergarten, to clean water, etc.

56 Woerhling, *supra* note 32 at 113.

57 For instance, the 47 states that are signatories to the European Convention of Human Rights, the 24 states that have ratified the American Convention of Human Rights (and other related instruments), or the 53 states that are parties to the African Charter on Human and People's Rights are not precluded from improving on those instruments. Of course, the challenge may be, as we discuss below, to determine when variation amounts to an actual "improvement." See Frédéric Mégret, "Ban on Religious Symbols in the Public Service: Quebec's Bill 21 in Global Pluralist Perspective" (2022) 11:2 Global Constitutionalism 217.

58 Belser, *supra* note 44 at 70.

tion which provides specific protections against discrimination and harassment in private and public sectors, such as employment, education, housing, and access to services.[59] This web of laws complements the *Charter*, which only applies to legislation and governmental action.[60] This is the case of the Quebec *Charter of Human Rights and Freedoms* for instance, which applies to both private and state actors, and includes innovative social, cultural, environmental, and economic rights, as well as protection against exploitation of older persons or persons with disabilities.[61]

These various instruments generally have an aggregative — and partially overlapping — effect. Underscoring the importance of multiple sources of fundamental rights protection, including those enacted prior to the *Charter* like the *Canadian Bill of Rights*, former Supreme Court Justice Beetz wrote:

> Because … constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect.[62]

In fact, the Canadian *Charter* itself stipulates that:

> The guarantee in this *Charter* of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.[63]

Presented this way, the cumulative effect of human rights instruments sounds like a rather positive outcome of a federal regime. As John Kincaid puts it, such a combination of sources — international, national, provincial, local — generates a rich and complex landscape that includes:

> … peaks and valleys of rights protection within a nation [or multi-national state], but this rugged rights terrain is surely preferable to a flat land of minimal or ineffectual national rights protection. The peak jurisdictions can function, under democratic conditions, as rights leaders for a leveling-up process.[64]

59 For a review of the multiple sources of protection for the right to equality, see Sheppard, "Principles of Equality", *supra* note 18.

60 See Poirier, "Legal Proceedings", *supra* note 18.

61 See *Quebec Charter*, *supra* note 18, arts 39-48. On the application of the Quebec *Charter* to the public and private sphere, see e.g. *Amselem*, *supra* note 30 at para 38.

62 *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 224, 17 DLR (4th) 422.

63 *Charter*, *supra* note 1, s 26.

64 John Kincaid, "Foreword: The New Federalism Context of the New Judicial Federalism" (1995) 26:4 Rutgers LJ 913 at 946-947, cited in Robert F Williams, "Comparative Subnational Constitutional Law (a Foreword)" in Patricia Popelier, Giacomo Delledonne & Nicholas Aroney, eds, *The Routledge Handbook of Subnational Constitutions and Constitutionalism* (New York: Routledge, 2022) xv at xxv.

However, while multiscalar human rights protections may be beneficial, the narrative is not quite so simple. Multiscalar rights protection raises numerous interpretive challenges. First, it may not always be clear if a right protected by a constitutive unit actually "improves," "complements," or runs afoul of the "pan-country" bill of rights. In particular, there may be disagreement as to what actually constitutes the "floor" of protection, or there may be disagreement about the proper balancing of rights.[65]

Second, major debates occur about how much deviation can be tolerated from a basic pan-country human rights norm. In some federations, "homogeneity" clauses may preclude variation between the "overarching" human rights instrument and the additional ones,[66] but those are exceptions rather than the rule. The Canadian federation, with its decentralized tradition and history, has no such blunt instrument of standardization. Nevertheless, homogeneity may result from judicial interpretation. This may yield the strongest degree of rights protection, but it is not necessarily the case. What if the ultimate "umpire" interprets rights in ways that are less protective than those claimed by human rights advocates, or less protective of the rights that a provincial government wishes to protect?[67] In this scenario, again, you may get more uniform protection, but arguably, at the expense of effective rights protection.

Third, in a plurinational state such as Canada, there can be multiple, overlapping and nested citizenships, collective identities, and diverse rights regimes. Some of the nations within a plurinational federation are endowed with the "tools of state" — autonomous institutions and competencies — that can generate divergent and asymmetrical protections of rights and freedoms.[68] In some instances, as noted above, the result will be heightened rights protections; in

65 To use an analogy in the international sphere, the inter-American human rights regime is largely restrictive of abortion rights and protective of the life of the foetus from conception. When member states expand their abortion rights, many would maintain they are "improving" on the "floor" of the Convention. But others argue they are going "below it." We thank Frédéric Mégret for this example.

66 Palermo & Kössler, *supra* note 21 at 321; Martenet, *supra* note 53; Patricia Popelier, Nicholas Aroney & Giacomo Delledonne, "Subnational Constitutionalism: Defining Subnational Constitutions and Self-constituent Capacity" in Patricia Popelier, Giacomo Delledonne & Nicholas Aroney, eds, *The Routledge Handbook of Subnational Constitutions and Constitutionalism* (New York: Routledge, 2022) 1 at 16.

67 See *Chaoulli, supra* note 29, in which the Supreme Court ruled that a legislative measure designed to prevent the privatization of medical care violated a patient's section 7 rights to security of the person (given long waiting lists). In this balancing between social policy and individual rights, the Court favoured the latter.

68 Benoît Pelletier, "La théorie du fédéralisme et son application au contexte multinational canadien" in *La laïcité : le choix du Québec : Regards pluridisciplinaires sur la Loi sur la laïcité de l'État* (*supra* note 37) at 373-528.

other situations, though, diversity might pose a serious challenge to fundamental human rights protection.[69]

With these caveats in mind, we can still conclude that federalism and rights are not necessarily antithetical. Federalism might hinder the development of a robust uniform *Charter* Canadian identity; however, it does not necessarily preclude effective rights protection. Conceived within a multiscalar framework, the diversity and innovation that flow from the division of powers and the granting of jurisdiction to diverse groups may in fact enrich rights protection. In this regard, federalism provides nested, distinct, and intersecting political communities with the institutions and the powers to improve the protection already offered by the "country-wide" *Charter*. But, of course, this potential does not necessarily maximize rights protection; it all depends on the rights policies actually put in place by the multiple powerholders.

The co-existence of multiple jurisdictions and sources of legal authority ensures that there is not one monolithic source of human rights law, thereby increasing the likelihood that all orders of government will abide by human rights commitments insofar as failure to do so will result in another layer of jurisdictional authority stepping in.[70] That said, such a multiplicity of actors and norms can generate blame-shifting and conflict. Moreover, while due regard for local mobilization needs to be taken into account in a textured federal democracy, effective protection of human rights does not always ensue from decentralized governance.[71] Similarly, rights defined at a broader level are not necessarily maximized — it is all about interaction, justification, and context.

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69 A similar tension is at play regarding social protection in federal systems, particularly multinational ones. To what extent should social rights and public services be uniform in a federation? Is this a marker of "social citizenship" or should diversity also allow for diversity in social protection? The answer is likely to differ depending on whether the federal regime arose through a process of dissociation (as in Belgium, for instance) or association, and on whether social (or human) rights develop before or after the state becomes federal. On this, see Johanne Poirier, "Protection sociale et citoyenneté dans les fédérations multinationales" in Jane Jenson, Bérangère Marques-Pereira & Éric Remacle, eds, *L'état des citoyennetés en Europe et dans les Amériques : en Europe et dans les Amériques* (Montréal: Presses de l'Université de Montréal, 2007) 195.

70 Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001).

71 "Small" may be more beautiful, but this is not always the case. Certainly, the historical US experience demonstrates the risks of racism at the state level that demanded a federal response. For a compelling depiction of this dynamic, see e.g. *Eyes on the Prize*, 1987, Documentary (Arlington County, VA: PBS Distribution, 2010), also available online (video): *YouTube* <www.youtube.com/show/SCn3LH6nH5IyTM_yc8i6iFEA?season=1&sbp=CgEx> [perma.cc/8QFX-CSSK]. The constellation of protections at local and federal levels varies depending on political commitments to advancing human rights.

In the end, one of the most important aspects of the intersection between rights and multi-tiered systems may be the additional protection afforded by the presence of multiple and autonomous sources of jurisdiction over diverse dimensions of rights. In the words of Martha Minow, "[i]t is the presence of multiple authorities that, paradoxically, gives minority groups the opportunity to seek alternatives to a singular answer" and increases avenues and instruments for challenging public and private intolerance.[72] In this respect, multi-layered norms and institutions enrich rights protection through interaction, dialogue, and adjustments, which take place at the local, provincial, pan-country, and more global level.[73] None of these levels can claim a legitimate monopoly on "the best" human rights protection.

## IV. Exploring Interpretive Synergies Between Rights and Federalism

Constitutional judicial review provides an important site for examining the potential synergy between federalism and rights. On the one hand, contested jurisdictional claims are being adjudicated in a post-*Charter* legal culture increasingly attentive to the normative importance of rights. On the other hand, greater attention is now being paid to the governance and empowerment dimensions of rights, particularly where collective rights are in dispute. In the discussion below, therefore, some preliminary reflections are offered on the connection between federalism and rights — or jurisdiction and justice — in the adjudicative domain.[74]

### A. Interpreting the Division of Powers: Justice and Jurisdiction

As a rule, judges ruling on division of powers issues insist on a clear divide between jurisdictional issues and underlying policy or social justice concerns,

72 Martha Minow, "Putting Up and Putting Down: Tolerance Reconsidered" (1990) 28:2 Osgoode Hall LJ 409 at 444-45.

73 Robert A Schapiro, "Foreword: In the Twilight of the Nation-State: Subnational Constitutions in the New World Order" (2008) 39:4 Rutgers LJ 801; Federico Fabbrini, "Fundamental Rights and Federalism in the European Union and the United States: Challenges, Transformations and Normative Questions" in Lorenz Violini & Antonia Baraggia, eds, *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors* (Cheltenham: Edward Elgar Publishing, 2018) 25 at 32. See Mégret, *supra* note 57 at 245-48.

74 We are indebted to Hester Lessard for the concept of "jurisdictional justice," which she explains is attentive to the relationship between jurisdiction (including the constitutional division of powers) and justice. She observes that social justice is often enhanced (though not always) by local governance and civil society mobilization when they facilitate greater democratic participation and voice for marginalized communities. These latter concerns resonate with issues at the heart of both human rights and federalism. See Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2011) 19:2 Const Forum Const 93.

including those related to equality and the rights of more vulnerable communities. As the Supreme Court has put it, "[t]he inquiry into constitutional powers under s[ections] 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy."[75] In other words, the orthodox conception of judicial interpretation of the division of powers is divorced from public policy considerations. Using a panoply of doctrines, judges are to determine "who *can* do what," not "who *should* do what."

Yet, the apparent bifurcation between jurisdictional issues and underlying social justice concerns is not as clearly demarcated as conventional constitutional law often suggests. Beyond the historical intersection discussed above,[76] some federalism jurisprudence inevitably takes societal interests and public policy into consideration as an integral part of delineating jurisdictional powers. One important domain where this has occurred concerns federal jurisdiction over criminal law.[77]

Given that the criminal law power covers an expansive range of purposes — the protection of public health, safety, security, morality, and the environment — federal legislation enacted pursuant to the criminal law power often reaches issues at the heart of human rights.[78] Similarly, provincial jurisdiction over civil rights and local matters implies authority to enact explicit human rights protections, but also legislation dealing with education, housing, welfare, workers' safety, etc, all of which have a significant impact on the realization — and the expansion — of rights.[79]

In some contexts, doctrinal interpretation has shown an awareness of how federalism issues will impact the needs and interests (effectively the rights) of vulnerable groups that have experienced historical exclusion and discrimination. The *References re Greenhouse Gas Pollution Pricing Act* provides a recent

75 *Reference re Securities Act*, 2011 SCC 66 at para 90 [*Securities Act Reference*]. See also *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 155 [*Genetic Non-Discrimination Act Reference*]; *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 2 [*Firearms Reference*].

76 See Parts II and III, above.

77 See discussion of federal criminal law power in *Genetic Non-Discrimination Act Reference, supra* note 75; *Firearms Reference*, *supra* note 75; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*Assisted Human Reproduction Act Reference*]; *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 [*Hydro-Québec*].

78 Though criminal law legislation must also satisfy formal conditions (i.e. be framed in terms of a prohibition and a penalty), this prong of the test has been readily satisfied in numerous cases. See e.g. *Genetic Non-Discrimination Act Reference*, *supra* note 75; *Firearms Reference*, *supra* note 75; *Assisted Human Reproduction Act Reference*, *supra* note 77; *Hydro-Québec*, *supra* note 77.

79 See *Constitution Act, 1867*, *supra* note 10, ss 92(13), 92(16).

example.[80] In assessing the scope and meaning of the national concern branch of the federal "peace, order and good government" power (POGG), the Court had to consider whether expanding federal jurisdiction would have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[81] Of significance in this regard was Chief Justice Wagner's express consideration of not only provincial interests, but also of the impact of the division of powers on vulnerable groups:

> [I]t is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. *This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities* and regions, with profound effects on *Indigenous peoples*, on the Canadian Arctic and on Canada's coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction.[82]

The Court thus engaged in an explicit evaluation of the impact of jurisdiction on vulnerable communities.

Significantly, the doctrinal test for the national concern branch of POGG also implicitly embraces the principle of subsidiarity by requiring judges to ponder whether a policy challenge can be met by provinces, acting individually or collectively.[83] In addressing this question, judges are necessarily involved in weighing some policy concerns in the drawing of jurisdictional boundaries. While this does not require judges to assess the wisdom of policy *per se*, they will be engaged in policy analysis, notably to assess the potential impact of an absence of pan-Canadian action. Although the impact on human rights may not be directly apparent, considerations of justice (rights) and jurisdiction (power) are not entirely divorced from this type of judicial inquiry.

The Supreme Court has also adopted an "evolutive" and teleological interpretation of the division of powers that demonstrates concerns with the need for governments to address contemporary issues that intersect with equality. Hence, in two unanimous References rendered in 2004 and 2005, the Supreme Court relied on the "living tree" doctrine — not initially envisaged in the

80 *Greenhouse Gas References*, *supra* note 5.

81 *Ibid* at para 160, citing *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 432, 49 DLR (4th) 161.

82 *Ibid* at para 206 [emphasis added].

83 See Jean-François Gaudreault-DesBiens & Noura Karazivan, "Dissipating Normative Fog: Revisiting the POGG's National Concern Test" (2021) 55:1 RJTUM 103. This concern with subsidiarity also arises with respect to the federal Trade and Commerce power: see *Securities Act Reference*, *supra* note 75.

context of the division of powers[84] — to expand the meaning of enumerated federal heads of power to respond to changing societal values and norms, including the concerns of equality-seeking groups.[85]

In the *Same-Sex Marriage Reference*, federal jurisdiction over "marriage" was interpreted to encompass a more inclusive definition of the institution than the "opposite sex" one that existed at the time of Confederation.[86] Recognition of same sex marriage as a dimension of equality was no doubt integral to defining the scope of jurisdiction over marriage expansively.

A year later, the Court again used the living tree metaphor to interpret the federal power over "unemployment insurance" to allow Ottawa to legislate paid maternity and parental leave across the country.[87] In that case, Justice Deschamps' expansive decision went beyond the more narrow reach of the provision, demonstrating sensitivity to parental rights and the changing nature of women's participation in the labour force. Of concern was the risk that invalidating the federal legislative scheme for maternity and parental benefits would leave new mothers and parents without compensation if provincial legislatures failed to establish paid parental benefits.[88] The "evolutive" approach updated the conception of valid — and more inclusive — reasons for being absent from the workforce, leading to a policy outcome that increased pan-Canadian social protection for women and families. Thus, the living tree doctrine has — in some contexts — emerged as a vehicle for an enhanced and flexible judicial response to changing conditions and to the needs of equality-seeking groups.[89]

84 For the classic statement on the living tree doctrine, see *Edwards v Canada (Attorney General),* [1929] UKPC 86, [1930] 1 DLR 98 (often referred to as the *Person's Case*).

85 Eugénie Brouillet & Alain-G Gagnon, "La constitution canadienne et la métaphore de l'arbre vivant : quelques réflexions politologiques et juridiques" in Alain-G Gagnon & Pierre Noreau, eds, *Constitutionnalisme, droits et diversité : Mélanges en l'honneur de José Woehrling* (Montréal: Thémis, 2017) 79 at 93-94. For the argument that several cases in which the "living tree" interpretative approach is seemingly used are, in fact, compatible with a modern conception of originalism, see Benjamin J Oliphant & Leonid Sirota, "Has the Supreme Court of Canada Rejected 'Originalism'" (2016) 42:1 Queen's LJ 107 at 144-145, 150-151. Both positions, however, recognize that courts do proceed with interpretations that can have the effect of expanding jurisdiction as a response to contemporary realities.

86 *Reference re Same-Sex Marriage*, 2004 SCC 79 [*Same-Sex Marriage Reference*].

87 *Reference re Employment Insurance Act (Can)*, ss 22 and 23, 2005 SCC 56 at para 9 [*Employment Insurance Reference*].

88 As was the case in most provinces outside Quebec, which already had its own parental benefits regime in place.

89 Of course, we can find numerous examples in which the impact on vulnerable groups has certainly *not* been taken into consideration in division of powers analysis. For instance, in 1988, the Supreme Court ruled that provincial norms regarding the preventive withdrawal of pregnant workers did not apply to federal telecommunication enterprises. In so doing it not only reinforced federal exclusivity, but deprived women of provincial social protection. See *Bell Canada v Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749, 51 DLR (4th) 161 [*Bell 1988*]. This said, *Bell*

While the above examples illustrate how courts sometimes engage with policy issues — and indirectly, with concerns integral to rights — when assessing jurisdictional issues, feminist scholars of federalism have gone further. An important strand of feminist scholarship endorses taking human rights concerns, particularly equality, more openly into account in division of powers cases. Gillian Calder, for example, suggests that principles of substantive equality should infuse the full panoply of constitutional interpretation, including federalism.[90] Similarly, Beverley Baines argues that to advance equality for women and other equality-seeking groups, "judges should investigate the potential that a doctrine of *equity federalism* might offer."[91] As Kerri Froc comments, "[t]hose that study constitutional law seldom ask 'the gender question' in relation to the *interpretation* of the division of powers."[92] As a remedy to this, Froc's scholarship examines the gendered implications of apparently neutral legal doctrines regarding the division of powers. Thus, she queries, "[w]hen and to what extent do power-sharing regimes in the Canadian federation reflect the notion of women as national versus local or non-citizens … ?"[93] For Froc, "federalism jurisprudence [is] … one of the gendered/gendering structures" of the Canadian state. [94]

Similarly, in her work on federalism, Hester Lessard focuses on disempowered communities.[95] She maintains that division of powers jurisprudence

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*1988* — and its conception of interjurisdictional immunity — has been partly revised since, so that overlapping jurisdiction is now favoured. See *Canada Western Bank v Alberta*, 2007 SCC 22 at paras 32-68. See also Kerri A Froc, "Is Federalism a Feminist Issue? The Gender of Division of Powers Jurisprudence" (2018) 12 JPPL 197 at 199-202.

90 Gillian Calder, "Federalism, Equality and Autonomy: Toward an Embedded Feminist Constitutional Agenda" (2006) 44:4 Alta L Rev 465 at 474-75, citing Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22:2 Dal LJ 5.

91 Beverley Baines, "Federalism and Pregnancy Benefits: Dividing Women" (2006) 32:1 Queen's LJ 190 at 222 [emphasis added]. Baines also writes at 222 that "Katherine Swinton hinted at a notion of equity federalism when she recommended that 'we must be vigilant to design institutions that make us attentive to the perspectives of women, aboriginal people, ethnic groups, the poor — all groups who have not dominated our political and social institutions, but who are important members of the society and who are no longer willing to be ignored in the policy process'" (citing Katherine Swinton, "Areas of Adjustment: A Lawyer's Perspective" in Ronald L Watts & Douglas M Brown, eds, *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 337 at 340-341).

92 Froc, *supra* note 89 at 197.

93 *Ibid.*

94 *Ibid*, citing Jill Vickers, "Is Federalism Gendered? Incorporating Gender into Studies of Federalism" (2013) 43:1 Publius 1. See also, Jill Vickers, "A Two-Way Street: Federalism and Women's Politics in Canada and the United States" (2010) 40:3 Publius 412. See also Beverley Baines, "Federalism and Women's Equality Rights Campaigns in Canada" in Jill Vickers, Joan Grace & Cheryl N Collier, *Handbook on Gender, Diversity and Federalism* (Cheltenham, UK: Edward Elgar, 2020) 149 at 156. One significant federalism case that Froc examines through a gendered lens is the *Bell 1988* case, *supra* note 89.

95 Lessard, *supra* note 74.

"should incorporate a fuller, more substantive consideration of democratic principles"[96] which are central to social justice. According to Lessard, where jurisdictional choices affect the fundamental rights of politically marginalized communities, their social mobilization to advance local governance initiatives should be taken into account. Though lamenting the lack of "rhetorical space" for this type of inquiry in division of powers case law, she does note that the federalism principle of subsidiarity, with its concern for law-making close to the people, resonates with her vision of jurisdictional justice.[97]

As these diverse insights reveal, some federalism scholars are disrupting the presumed divide between rights (and policies to advance them) and federalism, suggesting instead that we should be attentive to their intersections and overlap.

## B. Interpreting Rights: Jurisdictional Dimensions of Justice

A conceptual shift regarding rights enables us to capture the synergy — rather than the tension — between federalism and rights. In some contexts, the judicial determination of rights engages with issues at the heart of jurisdiction, understood as the authority to adopt legal norms. These include democratic participation, minority empowerment, and self-governance.[98]

As the Supreme Court asserts, one of the functions of constitutional design is "to ensure that vulnerable minority groups are endowed with the *institutions and rights* necessary to maintain and promote their identities against the assimilative pressures of the majority."[99] This connection between rights and *auto-nomy* (the capacity to determine one's own law) is premised upon an expanded view of decentralized governance that can reach beyond traditional provincial/territorial orders of government, and that calls for an understanding of federalism writ-large.

96 *Ibid* at 94. Lessard applies her argument for jurisdictional justice to the analysis of the interjurisdictional immunity doctrine in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*Insite*].

97 Lessard, *supra* note 74 at 106, citing *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 (L'Heureux-Dubé J). Lessard also notes at 107 that Indigenous peoples "have turned to the language of division of powers in pursuing their right to decide issues that bear directly on their survival as communities." However, at 108, she also carefully acknowledges that in some instances, federal rather than provincial jurisdiction can better protect the rights of marginalized communities.

98 Colleen Sheppard, "Inclusion, Voice, and Process-Based Constitutionalism" (2013) 50:3 Osgoode Hall LJ 547 [Sheppard, "Inclusion, Voice"].

99 *Secession Reference*, *supra* note 4 at para 74 [emphasis added].

Understood through this lens, the mobilization, empowerment, and self-governance of local communities, minorities, Indigenous peoples, and internal nations are connected to federalism. In effect, these issues raise important questions about how power is divided, shared, and exercised in communities, and in the institutions of everyday life.[100] They not only shift the paradigm from one of rights to one of power;[101] they also call for an inclusion of power *within* the very definition of rights themselves.

In the domain of rights, this expansive vision of jurisdiction and governance invites us to reach beyond the substantive dimensions of rights and freedoms to consider their *procedural* dimensions. Institutional, systemic, societal structures and processes can undeniably contribute to the continued violation of rights. But structures and processes can also enable "rights holders" to determine the contours and the implementation of rights and thus provide pathways to more transformative justice.[102] This line of analysis incorporates considerations usually associated with jurisdiction in the very definition of rights. It is premised on the belief that socially disadvantaged communities will be most effectively protected by an interpretation of rights that secures greater political participation in ways that affirm agency and democratic engagement. In other words, one of federalism's fundamental concerns — promoting meaningful autonomy — informs the interpretation and the realization of rights.[103]

One domain where this blending of rights with governance occurs is in linguistic minority education cases. While the dominant discourse about Canadian diversity, federalism, and multiculturalism has tended to ignore linguistic minorities,[104] courts have, to a limited degree, taken on board the idea

100 For an even more expansive vision of federalism, drawing on legal pluralist theory, see Roderick A Macdonald, "Kaleidoscopic Federalism" in Jean-François Gaudreault-DesBiens & Fabien Gélinas, eds, *The States and Moods of Federalism: Governance, Identity, and Methodology* (Montreal: Yvon Blais, 2005) 261.

101 See Poirier, "Autonomy and Diversity", *supra* note 46.

102 See Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York: Columbia University Press, 2009). For a more expansive discussion of the procedural and relational dimensions of rights, see Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montréal & Kingston: McGill-Queen's University Press, 2010) [Sheppard, *Inclusive Equality*].

103 Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal & Kingston: McGill-Queen's University Press, 2009) [Grammond, *Identity Captured*]. For a more expansive discussion of democracy as a relational dimension of equality for linguistic minorities and Indigenous peoples, see Sheppard, *Inclusive Equality*, *supra* note 102 at 119-135.

104 Will Kymlicka's influential work on "old" and "new" minorities focused on Quebec, Indigenous peoples, and immigrants, but did not address linguistic minorities. See Rémi Léger, "Le Canada multinational dans la pensée de Will Kymlicka" in Frédéric Boily & Donald Ipperciel, eds, *D'une nation*

that self-management is key to minority survival and flourishing. Hence, as early as 1990, the Supreme Court underlined how participation and governance were critical to the enjoyment of minority language rights in education.[105] This was in the *Mahe* case, where the claiming parents were not contesting the substantive level of services provided, but were seeking more decision-making input into how French language education operated. In its reasons, the Court acknowledges that:

> [M]anagement and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring and expenditures, can affect linguistic and cultural concerns.[106]

Drawing on the ways in which constellations of majority and minority interests impact institutional decision-making, the Court added:

> [M]inority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority.[107]

Some ten years later, the Court again underscored the importance of "management and control" of schools to members of a minority linguistic community, notably to redress historical wrongs.[108] In that context, the Court explains:

> *Empowerment* is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.[109]

These cases illustrate how the definition of some *Charter* rights — here linguistic minority education rights — include both substantive and governance

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*à l'autre : discours nationaux au Canada* (Québec: Les Presses de l'Université Laval, 2011) 107; Poirier, "Francophone Minorities in Canada", *supra* note 7.

105 *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69 [*Mahe*]. There is significant interdisciplinary work on the importance of "institutional completeness" for the vitality — even the survival — of linguistic minorities. See Stéphanie Chouinard, "Quand le droit linguistique parle de sciences sociales : l'intégration de la notion de complétude institutionnelle dans la jurisprudence canadienne" (2016) 3 RDL 60; Janique Dubois, "The Fransaskois' Journey from Survival to Empowerment through Governance" (2017) 11:1 Can Political Science Rev 37; Johanne Poirier, "Au-delà des droits linguistiques et du fédéralisme classique : favoriser l'autonomie institutionnelle des francophonies minoritaires du Canada" in Joseph-Yvon Thériault, Anne Gilbert & Linda Cardinal, eds, *L'espace francophone en milieu minoritaire au Canada : nouveaux enjeux, nouvelles mobilisations* (Montréal: Fides, 2008) 513.

106 *Mahe, supra* note 105 at 371-72.

107 *Ibid* at 372.

108 *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1.

109 *Ibid* at para 45 [emphasis added].

dimensions.[110] In this regard, questions of participation, control, and community management arise at the interstices of rights.[111] Though not related to traditional division of powers debates, these cases remind us that the effective enjoyment and implementation of some *Charter* rights require recognition of powers of self-government — or autonomy — for specific groups. Of course, increasing community self-management in the area of minority education limits the scope of the provinces' exclusive power over education, but it does so without increasing federal jurisdiction. In other words, these cases do not raise typical division of powers issues, but they nevertheless illustrate the intersection between jurisdiction (power) and rights.

A second example of the integral connection between rights and governance relates to Indigenous rights. As mentioned above, the scope of this article does not allow for an in-depth analysis of the complex relationship between entrenched Aboriginal rights and federal theory.[112] Nevertheless, it is important to acknowledge how section 35 of the *Constitution Act*, *1982* marked an important turning point in Canadian constitutional law in ways that call for a profound re-thinking of the intersection between justice and jurisdiction.[113]

While Indigenous peoples were committed to participating in negotiations to secure self-governance as an integral dimension of their rights, the constitutional conferences of the 1980s did not result in any agreement on this

110 See Cardinal & Foucher, *supra* note 6. For a more extensive discussion of this process-based shift in the meaning of constitutional rights and freedoms, see Sheppard, "Inclusion, Voice", *supra* note 98. See also Grammond, *Identity Captured*, *supra* note 103.

111 See also Asha Kaushal, "Collective Diversity and Jurisdictional Accommodations in Constitutional Perspective" in Richard Albert, Paul Daly & Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2019) 193.

112 See Robert Hamilton, "Indigenous Peoples and Interstitial Federalism in Canada" (2019) 24:1 Rev Const Stud 43; Johanne Poirier & Sajeda Hedaraly, "Truth and Reconciliation Calls to Action Across Intergovernmental Landscapes: Who Can and Should do What?" (2019) 24:2 Rev Const Stud 171 at 188-193. Nor do we delve into the potential of treaty-federalism to reconceptualize the relationship between Indigenous and non-Indigenous peoples. See Joshua Ben David Nichols, "A Narrowing Field of View: An Investigation into the Relationship Between the Principles of Treaty Interpretation and the Conceptual Framework of Canadian Federalism" (2019) 56:2 Osgoode Hall LJ 350; Jeremy Webber, "Contending Sovereignties" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 281; Martin Papillon, "Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States" (2012) 42:2 Publius 289; Martin Papillon & André Juneau, eds, *Canada: the State of the Federation, 2013: Aboriginal Multilevel Governance* (Montreal & Kingston: McGill-Queen's University Press, 2015).

113 See e.g. Louise Mandell & Leslie Hall Pinder, "Tracking Justice: The Constitution Express to Section 35 and Beyond" in Lois Harder & Steve Patten, eds, *Patriation and its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015) 180.

issue.[114] The proposal that Indigenous peoples be recognized as a "third order of government" in the 1992 Charlottetown Accord also failed.[115] As a result, the interpretation of Indigenous rights largely shifted to the courts.

Since the failed negotiations of the 80s and 90s, the Supreme Court has struggled to interpret the substantive content of section 35 Aboriginal rights, focusing on discrete traditions, customs, and practices rather than a more general right to self-governance.[116] For many observers, this interpretation of section 35 rights is lacking a deep commitment to the agency, autonomy, and sovereignty of Indigenous peoples, and it has been critiqued for constitutionalizing a diluted and fossilized conception of entrenched rights.[117] Thus, though framed in the text of the Constitution as "rights," claims by Indigenous peoples are increasingly being recast through a prism of autonomy, jurisdiction, decolonization, and power. As such, self-governance is now considered a central component of section 35 rights, in opposition to the interpretations offered by the Supreme Court.[118] One important source of guidance in this regard is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which affirms the right of self-determination of Indigenous peoples, including "the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[119] As Jeremy Webber observes:

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114 See Maurice Bulbulian, National Film Board of Canada, "Dancing Around the Table, Part One" (1987), online (video): *National Film Board of Canada* <www.nfb.ca/film/dancing_around_the_table_1> [perma.cc/7E2M-W25Q]; Maurice Bulbulian, National Film Board of Canada, "Dancing Around the Table, Part Two" (1987), online (video): *National Film Board of Canada* <www.nfb.ca/film/dancing_around_the_table_part_two> [perma.cc/4MSV-6HBN] (documenting the failed constitutional negotiations).

115 See The Canadian Encyclopedia, "Charlottetown Accord: Document" (last modified 1 June 2020), Section IV: First Peoples, online: *The Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/charlottetown-accord-document> [perma.cc/VS9S-7A2H].

116 See e.g. *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204.

117 See e.g. John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Can Historical Rev 114; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993.

118 On the connection between Indigenous rights and self-governance, see John Borrows, Larry Chartrand, Oonagh E Fitzgerald & Risa Schwartz, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal & Kingston: McGill-Queen's University Press, 2019).

119 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, arts 3, 4, online (pdf): *United Nations* <www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> [perma.cc/AG6L-G2V9]. Canada's commitment to respecting UNDRIP is acknowledged in the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14. See also *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44

> [T]he notion that the Indigenous dimensions of the Constitution are fundamentally about rights — about claims against the state — is misleading. They are more about federalism: about the recognition of a sphere in which Indigenous law and institutions of governance are predominant.[120]

Giving true meaning to section 35 *rights* requires taking *jurisdiction* into consideration. This approach, in turn, provokes a recalibration of jurisdictional boundaries within the Canadian federation. Again, we see how issues of power, governance, and autonomy — generally associated with federalism — are emerging as critical dimensions of constitutional rights as well.[121]

## V. Conclusion

This article began by reviewing the intersection between rights and federalism in the pre-*Charter* era. The image that emerges is one of a tapestry of decentralized and diverse regimes of rights protection in different parts of the federation. Crucially, this complexity did not disappear with the *Charter*. While the latter introduced a new stock of pan-Canadian norms into the law and favoured some "pan-Canadian" values, creating what some have called "*Charter* Canadians,"[122] this shift towards uniformity has not taken place across the board.

In assessing the contemporary interface, this article argues that rights and federalism are not necessarily in tension; they may, in fact, reinforce each other. This synergy occurs when the federal system allows for cumulative, overlapping, and reinforcing instruments of rights protection. It also happens when judicial interpretation of the division of powers is attentive to the needs of vulnerable communities and historically disadvantaged groups, as well as values of local mobilization and democratic participation. Moreover, the interpretation of rights to require self-governance and participatory democracy further blurs the line between rights and jurisdiction. The empowerment of rights holders ensures not only more effective substantive protection of rights, but also pro-

(which preceded the federal Act by 18 months). So far, British Columbia is the only province that has legislated to implement UNDRIP.

120 Webber, *supra* note 15 at 212.

121 The importance of autonomy, multiscalar rights protection, and jurisdictional space for community governance is also apparent in other rights contexts. There is growing recognition of the importance of expanding our conceptual engagement with, and research into, a rethinking of the traditional boundaries between rights, freedoms, and power in ways that are germane to federalism in its most fundamental sense. On this, see Shachar, *supra* note 70, who argues in favour of "shared jurisdiction" in certain religious and multicultural contexts. See also Kaushal, *supra* note 111.

122 Alan C Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 Can Pub Pol'y S 121.

motes community engagement in determining the contours and texture of those very rights.

Of course, there are cases when minorities or individuals require protection from local or provincial majorities (as well as the overarching majority). This protection, though, should be secured through access to multiple sources of rights protection, including local, provincial, national, and international sources of human rights accountability. In this respect, retaining our commitments to federalism must infuse our approach to rights, because the latter are often most effectively protected through multi-level human rights protection.

The *Charter* was born as a pan-Canadian "nationalist project" framed predominantly in a language of universal individual rights and freedoms. But it grew in a largely decentralized federal family rooted in diverse communities. In multiple and complex ways, jurisdiction and rights are deeply intertwined. In this context, rethinking the traditional dichotomy between federalism and constitutional rights favours a more nuanced understanding of the jurisdictional dimensions of justice and the justice dimensions of jurisdiction.