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CONSTITUTIONAL JURISDICTIONS
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Abstract

This paper explores the constitutional consequences of the shifting demographics of Canadian society. It begins by examining the contemporary constitutional population, one marked by new vectors of difference: visible minorities, multilingual speakers, non-Christian religions, and myriad cultures. Then, the paper examines the understudied iteration of constitutional power — jurisdiction — for insights about the themes, temporalities, and geographies that underwrite and attract the allocation of constitutional jurisdiction. This examination occurs in three constitutional contexts: constitutional federalism, national minorities, and Aboriginal peoples. The paper concludes with an exploration of jurisdiction as a mode of constitutional power in contexts of collective diversity.

Résumé

Cet essai examine des conséquences constitutionnelles de l'évolution démographique au Canada. Il explore les nouveaux vecteurs de la diversité : minorités visibles, locuteurs multilingues, religions non chrétiennes et les cultures mixtes et multiples. L'essai considère ensuite l'itération peu étudiée du pouvoir constitutionnel – la notion de « juridiction » ou de « compétence », notamment les thèmes, les temporalités et les géographies qui sous-tendent l'attribution de la juridiction constitutionnelle. Cet examen se déploie dans trois contextes constitutionnels : le fédéralisme, les minorités nationales et les peuples autochtones. La conclusion explore la notion et le phénomène de la « juridiction » et de la « compétence » comme modalités du pouvoir constitutionnel dans un contexte de diversité profonde.

I. Introduction

In 1867, three colonies agreed to confederate. They became four provinces. Their political identities loosely tracked their territorial boundaries. The new constitutional federation was underwritten by a narrative of two founding nations – first, Upper Canada and Lower Canada; later, French Canada and English Canada – which survive in the popular imagination as representative of the sociopolitical reality of 1867. The Aboriginal peoples were notably absent from the constitutional conferences of 1864. It is often remarked that there is no singular constitutional moment in Canadian history, that the constitutional framework is an ongoing process of becoming. To this end, several more colonies would join the national project over the next decades. By the turn of the century, Canada had grown to seven provinces and two territories.

In 2017, Canada contains ten provinces, three territories, and twenty-two self-governing Aboriginal nations. It is made up of national minorities, municipalities, separate communities, and various other collectivities. Some of these are constitutional creatures, others are not. The narrative of two founding nations remains firmly lodged in the constitutional consciousness although it is increasingly contested in the popular one. Provinces have assumed more functions in areas of concurrent jurisdiction, municipalities have created urban autonomy regimes, and identity groups have fought for constitutional exemptions. It is increasingly obvious that, from the French fact in Canada to the creation of Nunavut to the political backlash against the niqab,

heterogeneity is part of the Canadian constitutional landscape. A key part of the constitutional process of becoming, in other words, has turned out to be a negotiation with diversity.

This chapter is a meditation on historical and emergent constitutional concepts of jurisdiction in the Canadian context of diversity. It explores the shifting composition of the Canadian population against the background of current constitutional values. This exploration reconsiders the constitutional accommodation of diversity in jurisdictional terms. The chapter is divided into two main parts. Part One examines the contemporary sociopolitical landscape and the nature and kind of legal conflicts generated from it. I begin by arguing that the composition of the people over whom the constitution has authority is changing. The first section describes the statistical terms of this demographic and social shift. I predict that this shift will expose new sites of tension in constitutional theory and adjudication. The old fault lines were French versus English Canada, in identarian terms, or Quebec versus other provinces, in juridical terms. Now, Quebec hosts its own set of tensions between French Quebecois, English Quebecois, Aboriginal peoples, and newcomers. These tensions can be extrapolated, albeit with slightly different cleavages, to the country at large, which is beset by new categories of conflicts. At first glance, this presents a problem of mismapping in which old constitutional forms are transposed onto a new constitutional population.

Constitutional power, however, has two iterations: rights and jurisdictions.[1] In Part Two, I suggest that we should shift our focus to jurisdictions. I argue that there are multiple proliferating forms of jurisdiction in constitutional law. By returning to the terms of legal authority – how it is

[1] Heidi Libesman, "Book Review: Indigenous Difference and the Constitution of Canada by Patrick Macklem" (2002) 40:2 Osgoode Hall Law Journal 200.

parcelled out and to whom – we can locate the constitutional values of jurisdictional allocations *and* analyze the potential of new jurisdictional forms and allocations. In Canadian constitutionalism, the prototypical understanding of jurisdiction is a division of powers between the federal and provincial governments. The judicial interpretation of constitutional federalism sorts cases according to the relevant head of power. Already, it is possible to see that the constitution parcels out jurisdiction territorially to the provinces and the federal government but also functionally based on subject-matter, and that some of these subjects are concurrent. Part Two analyzes constitutional jurisdiction in three settings: federalism; linguistic minorities; and Aboriginal peoples. By comparing and contrasting traditional territorial jurisdiction to other functional, flexible, and personal forms of jurisdiction, its potential is made clear.

First, though, what exactly does jurisdiction mean in this chapter? Jurisdiction is the "signature canon in law".[2] It tells us where law can speak and shows us where law is authoritative. In a general sense, jurisdiction denotes the 'scope' or 'reach' of a thing or activity. It is through jurisdiction that "a life before the law is instituted, a place is subjected to rule and occupation, and an event is articulated as juridical".[3] Reliance on the idea of jurisdiction as "legal authority over" illuminates both constitutional allocations of power and contemporary conflicts over constitutional power. This takes the old fault lines of federalism - the primary model for distributing jurisdiction in Canada - and extends them outwards for a new constitutional population. This mode of thinking about parcels of legal authority illuminates the constitutional

[2] John Brigham, "Seeing Jurisdiction: Some Jurisprudential Issues Arising from Law Being '...All Over'" (2009) 31 L & Pol'y 381.
[3] Shaunnagh Dorsett & Shaun McVeigh, "Questions of jurisdiction" in Shaun McVeigh, ed, *Jurisprud Jurisd* (New York, NY: Routledge-Cavendish, 2007) 3.

potential outside of rights for resolving issues of diversity. In short, the potential of jurisdiction is to take constitutional law beyond the rights paradigm in order to deal with issues of difference.

II. Governing the New Constitutional Population

a. The Constituency of the Constitution

Canada has a population of over 35 million people. The Canadian population in 2017 is dramatically different from the Canadian population in 1791 or 1867 or even 1982.[4] All of these people are covered by the Constitution to varying extents. The breadth and depth of this coverage is found in a combination of the original constitution and ongoing contestations. There have been multiple moments of public consultation and contestation about the constitutional text. Although only some of them have been entrenched, each articulation is a dialogue about constitutional identity and values. Nonetheless, the historical pull of the original constitutional text is undeniable. The original constitutional solutions – first, jurisdiction and then rights – were designed for a particular albeit evolving population based in the provinces and they have strong roots. In this section, I provide a brief historical overview of the constitutional population and the corollary constitutional compromises and resolutions. I use jurisdiction as a means to consider how the constitutional population was conceived and categorized. I then turn to the new constitutional population to set the stage for considering alternative jurisdictional compromises and resolutions.

[4] *Constitutional Act 1791*, 31 Geo III, c 31 (UK), reprinted in RSC 1985, App II, No 3 (dividing Quebec into the provinces of Lower Canada and Upper Canada); *Constitution Act 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No. 5 (bringing together three colonies into a federal structure); *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982* (UK), c 11.

The diversity of the Canadian population is not new but the nature of that diversity has changed over time. In the very beginning, constitutionally speaking, there were almost 3.5 million people in Canada.[5] Most but not all of them were born in Canada or came from France or England.[6] Almost all of them were either Roman Catholic or Protestant. There were Aboriginal peoples, although their numbers were decimated by the violence of European contact. These identities were included in the constitutional text through a combination of constitutional federalism and exceptional rights regimes. The 1867 text specifically enumerated and thus accommodated the French fact to the extent it coincided with the province of Quebec, in addition to linguistic and religious minorities in constitutional educational regimes. The constitutional questions then rolled out as questions about the relative powers of the federal government and the provinces as well as the coexistence of French and English ethnic and linguistic populations.[7]

Canada is a settler society, which means it is a country of immigration. This has several implications, most notably that its nation-building project is closely tied to immigration and thus diversity. This diversity has morphed over time from historically Irish, Greek, and Ukrainian arrivals to contemporary Asian and South Asian arrivals. As the Canadian population grew, reaching 20 million people in 1967, the harbingers of change were already on the horizon.[8] From a diversity standpoint, two decisive events marked the one hundred year anniversary of Confederation. First, it was the year of the first report of the *Royal Commission on Bilingualism and Biculturalism* ("*B & B Commission*") – the report that ultimately led to the adoption of

[5] Statistics Canada, *Censuses of Canada, 1665 to 1871, Statistics of Canada, Volume IV*, Catalogue No 98-187-X (Ottawa: Statistics Canada, 2000).
[6] Statistics Canada, *Canada Year Book 1867*, online: http://www66.statcan.gc.ca/eng/acyb_c1867-eng.aspx.
[7] Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).
[8] *Censuses of Canada, supra* note 4.

multiculturalism.[9] Strains of public discord objected to the bicultural framework of the commission. Ultimately, the *B&B Commission* recognized the voices of these "other Canadians" who had argued that they did not fit neatly into the categories of French Canada and English Canada. It used the term "Third Force" to refer to this group of Canadians. Second, 1967 was the year that Canadian immigration laws abandoned national origin as an admission criterion.[10] The immigration laws switched over to the points system, which prioritized human capital over nationality. This would greatly change the composition of immigrant flows to Canada. Together, then, these events changed the people coming to Canada and the terms of their welcome once there. At the time, though, the composition of the Canadian population remained overwhelmingly European in origin.[11] The glimmer of new articulations of identity was visible but not yet manifest.

There is one more piece to develop in this historical overview: the details of the policy of multiculturalism. Multiculturalism is a set of ideas about groups that end up living together in a state because of immigration.[12] It is a territorial construct; the very idea of multiculturalism contains within it the idea of a shared national space.[13] As a set of ideas about identities and groups that live together within a territory, multiculturalism has almost no legal content. The first reason for that is the nature of its inclusion in the *Charter*. Multiculturalism appeared in section 27 of the *Charter* as an interpretative principle of construction, which means it effectively either

[9] Royal Commission on Bilingualism and Biculturalism, *Report* (Ottawa, Queen's Printer, 1967) vol 1.
[10] Department of Justice, "Cultural Diversity in Canada: The Social Construction of Racial Differences" by Peter S. Li (Ottawa: Department of Justice, 2000).
[11] Li, *ibid.*
[12] Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies*, forthcoming Cambridge University Press, February 2016.
[13] Ghassan Hage writes of multiculturalism as a 'nationalist practice' that loses meaning without a national territory in which to be applied: see Ghassan Hage, *White Nation* (New York: Routledge, 2000) at 28-32.

piggybacks on or conflicts with specific rights such as freedom of religion.[14] The second reason is the historical backdrop to multiculturalism, which is framed by the battle for identity and sovereignty between French and English Canada. One expression of that limiting backdrop is visible in the judicial interpretation of exceptional national minority rights, which are insulated from both section 15 and section 27: "the natural nexus between section 27's cultural protections and linguistic, educational and religious rights is artificially severed".[15] These historical turns have rendered multiculturalism somewhat insubstantial in the face of identity claims.

The last of the constitutional dialogues, the Charlottetown Accord, ended in failure in 1992.[16] Despite the relative recency of those negotiations, they did not address the nature of the diversity that is making contemporary headlines. In Canada, the population is aging and birthrates are falling. In 2006, natural increase, the historical pattern of population growth in Canada, reversed, and migratory increase came to account for two-thirds of Canadian population growth.[17] By 2030, Statistics Canada projects that immigration will be the only growth factor for the Canadian population.[18] Thus, immigration has become integral to sustaining the Canadian population even as it presents new challenges for that population. Alongside - or inside - these numbers, immigration flows have shifted away from European countries toward Asian countries (China, India, and the Philippines). These recent immigrants are building new forms of difference into society: visible minorities, multilingual speakers, non-Christian religions, and myriad cultures.

[14] *See Roach v. Canada (Minister of Multiculturalism and Culture*), [1994] 2 F.C. 406 (FCA) (striking out the s. 27 claim on the basis that it was not a substantive provision capable of being violated); *see also Grant v. Canada (Attorney General*), [1995] 1 F.C. 158 (TD) (finding that s. 27 provided no independent Charter right).
[15] Vern W. DaRe, "Beyond General Pronouncements: A Judicial Approach to Section 27 of the Charter [forthcoming?]" (1995) 33 Alta. L. Rev. 551 at 2.
[16] Charlottetown Accord, *Draft Legal Text, October 9, 1992* (Ottawa, Queen's Printer, 1992).
[17] Statistics Canada, *Canadian Demographics at a Glance*, Catalogue No 91-003-X (Ottawa, Statistics Canada, 2008).
[18] *Ibid.*

Statistics Canada projects that by 2031, one in three Canadians will be a visible minority, and visible minorities will outnumber non-visible minorities in Canada's major cities.[19] Tracking these projections, one in seven Canadians will have a non-Christian religious denomination and half of those Canadians will be Muslim. One in three Canadians will speak neither English nor French as their mother tongue.[20]

As the composition of immigration has shifted, so too have the contours of settlement and integration. It is already possible to see the effects of these changing demographics.[21] These include larger numbers of visible minority immigrants on the ground, some of whom settle in enclaves, pressures in the public sphere surrounding integration and tolerance, and tensions in the legal sphere between equality and religious freedoms. What does this demographic transformation with its multiplying vectors of diversity portend for constitutional federalism? It demands a rethinking of the coincidence of territory and nation that underwrites the model of federalism as federal and provincial heads of power. The idea of "landedness", in the words of Alan Cairns, is no longer descriptively accurate.[22] Even for the original nations or communities of the constitution – its multiple *demoi* – landedness no longer captures a bounded political nation or even its political imagination. Aboriginal peoples are scattered across rural and urban settings; Quebec is host to French Quebeckers as well as English Quebeckers, Aboriginal peoples, and newcomers. Perhaps most importantly, those categories fracture further along religious, linguistic, and cultural lines. In the sections that follow, I examine the territorial heft of

[19] I recognize that this is a controversial term. I use it here to denote observable difference in keeping with official government terminology. See *Employment Equity Act*, SC 1995, c. 44.
[20] *Supra* note 16.
[21] Statistics Canada projects that, by 2031, one in three Canadians will belong to a visible minority. See Joe Friesen, "The changing face of Canada: booming minority populations by 2031", *Globe Mail* (9 March 2010).
[22] Cairns, *supra* note 6.

jurisdiction in three constitutional regimes: federalism, national linguistic minorities, and Aboriginal self-government arrangements.

III. Jurisdiction in the Constitution

In the Canadian constitutional system, there are two pathways for collective difference and these pathways mirror the two iterations of constitutional power: rights and jurisdictions. There are some jurisdictions embedded in the constitutional text – namely, the federal and provincial division of legislative powers, linguistic and religious minority rights, and, to some extent, Aboriginal rights. In this section, I place these existing jurisdictional forms into conversation with new collectivities of difference to locate the opportunities and obstacles for accommodation.

a. The Federal Jurisdictional Paradigm

Federalism is a means of political and legal organization that combines the search for unity with respect for autonomy.[23] It is a response to internal diversity. Such forms of diversity are internal to the state to the extent that they are already present at the time of federation. This is to be distinguished from external diversity, including from immigration, which is conceived as outside the state. As a response to internal diversity, federalism produces a sticky institutional version of autonomy that is rooted in history and territory. It is ostensibly oriented toward diversity – this is the whole point of the federal form – but it is closed to identities and communities which are not part of the original territorial division. This is not to say that federalism is static; it is possible to

[23] Pierre Pescatore, "Preface" in Terrance Sandalow & Eric Stein, eds, *Courts Free Mark Perspect United States Eur* (New York: Clarendon Press, 1982).

be sympathetic to the claim that federalism "amplifies the polity's capacity for politics" while acknowledging its distinctive historical and territorial drag.[24]

In the *Constitution*, the concept of federalism appears only once, in the preamble reference to the colonies' "desire to be federally united into one Dominion".[25] Three British colonies were united into a federation made up of four provinces and then legislative powers were divided between them.[26] The division of powers articulated in sections 91 and 92 that allocates jurisdiction to the federal government and the provincial governments is the primary textual expression of the principle of federalism in Canada. The two levels of government are coordinate; each sovereign within its spheres of action.[27] The federal and provincial governments are the only levels of government that have constitutionally protected jurisdiction.[28] There are, however, other collectivities marked by constitutional jurisdiction. These collectivities are: French and English language speakers, Protestant and Catholic parents, Quebec, New Brunswick, and indigenous peoples. The inclusion of these collectivities (and not others) may be traced to historical federalist compromises as well as the particular evolution of federalism in the Canadian context. The drawing of provincial boundaries made some collectivities into majorities and others into minorities. For example, Francophone Quebecers and scholars have viewed Quebec as "an essential bulwark of the French fact in North America".[29] But it was never the case that all

[24] Cristina Rodriguez, *Federalism and National Consensus* (2010); Heather Gerken, "The Supreme Court 2009 Term - Foreword: Federalism All the Way Down" (2010) 124 Harvard Law Review 4.
[25] Marc Chevrier, "The Idea of Federalism Among the Founding Fathers of the United States and Canada" in Alain-G Gagnon, ed, *Contemp Can Fed* (Toronto: University of Toronto Press, 2009) 11.
[26] It united Canada, Nova Scotia and New Brunswick into Canada with the provinces of Ontario, Quebec, Nova Scotia, and New Brunswick.
[27] *Hodge v The Queen* (1883) 9 App Cas 117. This is complicated by tolerance of overlap as well as two concurrent powers – agriculture and immigration.
[28] Jeremy Webber, *The Constitution of Canada: A Contextual Analysis* (Oxford: Hart Publishing, 2015) at 134. Arguably, Aboriginal governments have some measure of constitutional jurisdiction: see below, section ii.
[29] Webber, *ibid.* at 47.

members of a collective – whether French-speaking Quebeckers or English-speaking provinces, Catholics or Protestants, or Aboriginal peoples – were neatly contained within a province without others. Indeed, federalism has a more complex set of tools at its disposal: divorce was made federal so that Protestants in Quebec would not be subject to restrictions imposed by that Province's Roman Catholic majority.[30]

For constitutional lawyers, it is axiomatic that federalism articulates constitutional values.[31] For several of them, federalism is instrumental – not a value in itself, but rather a means to realize other political values.[32] The nature of those values is a matter of some dispute. They tend to be some combination of: the diffusion of power and the prevention of tyranny; the promotion of diversity and experimentation; and the efficiency of local governance and the enhancement of democracy.[33] Underwriting these values and objectives, or at least orbiting around them, is the value of identity. In many ways, at its core, federalism is about autonomy in the service of identity. In this sense, federalism is the original constitutional form of identity politics, closely linked to ideas about the relationship between identities and the state.

The identities within the ambit of federalism are collective in nature. Felix Frankfurter articulated the now-familiar communitarian notion that individual identity is formed in conjunction with the communities and states in which they live as one of the key normative

[30] Webber, *ibid.* at 32.
[31] Robert C. Post, "Justice Brennan and Federalism" (1990) 7 Constitutional Commentary 227.
[32] Richard Simeon & Katherine Swinton, "Rethinking Federalism in a Changing World" in Karen Knop et al, eds, *Rethinking Federalism* (Vancouver, UBC Press, 1995) at 7.
[33] Erwin Chemerinsky, "The Values of Federalism" (1995) 47 Florida L Rev 499; Post, *supra* note 29; Malcolm Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (Ann Arbour: University of Michigan Press, 2011).

values of federalism.[34] In the Canadian context, Richard Simeon and Ian Robinson have remarked that to understand Canadian federalism, one must pay attention to collective identities.[35] Patrick Monahan has written that, "the rights of collectivities lie at the very core of federal theory".[36] This identity frequently has several dimensions but, in the context of federalism, its primary or dominant projection must be political identity.[37] So, for example, the Province of Quebec is the federal construct of political identity but its conceivable other identities are linguistic (francophone), cultural (Canadien), religious (French-Catholic), and even civic (Province of Quebec).

However, once federalism is on the terrain of collective identity, the queue of new and competing identities comes into view. Societal diversity is often categorized according to its nature as multicultural or multinational or both.[38] The nature of accommodation will differ depending on the categorization.[39] Multicultural diversity is immigrant and ethnic group based and it is matched with multiculturalism. Multinational diversity is national minority based and it is matched with federalism. Despite significant focus on multinational federalism, there has been little attention paid to its multicultural counterpart. As discussed above, the policy of multiculturalism is hollow accommodation. It is concerned with representations of culture, not identities and rights. It amounts to a welcome mat, not more. Federalism may be only for national minorities but what kinds of logics and values underwrite its approach to diversity? The

[34] Felix Frankfurter, quoted in Post, *ibid.* at 233.
[35] Richard Simeon & Ian Robinson, "The Dynamics of Canadian Federalism" in James Bickerton & Alain-G Gagnon, eds, *Canadian Politics* (Toronto: University of Toronto Press, 2009) at 155.
[36] Patrick Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 UTLJ 47 at 83.
[37] Feeley & Rubin, *supra* note 32 at chapter 1.
[38] Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995); Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Oxford: Oxford University Press, 1998).
[39] Jean-Francois Caron & Guy Laforest, "Canada and Multinational Federalism: From the Spirit of 1982 to Stephen Harper's Open Federalism" (2009) 15 Nationalism & Ethnic Pol 27 at 28.

question is not only whether new and multiple bases of identity in modern society can find some representation but also whether, as Jane Jenson queries, federalism institutionalizes the territorial distribution of power to the detriment and even harm of other groups.[40]

Federalism is simply a "formalised transaction of a moment in the history of a particular community".[41] It secures a particular mode of autonomy – the territorial province – but it precludes or at least abbreviates other modes of autonomy.[42] This matters because it is not only that diversity runs across provincial borders, but also that the provinces are rife with internal differences. This is particularly challenging in the context of immigration and collective heterogeneity for new sociological identities which "cannot be handled by federalism".[43] Immigration challenges the federal constitutional order by challenging its "assumptions of both space and time": the practices of privileging territorial diversity and historic communities.[44] The strength of federalism is to match collective identities with pockets of territorial autonomy. Its weakness, however, is precisely in channelling the same form again and again.

The organizing principle of federalism is territorial and this is a key part of its heft and its presentation.[45] Malcolm Feeley and Edward Rubin have described the grip of the geographical framework for federalism along two axes: first, geographical divisions are mutually exclusive in a way that functional divisions are not; and second, geographic entities reiterate the structure of

[40] Simeon & Swinton, *supra* note 31 at 8.
[41] Monahan, *supra* note 34, quoting Davis at fn 144.
[42] Jane Jenson, "Citizenship Claims: Routes to Representation in a Federal System" in Karen Knop et al, eds, *Rethinking Federalism* (Vancouver, UBC Press, 1995) ("They (collective actors) dispute the definition of constitutional politics as being "about" federalism") at 111.
[43] Alan Cairns, "Constitutional Government and the Two Faces of Ethnicity: Federalism is Not Enough" in Karen Knop et al, eds, *Rethinking Federalism* (Vancouver, UBC Press, 1995) at 19.
[44] Cairns, *ibid.* at 30.
[45] Preston King, *Federalism and Federation* (Baltimore: John Hopkins Press, 1982).

the state.[46] This means that "we are compelled by the nature of physical space to define [geographic] regions as separate from each other".[47] And while these two qualities might seem to make territorial federalism rigid and centric; they actually permit divisions in service of creating more bases and possibilities for political identity.[48] These are the logics of federalism – to modulate political identity so that loyalties can be multiple and overlapping.

Territory has two faces in federalism. On the one hand, territory is the basis for autonomy, permitting diversity, and dividing the state into sub-state units. On the other hand, this division is in service of the state maintaining its territorial integrity and ultimately its existence.[49] Indeed, constitutional federalism relies on territory as the constant over time. Following Feeley and Rubin, territory's qualities as authoritative and exclusive provide the basis for binding future generations and for justifying the division as it was done. It is territory that provides some resolution of the paradox of constituent power, enabling the constitution to carry forward without mass dislocation. This is partly because territory – and specifically divisions of territory - forge a narrative of Canadian identity. The result is that territory that is part of the framework constitutional federalism is conceptually and qualitatively different from other territories. A province is categorically distinct from Chinatown or Brampton. The basis for that distinction is territorial jurisdiction and the division of powers.

[46] Feeley & Rubin, *supra* note 32 at 13.
[47] Feeley & Rubin, *supra* note 32.
[48] Feeley and Rubin, *supra* note 32 at 14.
[49] David Storey, *Territories: The Claiming of Space* (New York: Routledge, 2012).

At this point, I want to offer some tentative thoughts about the limits of the federal framework and the potential for jurisdiction. By honing in on the purposive nature of federalism, the potential value of the federal form is crystallized. Feeley and Rubin suggest:

> The point of granting partial independence, and thus the point of federalism, is to allow normative disagreement among the subordinate units so that different units can subscribe to different value systems.[50]

In other words, federalism provides what rights cannot: a resolution of incommensurable values and subjective disagreements. It provides a sphere within which governments and people may decide how to order provincial priorities. These include deeply normative social issues such as funding fertility treatments and safe injection sites.[51] In contrast, rights in their simplified form, provide individual protection from state interference. They do not allow collectives to order any part of their affairs but rather provide for individual members to express themselves or practice their religion or to be free from discrimination. Many years ago, Alan Cairns argued that "federalism is not enough", claiming that it precluded the inclusion of minorities within minorities.[52] He suggested that constitutional practitioners needed to link federalism and rights in a category called "charter federalism". He acknowledged that these two forms do not create an "ethnically level playing field" but that they were a "commendable attempt at fairness".[53] What rights or a charter lack is the ability to put power in the hands of minorities. However, this non-

[50] Malcolm Feeley & Edward Rubin, *Judicial Policy Making and the Modern State* (Cambridge: Cambridge University Press, 2000) at 174.
[51] Globe & Mail, "Ontario government sets age limit at 43 for IVF coverage" 1 October 2015; *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 SCR 134.
[52] Cairns, *supra* note 42.
[53] Cairns, *supra* note 42 at 33.

equivalence between federal and non-federal and territorial and non-territorial collective identities is not inevitable. Jurisdiction is a means to put them on the same plane in terms of offering the same goods.

It is possible to extrapolate this by suggesting that federalism in Canada builds in forms of functional jurisdiction, and that these open the door to new modes of value variance and autonomy. The notion of jurisdiction as both territorial and functional expands the horizons of jurisdiction in the constitutional context. The territorial piece is self-explanatory – the constitution apportions jurisdiction to territorial units called provinces – but the nature of this apportionment is partly functional because it does not assign *everything* to the provinces. It is not a wholesale grant of legal authority. Rather, it assigns specific heads of jurisdiction, particular subject matters to each level. The nature of functions is that they are "socially constructed in their entirety" and the "functional divisions depend on the way they are defined".[54] This means they bump up against each other and require judicial intervention to settle and categorize. Indeed, this is how the provincial jurisdiction over "property and civil rights" has come to subsume so much: because it is functional and permissive of interpretation and definition in line with philosophical positions and policy choices.

From here, it becomes possible to imagine parcelling out other kinds of functional jurisdiction to other kinds of (possibly non-territorial) collectivities. This is not to make the case for wholesale self-governance by religious and cultural collectivities. Rather, I am suggesting that pockets of jurisdiction that exist alongside state norms may go some distance toward integrating new non-constitutional collectivities. Indeed, it is important to note that the logic of most if not all of these

[54] Feeley & Rubin, *supra* note 32.

collectivities is concerned to secure a mix of inclusion and autonomy. It is a more robust and complex inclusion. It contrasts to the self-determination logic of a collectivity such as Quebec, which points away from inclusion in the larger state and toward political autonomy on the basis of difference.[55] It is essential to remember that the collectivities that make it into federalism are part of the distribution of state power. They are not neutral territorial containers but political and juridical actors. The reconsideration of federal jurisdictional allocations along functional lines reveals jurisdiction as a negotiable instrument with other possible permutations.

b. Other Jurisdictional Paradigms

i. National Minorities as Exceptional Jurisdictional Regimes

This section focuses on the extension of jurisdictional allocations to collectivities that are not provinces and thus not captured by federalism but are nonetheless constitutional. There are two historical sets of collective rights in the constitutional text which fall into two overlapping categories: language rights and education rights. Section 23 provides for minority language education rights in French and English, while section 29 guarantees special educational rights previously granted to "denominational, separate or dissentient schools", specifically the Protestants in Quebec and the Roman Catholics in Ontario.[56] In this section, I focus on the two language groups directly protected by the *Charter*.[57] French and English-speaking citizens enjoy the right, even where they are in the minority, to use their languages in some courts and legislatures, to have legislation enacted in their languages, to receive federal government services

[55] Webber, *supra* note 27.
[56] *Canadian Charter of Rights and Freedoms*, Part Const Act 1982 Sched B Can Act 1982 UK 1982 C 11 [*Canadian Charter of Rights and Freedoms*]. Note that some other provinces have included such protections in their acts of accession to confederation.
[57] Denise G Reaume & Leslie Green, "Education and Linguistic Security in the Charter" (1989) 34 McGill LJ 777.

in those languages, and to have their children educated in their mother tongue.[58] It is this last right - to education in a particular language - which is the focus of several Supreme Court cases. It is also this provision which is the most interesting for jurisdictional analysis and collective difference because it enumerates a constitutional minority and bestows it with a certain measure of self-rule "where numbers warrant".

Section 23 of the *Charter* is designed to preserve and promote the two official languages of Canada by ensuring that each flourishes in provinces where it is not spoken by the majority of the population. It grants minority language educational rights to minority language parents throughout Canada according to a sliding scale where there is a sufficient minority population. In *Mahe v. Alberta*, a francophone father sued the province of Alberta for refusing to establish an independent francophone school board pursuant to section 23.[59] The Court determined that French Canadians in Alberta were entitled to be represented on the school board.

The judgment is notable in three respects: it establishes the minority language rights regime as an exception; it confirms language as a collective and social good; and it establishes a uniquely calibrated approach to the group exercising the right. First, the Court confirmed that language rights in section 23 are "a novel form of legal right" both in genesis and form.[60] Section 23 "confers upon a group a right which places a positive obligation on government to alter or develop major institutional structures".[61] The form is unusual because most rights are not

[58] *Canadian Charter of Rights and Freedoms*, *supra* note 56.
[59] *R v Mahe*, [1990] 1 SCR 342 .
[60] *Ibid* at para. 37.
[61] *Ibid*.

differentiated by group identity, nor are they subject to a numbers constraint.[62] The Court then carves out section 23 as an exceptional "comprehensive code" for minority language education rights, thus insulating it from the application of sections 15 and 27. Section 23 is, "if anything, an exception to the provisions of ss. 15 and 27 in that it accords these groups, the English and the French, special status in comparison to all other linguistic groups in Canada".[63] The conflation of sections 15 and 27 ignores that section 15 is a substantive right while section 27 is an interpretative provision that speaks to the value of group culture, making it rationally applicable to a discussion about language as a group attribute that is coterminous with culture. In constructing the language provisions as a comprehensive code separate from other *Charter* obligations, the Court insulates them from review, restricts them to the two recognized groups, and reinforces the nation as a composite of French and English.

Second, Chief Justice Dickson focused on the role of schools as community centres "where the promotion and preservation of minority language culture can occur"; as locations where the language community can meet and express its culture.[64] He confirmed that the purpose of section 23 is to preserve and promote the official languages of Canada and their respective cultures:

> My reference to cultures is significant: it is based on the fact that any broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and

[62] Reaume & Green, *supra* note 57.
[63] *R v Mahe*, *supra* note 59.
[64] *Ibid*.

> culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.[65]

This dual approach highlights the universality of language as an aspect of collective identity and culture, yet particularizes its protection by the referring back to the unique political compromise.[66] This is a jurisdictional technique, holding the universal and particular in equipoise, and then finding resolution through politics. Even though section 23 is legal, contained in the constitutional text, it is also political and historical; immune from the constitution's other rights requirements.

Third, the Court broadly interpreted the criterion of "where numbers warrant", opting for a sliding scale approach that correlates the level of rights and services appropriate to the number of students involved. In cases where the numbers warrant, minority language parents acquire a right to management and control over the educational facilities in which their children are taught. Section 23 speaks of "wherever in the province" the "numbers warrant". "This means that the calculation of the relevant numbers is not restricted to existing school boundaries. The numbers test should be applied on a local basis throughout the province.[67] This is a significant territorial delimitation. The *degree* of management and control ranges from an independent school board to guaranteed representation on a shared school board. The purpose is to give the group control

[65] *Ibid* at para. 362.
[66] On language rights as political compromise, see: *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549 .
[67] *Reference re Bill 30, An Act to Amend the Education Act (Ont)*, 1 SCR 1148 (1987).

over those aspects of education which pertain to or affect their language and culture.[68] The result is that these parents are entitled to a certain level of self-rule over their children's schools.

This case shows how group rights are still held collectively even when individuals have standing to enforce them.[69] The right to minority language education is legally enforceable by individuals, but it only operates when a critical mass of minority students makes such an institution viable, and it entails a collective territorial right by a minority linguistic community to manage and control the facilities.[70] This group right constitutes the group by drawing its ambit loosely around school boundaries *and* by defining the nature and content of its right according to a sliding scale. But this constitution is fluid: the majority-minority characterization is evasive, appearing and disappearing depending upon where one stands and how many others stand there, too. Where the boundaries are drawn determines whether the group is a minority. Despite its references to minority language rights and provincial accommodation, section 23 is distinctly nationalist in orientation.

The combined effect of the national scope of the right and the mobility rights of individuals is the erosion of the provincial jurisdictional threshold. Provincial jurisdiction over education is delimited by the exceptionality of section 23, in which jurisdiction attaches to the family, not the province. Minority language rights travel across provincial borders with the family.[71] This is the jurisdictional threshold in motion, only crystallizing when the family relocates to a province

[68] *R v Mahe*, *supra* note 59.
[69] Sujit Choudhry, "Group Rights in Comparative Constitutional Law: Culture, Economics or Political Power" in Michel Rosenfeld & Andras Sajo, eds, *Oxf Handb Comp Const Law* (Oxford: Oxford University Press, 2012) 1099.
[70] Allen Buchanan, "Liberalism and Group Rights" in *Harms Way Essays Honor Joel Feinberg* (Cambridge: Cambridge University Press, 1994) 1.
[71] *Solski (Tutor of) v Quebec (Attorney General)*, [2005] 1 SCR 201, 2005 SCC 14 .

where the language of instruction is discontinuous with their children's former education, thus triggering law's application. It is also a jurisdictional threshold imbued with the national and its bilingual commitments, embodying the principle of subsidiarity, and transposing them to the community level. Put differently, it is possible to imagine a bilingual nation-state in which provinces or regions speak different languages; it is more difficult to conjure this scheme of spatial language pockets and moving minority/majority designations. And yet, this kind of flexible jurisdictional form should reveal the complex potential of jurisdiction to manage the intersecting pieces of collective identities.

ii. The Jurisdiction of Aboriginal Self-Government

The protection of Aboriginal and treaty rights is contained in section 35 of the *Constitution Act, 1982* and reaffirmed in section 25 of the *Charter*.[72] The precise nature and content of these rights is a matter of ongoing contestation. The law of Aboriginal rights functions as a kind of conceptual umbrella under which the rights shift and evolve.[73] In *Delgamuukw*, which considered the title claim of the Gitksan and Wet'suwet'en peoples in British Columbia, the Supreme Court created two categories of rights: Aboriginal rights, which are freestanding rights such as the right to hunt or fish; and Aboriginal title, which is a beneficial interest in the land.[74] In this section, I briefly explain the relationships between aboriginal rights, title, and self-government from the perspective of jurisdiction.

[72] *Canadian Charter of Rights and Freedoms*, *supra* note 56; *Constitution Act, 1982*, Sched B Can Act 1982 UK 1982 C11 [*Constitution Act, 1982*].
[73] Webber, *supra* note 27 at 228.
[74] Webber, *ibid.* 239.

The juridical understanding of Aboriginal title conceives of it as a proprietary interest, a specialized interest in land, that should be incorporated into property law. In contrast, Aboriginal peoples have understood title as a means to autonomy, including self-determination and self-government.[75] Aboriginal title to land and other Aboriginal and treaty rights are communal in nature, vested in the collective.[76] Jeremy Webber explains that this does not mean that Aboriginal peoples internally hold their land in undivided co-ownership.[77] Rather, it represents a jurisdictional allocation from other governments. Those governments are indicating that the allocation of those land rights is a matter for the Aboriginal nation in question; they are recognizing a sphere of territorial jurisdiction.[78]

> Even the notion that the Aboriginal 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 Aboriginal law and institutions of governance are predominant.[79]

Yet, or perhaps because, Aboriginal title implicates self-government, the status of self-government as an Aboriginal right in constitutional law remains an open question.[80] Approaches to carving out jurisdictional space for Aboriginal peoples occur against the backdrop of the constitutional division of powers. As an organizing principle of the constitution, the division of

[75] Webber, *ibid.*
[76] Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" Research Paper for the National Centre for First Nations Governance (11 October 2007) at 16.
[77] Webber, *supra* note 27 at 235.
[78] Jeremy Webber, "The Public Law Dimension of Indigenous Property Rights" in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions* (Oxford: Hart Publishing, 2013).
[79] Webber, *supra* note 27 at 228.
[80] *Ibid.*

powers leans toward legislative jurisdiction as already allocated out.[81] In light of these difficulties, the courts have proved reluctant to recognize and delineate Aboriginal self-government. The political negotiation track has been more fruitful.

There are currently twenty-two self-government agreements involving thirty-six Aboriginal communities.[82] Eighteen of these are part of a comprehensive land claims agreement. At present, Aboriginal Affairs and Northern Development Canada counts ninety self-government negotiating tables in Canada. These negotiations are sometimes wholesale comprehensive self-government agreements and other times sectoral transfers of authority or arrangements to particular fields or subject areas.[83] The agreements include powers that are defined in a manner unlike other constitutional powers. These include laws which are not defined on the basis of territory but rather on the basis of citizenship.[84] Those laws could apply to members who are not living on the First Nation's land base – for example, to those living in an urban area. The scope and subject matter of negotiations ranges from full discussion about government structures, internal constitutions, membership, marriage, Aboriginal languages, education, health, social services, and policing to partial jurisdiction over spheres such as divorce, some administration of justice issues, and gaming and fisheries co-management to no jurisdiction over national defence and foreign relations. I examine three examples of self-government arrangements, below, to illuminate the different forms of jurisdiction in play.

[81] John M. Olynyk, "Approaches to Sorting Out Jurisdiction in a Self-Government Context" (1995) 53 U T Fac L Rev 235 at 269.
[82] Indigenous and Northern Affairs Canada, "Self-Government" (2 April 2015), online: https://www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294.
[83] Parliamentary Research Branch, "Aboriginal Self-Government" by Jill Wherrett (Ottawa: Library of Parliament, 1999).
[84] Olynkyk, *supra* note 80.

The Champagne and Aishihik First Nations Self-Government Agreement came into effect in 1995.[85] The agreement gives the Champagne and Aishihik First Nations four categories of law-making powers: exclusive powers (primarily for internal matters of administration); powers applying over settlement land (territorial jurisdiction over matters related to the local or private administration of land); and powers applying to citizens (personal jurisdiction related to subject matters throughout the entire Yukon depending on citizenship in First Nation); and emergency powers.[86] This last type of jurisdiction, which is delimited first by citizenship in a First Nations and then further delimited by the territory of the Yukon, has no parallel in the constitutional text. This kind of personal jurisdiction makes the application of law dependent upon the identity of the individual. The intersection between the Champagne and Aishihik agreement and the Yukon territory, both creatures of federal jurisdiction, not constitutional jurisdiction, means that they could have concurrent powers.[87]

Perhaps the most recognizable Aboriginal jurisdiction to date is Nunavut, created from the Tungavik Federation of Nunavut land claims agreement in 1999.[88] In Nunavut, self-government aspirations are expressed through a public government; political rights are guaranteed to a self-government. This marks the creation of a new player in the territorial jurisdictional field that closely resembles constitutional forms of jurisdiction. It has jurisdictional powers and institutions similar to the Northwest Territories government. Nunavut is often held out as an exemplar, in part because it mimics the federal form. It is a territorial jurisdiction and government with

[85] Champagne and Aishihik First Nations Self-Government Agreement among the Champagne and Aishihik First Nations and The Government of Canada and The Government of the Yukon, dated May 29, 1993. Enacted as *First Nations (Yukon) Self-Government Act,* S.Y. 1993, c. 5 and *Yukon First Nations Self-Government Act,* S.C. 1994, c. 34.
[86] Olynkyk, *supra* note 80.
[87] *Ibid.*
[88] The federal government, the Northwest Territories, and Tungavik Federation of Nunavut signed a political accord in 1992.

authority over and representation of all of the people living on its territory. Yet it is also embedded in a larger federal system and this delimits its jurisdiction. Territories are not co-sovereigns in the same way as the provinces; they exercise delegated federal powers and this places Nunavut outside of the constitution. While remarkable, it is also likely inimitable: its physical location meant that its creation did not threaten existing jurisdictional arrangements in quite the same way as contemporary urban claims might do - there was both territory and jurisdiction available.

The Nisga'a Final Agreement, in comparison, does not create a federal form akin to Nunavut but it is the first treaty under which self-government powers are constitutionally protected under section 35. The Nisga'a Treaty came into effect in 2000. The Nisga'a Treaty is territorial: it covers both Nisga'a and non-Nisga'a people. Non-Nisga'a people do not have right to vote but there are inbuilt protections for non-Nisga'a residents who live on Nisga'a Lands. It creates two orders of government: the Nisga'a Lisims Government (external affairs) and the Nisga'a Village Governments (internal affairs). The Nisga'a Lisims Government has principal authority over administration of its own government, management of its lands and assets, Nisga'a citizenship, language and culture. Under these matters, both Nisga'a and federal or provincial orders of government may pass laws but, where there is a conflict, the Nisga'a law will prevail.[89] The opposite holds with regard to other subject matters, including the use of Nisga'a assets off Nisga'a lands, public order, peace, and safety, the solemnization of marriages, social services, health services, intoxicants, and emergency preparedness. These jurisdiction allocations are delimited by the application of Charter rights to the Nisga'a government. This is another layer in

[89] However, the treaty includes important limitations on Nisga'a authority. For example, the Nisga'a cannot make valid laws about Nisga'a citizenship that deal with immigration or Canadian citizenship.

the relationship between the Canadian state and the Nisga'a nation because it gives the federal state jurisdiction over Nisga'a member's Charter rights.

In this somewhat abbreviated analysis, it is clear that there are several self-government models, each with its own jurisdictional categories and allotments. Aboriginal nations are differently incorporated into the Canadian constitution and into Canadian law in general. Some are Territories – outside of the formal constitution but part of its *de facto* division of powers; others are protected under section 35, still other collective self-government forms are outside of the constitution altogether. More than this, Aboriginal jurisdictional forms are variously territorial, personal, subject-matter based, and sometimes a combination of these. This kind of jurisdictional variety is productive for moving past the federal form.

IV. Conclusion: The Space between Rights and Jurisdictions

These three jurisdictional iterations layer progressively more complicated ideas of jurisdiction onto the constitutional framework. The first and by far the most predominant setting is constitutional federalism. This is territorial jurisdiction and it is the original accommodation of diversity. The second setting, national minority regimes, is equally constitutionally entrenched but less fixed in time and space. This is floating jurisdiction loosely tethered to territory but closely tied to the collective. The third setting, aboriginal self-government, is somewhat indeterminately constitutionally entrenched. It takes various jurisdictional forms, including traditional territorial jurisdiction and other non-territorial forms. The coincidence of territory and

identity that underwrites federalism survives and is carried forward in different jurisdictional frameworks, but those frameworks alter the shape and content of that coincidence.

Together these existing constitutional understandings of jurisdiction adjudicate the fault lines of diversity and autonomy in Canada. As the population shifts to incorporate new kinds of heterogeneity and different concentrations of diversity, these fault lines will shift and constitutional understandings of jurisdiction will need to move in tandem. In some sense, federalism is the most productive jurisdictional lens because it gets to the root of the measure of legal or political autonomy that is at issue. Whenever rights are granted to a collectivity, there must be some kind of public law dimension to that grant because the state is handing over some measure of authority to the collective to decide how that right will run inside its edges.[90] The most prominent example is rights over land, particularly aboriginal title, where the recognition of title implicates the law of the collective. Aboriginal communities must have "decision-making authority over how those rights can be exercised".[91] That collective must have some kind of constitutional law in order to make decisions about that land.[92] One could also envision this with respect to rights over family law matters. Because federalism transposes this measure of autonomy onto a located and bounded collective, it rationalizes constitutional jurisdiction. This jurisdiction is theoretically mutually exclusive and territorial but, as this chapter has noted, in practice it is functionally overlapping.

To meet the collective identity challenges ahead, we need to complicate the federal model. Federalism is a vestige of privilege for the territories and temporalities of the constitutional

[90] Webber, *supra* note 77.
[91] McNeil, *supra* note 75 at 17.
[92] Webber, *supra* note 77.

moment; it does not contain internal mechanisms of inclusion for new or different collectivities. Several contemporary collectivities and their individual members are not seeking federal jurisdictional solutions, but neither are they satisfied with individual rights exemptions on a case-by-case basis. They are seeking something in between – something akin to limited autonomy over personal or particular decisions. The place to draw the line will differ from case to case. Kent McNeil describes how the judicial approach to Aboriginal jurisdiction establishes jurisdiction piece by piece.[93] It forces the nations to start with an empty boxy and to prove that each matter over which they claim jurisdiction is integral to their distinctive culture. While this is clearly the wrong approach for Aboriginal self-governments, who should receive plenary jurisdiction, it has some merit for identity groups who are not seeking self-government but rather some form of expression or freedom.

There have been some forays into these kinds of original hybrid or creative jurisdictional forms – most notably, Ayelet Shachar's suggestion of interjurisdictional accommodation - but they are dated now. We need to take seriously the deep meaning of self-determination as a constitutive human value in order to understand why distributions of constitutional power ultimately matter.[94] The challenge, then as now, is to create flexible jurisdictional nodes that permit collectivities some measure of decision making autonomy without ceding the ground of democratic freedom and equality. It is in many ways a very old problem - where to locate the balance between the individual and the collective - but it is in a new context with new expressions of difference. And it will fall to constitutional lawyers to reconceive jurisdictional forms inside and outside of the constitution to make room for diversity.

[93] McNeil, *supra* note 75.
[94] Libesman, *supra* note 1.