

## SUBSIDIARITY, REPUBLICANISM, AND THE DIVISION OF POWERS IN CANADA

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### Résumé de l'article

Dans cet article, j'entreprends le projet normatif de déterminer ce que le principe de subsidiarité devrait signifier en droit constitutionnel canadien et comment il devrait être appliqué. J'argumenterai sur le fait que le principe de subsidiarité devrait être compris dans le cadre théorique du républicanisme et, afin de contribuer à ce numéro qui rend hommage à la jurisprudence constitutionnelle de la juge Deschamps, je démontrerai comment une de ses décisions dans un arrêt de droit constitutionnel illustre cette interprétation républicaine du principe de subsidiarité. Dans la première partie, j'établirai la pertinence de l'approche républicaine pour l'interprétation du fédéralisme canadien et démontrerai comment cela permet de mieux cerner le principe de subsidiarité. Brièvement, l'argument veut que le concept républicain de non-domination offre une norme permettant aux tribunaux de déterminer si les conditions du principe de subsidiarité sont satisfaites. La deuxième partie me permettra de présenter comment une interprétation républicaine du principe de subsidiarité est évidente dans la jurisprudence du fédéralisme de la juge Deschamps.

## **SUBSIDIARITY, REPUBLICANISM, AND THE DIVISION OF POWERS IN CANADA**

by Hoi L. KONG \*

*Dans cet article, j'entreprends le projet normatif de déterminer ce que le principe de subsidiarité devrait signifier en droit constitutionnel canadien et comment il devrait être appliqué. J'argumenterai sur le fait que le principe de subsidiarité devrait être compris dans le cadre théorique du républicanisme et, afin de contribuer à ce numéro qui rend hommage à la jurisprudence constitutionnelle de la juge Deschamps, je démontrerai comment une de ses décisions dans un arrêt de droit constitutionnel illustre cette interprétation républicaine du principe de subsidiarité. Dans la première partie, j'établirai la pertinence de l'approche républicaine pour l'interprétation du fédéralisme canadien et démontrerai comment cela permet de mieux cerner le principe de subsidiarité. Brièvement, l'argument veut que le concept républicain de non-domination offre une norme permettant aux tribunaux de déterminer si les conditions du principe de subsidiarité sont satisfaites. La deuxième partie me permettra de présenter comment une interprétation républicaine du principe de subsidiarité est évidente dans la jurisprudence du fédéralisme de la juge Deschamps.*

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*The present paper undertakes the normative project of determining what subsidiarity should mean in Canadian constitutional law, and how it should be applied. In this paper, I will argue that subsidiarity should be understood in republican terms, and in furtherance of this special issue's goal of offering tribute to the constitutional jurisprudence of Justice Deschamps, I will argue that a representative case from her federalism jurisprudence is consistent with a republican interpretation of subsidiarity. Part I sets out the case for interpreting Canadian federalism in republican terms and for arguing that these are relevant for understanding the principle of subsidiarity. In brief, the argument is that the republican idea of non-domination provides a normative standard that enables courts to determine whether the conditions of the principle of subsidiarity are satisfied. Part II turns to demonstrate how a republican application of the subsidiarity principle is evident in the federalism jurisprudence of Justice Deschamps.*

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## TABLE OF CONTENTS

<b>Part I:</b>	<b>Republicanism, Subsidiarity, and the Division of Powers in Canada</b> .....	20
	A. <i>Non-Domination and the Division of Powers in Canada</i> .....	22
	B. <i>Subsidiarity, Multinationalism, and Non- Domination</i> .....	30
	C. <i>Republican Federalism: The General Case</i> .....	31
<b>Part II:</b>	<b>Republicanism, Subsidiarity, and Federalism Doctrine</b> .....	35
	A. <i>Federalism Doctrine and Non-Domination</i> .....	36
	B. <i>Non-Domination and Non-Interference: Levy's Objection to Young</i> .....	39
	C. <i>Non-Domination and the Federalism Jurisprudence of Justice Deschamps: the Criminal Law Power</i> .....	41
<b>Conclusion</b> .....		46

The concept of subsidiarity entered Canadian federalism jurisprudence through the reasons of Justice L'Heureux-Dubé in *114957 Canada Ltée v. Hudson*, commonly referred to as *Spraytech*.<sup>1</sup> The oft-cited passage from the decision describes the principle of subsidiarity as “the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity”.<sup>2</sup> There are at least two situations in which this idea of subsidiarity is applicable in the federalism context.<sup>3</sup>

First, one might understand the concept to be relevant to deciding disagreements about which order of government should implement a policy objective, once it has been enacted into law, when the relevant orders of government agree that one of them has jurisdiction to legislate with respect to that policy. Consider the case in which the provincial and federal governments agree that a particular federal policy’s goal is to reduce crime, and accept that the federal government has jurisdiction to enact that policy. In such circumstances, the governments may nonetheless disagree about which level of government is best positioned to implement that policy, and the principle of subsidiarity can be used to resolve that disagreement. One might ask whether, in the given circumstances, considerations of effectiveness, responsiveness to local needs, and diversity would lead to a conclusion that a provincial rather than the federal government should implement the federal policy.

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1. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town of)*, [2001] 2 S.C.R. 241 [*Spraytech*].
  2. *Id.*, par. 3.
  3. I will be using the expressions “principle of subsidiarity”, “idea of subsidiarity”, “concept of subsidiarity”, “subsidiarity”, and similar expressions interchangeably. The statement of the principle of subsidiarity in the main text is the canonical one in Canadian jurisprudence, and will be the one that I shall use throughout this paper. Other statements or definitions of the principle are, of course, possible but since this is a paper about Canadian federalism jurisprudence, I adopt the one most pertinent to that body of thought.

Second, one might argue that the concept of subsidiarity is applicable in circumstances where two levels of government disagree about which has jurisdiction to regulate in a particular set of circumstances. Consider the case of a disagreement about whether the federal government can legislate over specific aspects of artificial reproduction. Subsidiarity in that instance may be used to resolve the jurisdictional question. One might argue that concerns about effectiveness, responsiveness, and diversity should be relevant to determining whether the federal government's attempt to regulate the relevant aspects of artificial reproduction would amount to an unconstitutional intrusion on provincial jurisdiction.

These two kinds of cases in which the concept of subsidiarity may be applied have given rise to debate in the jurisprudence and in the academic literature. For instance, the Chief Justice in *Reference re Assisted Human Reproduction Act*<sup>4</sup> limited the application of the subsidiarity principle to circumstances in which provincial (or municipal) regulation complements federal legislation and enables federal purposes to be adapted to local circumstances.<sup>5</sup> Similarly, some scholars<sup>6</sup> argue that the principle of subsidiarity is relevant only when one order of government has the undisputed power to enact a particular policy objective, and when the only question is which order of government should *implement* that objective. As a consequence, these authors argue, the principle is not useful for resolving disputes about which order of government *should regulate* when several conflicting policy objectives are at issue. Writing in the context of the European Union, Gareth Davies argues for this position and concludes that subsidiarity cannot resolve a disagreement about whether, in a particular set of circumstances, a Community-wide goal of achieving policy

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4. *Reference re Assisted Human Reproduction Act* [2010] 3 S.C.R. 457 [*AHRA Reference*].

5. *Id.*, par. 70, 72.

6. See e.g. Gareth DAVIES, "Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time", (2006) 43 *C.M.L. Rev.* 63.

harmonization should outweigh national interests in autonomous regulation.<sup>7</sup>

If some judges and some scholars focus on circumstances in which the principle of subsidiarity is relevant only to questions of policy implementation, others argue that subsidiarity considerations are pertinent to cases of jurisdictional disputes. For instance, in the *AHRA Reference*, Justices LeBel and Deschamps reasoned that the principle may assist courts in determining whether legislation fits within one head of power or another. They invoked the subsidiary principle at the end of a long analysis that found that the impugned provisions of the *Assisted Human Reproduction Act* were *ultra vires* because, in pith and substance, they were legislation in relation to the provinces' jurisdiction over hospitals, property and civil rights, and matters of a local or private nature.<sup>8</sup> Justices LeBel and Deschamps introduced the principle by stating that "[i]f any doubt remained, this is where the principle of subsidiarity could apply".<sup>9</sup> This formulation suggests that in cases where the extrinsic and intrinsic evidence, as well as an examination of the legal effects of federal legislation, tends towards a finding that the federal government is trenching upon provincial jurisdiction but does not conclusively establish this finding, consideration of the subsidiarity principle will be relevant.<sup>10</sup>

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7. *Id.*, 67-68. Davies writes: "Subsidiarity misses the point. Its central flaw is that instead of providing a method to balance between Member State and Community interests, which is what is needed, it assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work."

8. *AHRA Reference*, prec., note 4, par. 273. The discussion of the reasons of LeBel and Deschamps JJ. and of the Chief Justice in the paragraphs that follow draws on material previously published in H. KONG, "Beyond Functionalism", *infra* note 16.

9. *Id.*

10. Since Justices LeBel and Deschamps only suggested that if the principle were to be applied, it would have led to a finding that the provisions at issue were *ultra vires*, they did not specify the details of how the principle would be applied in a particular case (*Id.*).

This understanding of subsidiarity is not limited to the case-law: some scholars similarly argue that the principle of subsidiarity is useful in determining whether, in a given set of circumstances, one order of government rather than another should have jurisdiction to regulate. For example, Steven Calabresi and Lucy Bickford, writing in the U.S. context, have argued that the “economics of federalism” entails considerations that give content to the principle of subsidiarity and can assist courts in deciding jurisdictional disputes.<sup>11</sup> According to the authors, economic considerations can assist in determining whether state or federal governments should regulate a given matter. Calabresi and Bickford set out the advantages of state regulation: “(1) regional variation in preferences, (2) competition for taxpayers and businesses, (3) experimentation to develop the best set of rules, and (4) lower monitoring costs”.<sup>12</sup> The authors contrast these with factors in the presence of which federal regulation is advantageous: (1) economies of scale, (2) collective action problems, (3) control of externalities, and (4) civil rights issues.<sup>13</sup> The authors argue that the U.S. Supreme Court has used the considerations that comprise the “economics of federalism” to resolve jurisdictional disputes, and in so doing, it has ensured that matters that are best regulated at the state level are under the jurisdiction of the states and not of the federal government.<sup>14</sup>

In this paper, I will argue that in Canadian federalism, the principle of subsidiarity should play a role in resolving jurisdictional disputes. I do not address in any detail the narrow doctrinal question of whether the principle of subsidiarity in current Canadian constitutional law is, as Chief Justice McLachlin claims, best understood as being limited to circumstances in which the

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11. Steven G. CALABRESI & Lucy D. BICKFORD, “Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law”, (2011) [unpublished, Northwestern University of Law Scholarly Commons faculty working paper].

12. *Id.*, 11.

13. *Id.*, 14-16.

14. *Id.*, 28.

provinces can complement federal legislation, although I agree with those who argue that the scope of the principle's application in positive law is broader than this.<sup>15</sup> Instead, the present paper undertakes the normative project of determining what subsidiarity should mean in Canadian constitutional law, and how it should be applied. In this paper, I will argue that subsidiarity should be understood in republican terms, and in furtherance of this special issue's goal of offering tribute to the constitutional jurisprudence of Justice Deschamps, I will argue that a representative case from her federalism jurisprudence is consistent with a republican interpretation of subsidiarity.<sup>16</sup> The paper is divided into two parts.

Part I sets out the case for interpreting Canadian federalism in republican terms and for arguing that these are relevant for understanding the principle of subsidiarity. In brief, the argument is that the republican idea of non-domination provides a normative standard that enables courts to determine whether the conditions of the principle of subsidiarity are satisfied. That is, the concept of non-domination, which I shall describe and explain below, can assist a court in evaluating whether, in a given set of circumstances, jurisdiction should be given to the provinces because they are the order of government that is, in the words of the Court in *Spraytech*, "closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity".<sup>17</sup> I will further argue that two versions of the republican case for Canadian federalism — the multinational and the general case — are relevant

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15. See Dwight NEWMAN, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity", (2011) 74 *Sask. L. Rev.* 21.

16. I have argued elsewhere that Justice Deschamps's reasons in a pair of interjurisdictional immunity and paramouncy cases is consistent with her approach to the *AHRA Reference*, prec., note 4 (see Hoi KONG, "Beyond Functionalism, Formalism and Minimalism: Deliberative Democracy and Decision Rules in the Federalism Cases of the 2010-2011 Term", (2011) 55 *Sup. Ct. L. Rev.* (2d) 355 [H. KONG, "Beyond Functionalism"]). In his contribution to this volume, Professor Ryder makes an argument that applies to the entirety of Justice Deschamps's jurisprudence, which is consistent with the one made in this paper (Bruce Ryder, citation when available).

17. *AHRA Reference*, prec., note 4, par. 3.



to determining when the conditions of subsidiarity are satisfied, such that the provincial order of government should have jurisdiction over a given subject matter, or that the federal order's power should be limited. In the course of making that argument, I will distinguish between a normatively justifiable and a normatively objectionable conception of nationalism. We shall see that it is only the former that plays a role in the republican conception of a multinational federation.

Part II turns to demonstrate how a republican application of the subsidiarity principle is evident in the federalism jurisprudence of Justice Deschamps. In order to set the stage for that discussion, I consider and reject a suggestion — made in the political theory literature — that the concept of non-domination cannot assist in determining jurisdictional questions. Once I have cleared that objection away, I will argue that the concept of non-domination animates Justice Deschamps's application of the principle of subsidiarity in the context of interpreting the criminal law power. In particular, I will argue that Justice Deschamps's application of the principle of subsidiarity has implications for how broadly the criminal power is read, and for how much deference should be accorded Parliament. We shall see that the concept of non-domination is central to her conclusions about these matters, and that it influences her conclusion that the division of powers jurisprudence should limit the reach of the criminal power in order to ensure that the provincial governments can function as loci of distinctiveness and diversity. We will, in other words, see that Justice Deschamps's vision of federalism jurisprudence evinces a republican-influenced understanding of the principle of subsidiarity.

### **Part I: Republicanism, Subsidiarity, and the Division of Powers in Canada**

I have argued elsewhere for a republican conception of Canadian federalism that builds on the concept of non-domination and draws extensively on the multinational elements of the Canadian federation. In what follows, I will restate the core of the

argument, before demonstrating that it can be extended beyond the multinational elements of the Canadian federation to include the general relationship between the federal and provincial governments.<sup>18</sup>

Republicanism has emerged as an important school of thought in political theory and has exerted a strong influence on Anglo-American legal scholarship.<sup>19</sup> Republicanism has, however, been largely absent from Canadian constitutional law scholarship,<sup>20</sup> and this absence is particularly noticeable in the legal literature on federalism. Republicanism, of course, includes many different strands, some of which I have analysed in other work.<sup>21</sup> For present purposes, I adopt a particular version of republicanism, which stresses the norm of non-domination,<sup>22</sup> because it provides a

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18. The following paragraphs on multinational republican federalism draw from Hoi KONG, “Republicanism and the Division of Powers in Canada”, (2014) 64 *U.T.L.J.* 259 [H. KONG, “Republicanism”]. I am grateful to Justice Deschamps for suggesting such a broad application of my analysis in her response to this paper.
  19. For a survey, see Samantha BESSON & José Luis MARTÍ, “Law and Republicanism: Mapping the Issues” in Samantha BESSON & José Luis MARTÍ (eds.), *Legal Republicanism: National and International Perspectives*, Oxford, Oxford University Press, 2009, p. 3.
  20. For an exception, see Hoi KONG, “Towards a Civic Republican Theory of Canadian Constitutional Law”, (2011) 15 *Rev. Const. Stud.* 249 [H. KONG, “Civic Republican Theory”].
  21. Hoi KONG, “Something to Talk About: Regulation and Justification in Canadian Municipal Law”, (2010) 48 *Osgoode Hall L.J.*, 499, 502-505.
  22. There is an extensive literature on the relationship between republicanism and liberalism and, in particular, on the contrast between the republican concept of non-domination and the liberal concept of non-interference. For present purposes, I will accept one key distinction made by republican authors, who claim that an agent may dominate another and, as a consequence, may inflict harms that legal institutions should aim to prevent or remedy, even if that agent does not interfere with the dominated party’s interests. For present purposes, I will accept the distinction between non-interference and non-domination to be the defining cleavage that separates liberalism from republicanism, and I identify republicanism with the concept of non-domination. For the distinction, see Philip PETTIT, *Republicanism: A Theory of Freedom and Government*, New York, Oxford University Press, 1997, p. 52 [P. PETTIT, *Republicanism*]. For the debate

promising normative framework for analyzing the multinational elements of Canadian federalism<sup>23</sup> and because it is perhaps the most influential contemporary strain of republican theory. As a consequence, for the remainder of this paper, when I refer to republicanism, I mean this non-domination version of the theory. In what follows, I will show how republicanism applies to the multinational elements of Canadian federalism, and I will extend the argument about the significance of the norm of non-domination to the general relationship between the orders of government in the Canadian federation. Let us begin by fleshing out the idea of non-domination.

#### A. *Non-Domination and the Division of Powers in Canada*

According to Philip Pettit, who is most closely identified with the republican theory of domination, state action can be non-dominating if it tracks “common, perceived interests”;<sup>24</sup> this is the

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surrounding the distinction, see e.g. Ian CARTER, “How are Power and Unfreedom Related?” in Cécile LABORDE & John MAYNOR (eds.), *Republicanism and Political Theory*, Malden, Blackwell, 2008, p. 58; Quentin SKINNER, “Freedom as the Absence of Arbitrary Power” in Cécile LABORDE & John MAYNOR (eds.), *Republicanism and Political Theory*, Malden, Blackwell, 2008, p. 83; Philip PETTIT, “Republican Freedom: Three Axioms, Four Theorems” in Cécile LABORDE & John MAYNOR (eds.), *Republicanism and Political Theory*, Malden, Blackwell, 2008, p. 102; Charles LARMORE, “A Critique of Philip Pettit’s Republicanism”, (2001) 11 *Philosophical Issues* 229.

23. There are important American contributions to the legal literature on republicanism and federalism. For a general treatment, see Mark TUSHNET, “Federalism and the Traditions of American Political Theory”, (1985) 9 *Ga. L. Rev.* 981, 989-90; for a criticism of multinational federations including Canada, which argues that they undermine some of the purposes of federalism, see Steven G. CALABRESI, “A Government of Limited and Enumerated Powers: In Defense of *United States v. Lopez*”, (1995) 94 *Mich. L. Rev.* 752, 764.
24. Philip PETTIT, “Republican Freedom and Contestatory Democratization” in Ian SHAPIRO & Casiano HACKER-CORDÓN (eds.), *Democracy’s Value* Cambridge, Cambridge University Press, 1999 163, 172 [P. PETTIT, “Contestatory Democratization”]. See generally James BOHMAN, “Cosmopolitan Republicanism and the Rule of Law” in Samantha BESSON

case even when state action has coercive effects.<sup>25</sup> Pettit defines the relevant interests as those “that are consistent with the desire to live under a shared scheme that treats no one as special. They are interests that those who are expected to give a system of government their allegiance may reasonably expect a government to track”.<sup>26</sup> When state action tracks these kinds of interests, Pettit argues, it accords with reasons related to the public good and is non-dominating.<sup>27</sup> Pettit fits his account of non-domination and state action within a wider account of non-domination that applies to private relations when he sets out the conditions under which one party has dominating power over another. He writes that one has dominating power over another if one has (1) “the capacity to interfere (2) on an arbitrary basis (3) in certain choices that the other is in a position to make”.<sup>28</sup> In the context of the state, action is undertaken on an arbitrary basis when it is “sectional or factional in character”.<sup>29</sup> Such action does not attempt to track common perceived interests of all within a given polity, and instead merely reflects the interests and the political will of a segment of society. Note that on this understanding of domination, a party can be dominated even if there is no interference with her interests. How, then, are we to determine whether state action bears these characteristics or when the state stands in a relationship of domination vis-à-vis its citizens?

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& José Luis MARTÍ (eds.), *Legal Republicanism: National and International Perspectives*, Oxford, Oxford University Press, 2009, p. 60, at p. 61.

25. Pettit contrasts his position with others which view laws as necessarily curtailing freedom (P. PETTIT, *Id.*, p. 168-69). Pettit uses the modifiers “commonly perceived” and “politically allowable” interchangeably in his writings to describe the relevant interests. For the former usage see *id.* For the latter usage, see Philip PETTIT, *A Theory of Freedom: From the Psychology to the Politics of Agency*, Cambridge, Cambridge University Press, 2001, p. 156.

26. *Id.*, p. 176.

27. See P. PETTIT, *Republicanism*, prec., note 22.

28. *Id.*, p. 52.

29. *Id.*, p. 56.

Pettit provides us with two kinds of indicia. The first relates to a given polity's perception of an instance of domination. He argues that it will be "common knowledge" when the conditions of domination are met in a particular set of circumstances.<sup>30</sup> The second kind of indicia relates to the costs of being dominated by another. One who is subject to the arbitrary will of another individual or of the state suffers in three ways: (1) from uncertainty about when her interests will be interfered with, (2) from having to constantly act with strategic deference towards the dominating party, and (3) from not being able to engage with the dominating party as an equal.<sup>31</sup> Pettit applies these indicia in the course of making arguments in favor of institutional proposals that counter domination. One can identify these indicia in Canadian constitutional history and one can see versions of these kinds of institutional constraints in Canadian constitutional law bearing on the multinational elements of the federation.

French Canadians<sup>32</sup> at Confederation would reasonably have thought it likely that a government in a unified Province of Canada,

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30. *Id.*, p. 59. According to Pettit, the fact of domination's being common knowledge is both empirically likely and normatively significant. It is empirically likely because the fact of domination is salient to all those involved in a relationship of domination (*Id.*). Pettit argues that common knowledge of an instance of domination is normatively significant because the harms in relationships of domination arise when those who are party to the relationship are aware of them. According to Pettit: "Domination is going to involve awareness on the part of the powerful, the awareness of vulnerability on the part of the powerless, and the mutual awareness — indeed, the common awareness among all the parties to the relationship — of this consciousness on each side" (*Id.*, p. 60).

31. *Id.*, p. 87.

32. Deciding upon the appropriate nomenclature for the nation under discussion is a fraught exercise. For present purposes, I label the population who constituted the minority nation to be protected at the time of Confederation as "French Canadians" because that was the term used by participants in the Confederation debates, including, for instance, A.A. Dorion. I shift the terminology to "Quebecers" post-Confederation for two reasons. First, in the post-Confederation period Quebec became the repository of nationalist aspirations, and those aspirations came to be expressed in jurisdictional claims (see Stephen TIERNEY, *Constitutional Law*

in which they would be a persistent minority, would be persistently indifferent or hostile to their collective interests and therefore would fail to make decisions that tracked those interests. The institutional solution advanced by some fathers of Confederation, including George-Étienne Cartier, was to create a political unit in which this persistent doubt about the nature of the reasons motivating government action would be removed.<sup>33</sup> Under a federalist regime that would give democratically elected and controlled governments in Quebec jurisdictional control over the vast majority of government decisions and policies that would affect citizens' lives, it would no longer be possible for French Canadians (the vast majority of whom would live on the territory of Quebec) to persistently doubt that the institutions of popularly elected governments would track their collective interests.<sup>34</sup> The *Constitution Act, 1867* provided just such a set of institutions.

Canadian federalism can thus plausibly be characterized as facilitating republican decision-making and responding to a

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*and National Pluralism*, Oxford, Oxford University Press, 2004, p. 101). Second, I believe that the term "Quebecer" is appropriate for the post-Confederation period because an essential function of the institutions of a political jurisdiction is to speak for the residents of that jurisdiction as a whole. See on this point Philip PETTIT, "A Republican Law of Peoples", (2010) 9 *European Journal of Political Theory* 70, 71. Moreover, such institutions can legitimately speak in this way when residents of a jurisdiction pursue common ends through those institutions. This understanding of jurisdictions and their institutions is significant because domination of a jurisdiction arises in the federalism context only when a jurisdiction and its institutions have this representative function. In a different context, Pettit describes the domination of collective agencies such as the state in this way: "domination of corporate agencies will matter insofar as those agencies are organizations whereby individual human beings combine to act together. If the things that the members do as a corporate entity are subject to alien control of another agent or agency, then those members are themselves subject to alien control" (*Id.*, 76).

33. See Christopher MOORE, *1867: How the Fathers Made a Deal*, Toronto, McClelland & Stewart, 1997, p. 142-143.

34. See for the relevant history, A.I. SILVER, *The French-Canadian Idea of Confederation, 1864-1900*, 2<sup>nd</sup> ed., Toronto, University of Toronto Press, 1997, p. 3.

particular threat of domination. In other work, I have made a detailed argument for the claim that the Canadian federation was structured to safeguard a set of collective interests, which should be construed as national interests, from the threat of domination.<sup>35</sup> I will not repeat that argument here. Instead, I will simply note that when the activities that constitute a nation (including activities tied to the creation of a common public culture) and the goods that flow from these activities (including goods relating to the individual autonomy of group members) require state institutions that are controlled by members of the nation, nations can make a plausible claim to a measure of self-government.

For a minority nation in a multinational federation, this claim can be framed in terms of the principle of non-domination. For instance, French Canadians at Confederation may reasonably have believed that they could not ensure that in a state dominated by English Canadians, the relevant group activities and goods would be secured.<sup>36</sup> They might have been concerned, for instance, that institutions necessary to sustain the common public culture of French Canada, such as schools and courts competent to adjudicate civil law matters, might have been threatened in such a state. French Canadians at Confederation might also have believed that the protection of this common public culture was necessary in order for individual members of the nation to forge identities and benefit from cultural goods that could only result from participation in such a culture. Indeed, French Canadians might have reasonably believed that in such a state, any claims they made in relation to such activities or goods would be the object of outright hostility or indifference.<sup>37</sup> They would therefore have reasonably believed that

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35. H. KONG, "Republicanism", *prec.*, note 18.

36. For an argument that this group constituted a nation, see Eugénie BROUILLET, *La négation de la nation : L'identité culturelle québécoise et le fédéralisme canadien*, Sillery, Septentrion, 2005, p. 53.

37. For a survey of assimilationist policies directed at French Canadians before Confederation, see Stéphane KELLY, *La petite loterie : comment la Couronne a obtenu la collaboration du Canada français après 1837*, Montréal, Éditions du Boréal, 1997. There is an extensive debate about whether rights should be ascribed to nations, rather than to the

a government enacting policy based on majoritarian decision-making procedures would fail to track their interests in engaging in these activities and securing these goods. It was the potential persistent failure of governments in the United Province of Canada to track these kinds of interests that would have placed French Canadians in a relationship of domination with respect to the English Canadian majority.

These interests were politically avowable, according to Pettit's indicia: first, as we have seen above, the Confederation debates revealed that it was *common knowledge* to the Canadian public in the period leading to Confederation that such interests were among those that French Canadians could reasonably have expected to have safeguarded by the constitutional order. Second, the absence of constitutional safeguards would have rendered French Canadians vulnerable to the *effects* of domination: they would have been under persistent threat of having their national interests interfered with; they would have had to engage in strategic deference in their relationships with English Canadians with respect to those interests; and because those interests would not have been secure, they would not have been able to engage with English Canadians on an equal footing. Federal arrangements, which would allocate jurisdictional authority in order to enable French Canadians themselves to pursue their national interests, would have extricated French Canadians from this relationship of domination. It is for these reasons that we can conceive of the

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individuals within them. See the contributions to Will KYMLICKA (ed.), *The Rights of Minority Cultures*, Oxford, Oxford University Press, 1995. I do not intend to take a firm stance on this question, but only address it to the extent of noting that the central institutional settlement in Confederation of the claims related to the French Canadian nation took the form of creating a jurisdiction. As a result, claims with respect to this particular collective interest have been advanced in Canadian constitutional law in jurisdictional terms. The contours of the collective interest may be contested, and it may be that the ultimate justification for advancing that collective interest lies in the individuals that form the collective, but the institutional fact of the jurisdiction means that interests are articulated in terms of the polity that constitutes the jurisdiction, and thus in collective terms.



Confederation debates as evincing the concept of a multinational republican federation.

There is a real risk, however, that specific conceptions of nations will become fixed with reference to markers of ethnic identity. The Confederation debates as I have presented them are open to being interpreted in light of such a conception of nations and nationalism. According to this interpretation, representatives of groups defined exclusively by language and religion sought an institutional settlement that recognized and constituted, through jurisdictional boundaries, two nations that were defined by these markers of ethnic identity. Yet such an ethnocentric conception of nationalism would distort both the constitutional settlement and the evolving nature of the federation. Key elements of the *Constitution Act, 1867* aimed to protect the rights of minority group members who were presumed not to control the levers of power within a given political jurisdiction; these elements evidence a political desire to combat the creation of homogenous political units in which all traces of linguistic and religious difference would be effaced.<sup>38</sup>

In addition, the current cultural diversity of Quebec suggests that any attempt to ascribe to it an ethnocentric identity is problematic as an empirical and normative matter. Quebec today can be understood to constitute a nation because its history is distinctive, as is its shared public culture and sense of belonging, but these elements of nationhood are not the exclusive property of any single ethnically defined group.<sup>39</sup> They represent, rather, an ongoing narrative to which members of diverse communities, as well as citizens who do not identify with any particular community, contribute. The contours and contents of that narrative are contested. It is this ongoing and fluid conversation that constitutes the Quebec nation. The authors of the Bouchard-Taylor Report have recently described the sociological fact of ethnocultural diversity in

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38. See discussion of section 93 and the powers of disallowance and reservation, in H. KONG, "Republicanism", *prec.*, note 18.

39. David MILLER, *On Nationality*, Oxford, Oxford University Press, 1997.

Quebec and offered a way of conceiving of the national culture that incorporates this diversity. The authors of the report write:

[T]he members of the ethnic minorities can become valuable interlocutors in the search for new questions to be asked on Québec's past. They can also substantially enrich Québec's collective memory by contributing to it their own stories. The edification and dissemination of the collective memory can contribute powerfully to making known and promoting common values.<sup>40</sup>

This understanding of Quebec's common values, and the role of minority groups in constructing them, resonates with the idea of a nation as a contested narrative and is the very antithesis of a conception of nationalism that would define a nation on ethnocentric grounds. If membership in a nation is defined by one's willingness to contribute to the narrative project of defining the nation, rather than by criteria that are limited to those of a particular ethnocultural background, all citizens in a given polity are eligible to be considered as members of the nation. State regulation that reflects this conception of the nation will more likely take into consideration the common perceived interests of all who are affected by it than will regulation that evinces an ethnocentrically defined conception of the nation. We have seen above that domination results when regulation fails to consider these kinds of interests. To the extent that the policies of a state inevitably reflect a national identity,<sup>41</sup> states that ascribe to an ethnocentric view of nationhood will more likely create conditions of domination than will states that adhere to the view for which this paper argues. It is for this reason that an ethnocentric view of nationalism is normatively inferior to one that conceives of nationalism more broadly and in ways that recognize the existence of diversity within the jurisdictional boundaries of the nation.

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40. Gérard BOUCHARD & Charles TAYLOR, *Building the Future: A Time for Reconciliation*, Québec, Government of Québec, 2008, p. 127, online: <[www.accommodements-quebec.ca/documentation/rapports/rapport-final-integral-en.pdf](http://www.accommodements-quebec.ca/documentation/rapports/rapport-final-integral-en.pdf)>.

41. See Ferran REQUEJO, *Multinational Federalism and Value Pluralism: The Spanish Case*, New York, Routledge, 2005.

*B. Subsidiarity, Multinationalism, and Non-Domination*

To this point, I have argued for a multinational republican understanding of Canadian federalism. I have not, however, explained how that understanding is relevant to the principle of subsidiarity. I do so now, before turning in the next section to the discussion about a general, rather than multinational, republican conception of federalism and how that general conception can incorporate the principle of subsidiarity. Recall that the principle of subsidiarity, in its canonical formulation in Canadian law, states that “law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity”.<sup>42</sup> In order for this principle to be applied effectively, courts need some means of determining when its conditions are satisfied. In other words, a court intent on applying the principle would need criteria to determine when law-making is best achieved at the local level in ways that enhance regulatory responsiveness to local diversity and population diversity.

We have seen that Calabresi and Bickford have set out, in what they call “the economics of federalism”, considerations for determining when the principle of subsidiarity’s conditions are satisfied. According to the authors, U.S. states should have jurisdiction to regulate when state regulation yields the advantages that are understood to inhere in the concept of subsidiarity, including responsiveness to variations in local preferences (as evidenced by, for example, policies that facilitate efficient sub-federal competition for taxpayers). Moreover, Calabresi and Bickford argue that states should have jurisdiction when state regulation does not give rise to problems that only federal regulation can address (including negative externalities).<sup>43</sup> The concept of non-domination as it applies to multinational federations, can similarly assist courts in determining when sub-federal regulation fulfills

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42. *Spraytech*, prec., note 1, par. 3.

43. S.G. CALABRESI and L.D. BICKFORD, prec., note 11.

subsidiarity's function of protecting local and, in particular, multinational diversity.

Moreover, a conception of subsidiarity that is infused by the multinational principle of non-domination can also place principled limits on federal power.<sup>44</sup> Such a conception would specify when the value of multinational diversity, at the local level, is threatened by federal regulation. In particular, such a conception would specify when a province charged with safeguarding such diversity is threatened by domination, in the sense set out above. Federalism doctrines that evince this multinational republican conception of subsidiarity would protect against such threats, and it is to a consideration of how federalism doctrine *in general* can instantiate this conception of federalism that I turn to in opening sections of the next Part. The paper will conclude with reflections on how Justice Deschamps's federalism jurisprudence *in particular* reflects this conception of subsidiarity. Yet before I turn to the discussion of federalism doctrine, I will extend my arguments about republican federalism beyond the multinational case. The general case will reveal that the republican account can apply to those elements of Canadian federalism that do not give rise to multinational concerns.

### C. *Republican Federalism: The General Case*

Authors have made the case for a republican conception of federalism in the context of the American federation.<sup>45</sup> Because the United States is not a multinational federation, I call the republican argument made in that context the "general case". Although the details of the argument vary among authors, its core is that the

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44. In this respect, subsidiarity helps to identify which polity and which set of democratic institutions should regulate a certain subject matter, and fulfills what Nick Barber has called the purpose of democratic structuring. See Nicholas.W. BARBER, "The Limited Modesty of Subsidiarity", (2005) 11 *Eur. L.J.* 308.

45. See e.g. Cass R. SUNSTEIN, "Interest Groups in American Public Law", (1985) 38 *Stan. L. Rev.* 29, 44; S. Candice HOKE, "Preemption Pathologies and Civic Republican Values", (1991) 71 *B.U.L. Rev.* 685; Cass R. SUNSTEIN, "Beyond the Republican Revival", (1988) 97 *Yale L.J.* 1539, 1561-62, 1578 [C.R. SUNSTEIN, "Revival"].

institutions of American federalism collectively constitute a system that aims to check forms of domination. I label the two kinds of institutional mechanisms by which domination is controlled the “perspectival” and “deliberative” checks.

Recall that domination occurs when state action fails to track the common, politically avowable interests of citizens. We have seen above that such a failure can arise in cases where a minority group is vulnerable to the will of the majority. Majorities can fail to track minority interests out of hostility or indifference, which result from the fact that the majority does not share the perspective of the minority.<sup>46</sup> The institutions of federalism can be understood to address some situations in which a *lack of shared perspective* is likely to result in dominating legislation. For example, when state governments, which are most attuned to the local needs of citizens, are given the power to legislate, they can counteract the risk that federal legislators who are distant from those needs will enact legislation that is indifferent to them.<sup>47</sup> Similarly, American federal legislators who are attuned to federation-wide concerns can enact appropriate legislation, whereas state governments that focus only on local needs may enact legislation that is indifferent to these wider concerns and may therefore harm the interests of citizens in other states.<sup>48</sup> Each of these justifications for federalism’s institutions thus focuses on the institutions’ capacity to counteract the risk that one order of government’s failure to adopt the relevant regulatory

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46. See H. KONG, “Republicanism”, prec., note 18. Scholars writing about discrimination in the disability argue that the absence of a shared perspective can lead a majority to construct a social understanding of a minority group that imposes on the latter disadvantages that amount to discrimination. See e.g. Diane POTHIER, “Miles to Go: Some Personal Reflections on the Social Construction of Disability”, (1992) 14 *Dal. L.J.* 526.

47. See S.C. HOKE, prec., note 45, 710-11.

48. Scholars have characterized this basis for federal legislative power as being grounded in a concern about negative externalities. See e.g. Jonathan R. MACEY, “Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism”, (1990) 76 *Va. L. Rev.* 265.

perspective will yield legislation that is dominating, in the sense set out above.

In addition to this perspectival function, the institutions of federalism can promote *deliberation*. We saw above that domination can arise when state action results from exercises of factional will, and in particular when the state fails to offer a reasoned justification for its actions. Republican theorists have argued that governance mechanisms that facilitate deliberation and require justifications for state action can counter this threat of domination.<sup>49</sup> According to a republican conception of American federalism, the legislatures of each order of government were designed to be forums of this kind of deliberation, as were the courts.<sup>50</sup> In this understanding, each of these forums was to be a site in which the constitutional allocation of jurisdiction was debated and discussed. A federal system does not *guarantee* that such deliberation will occur within these bodies. However, deliberation and reason-giving is more likely to arise when different orders of government call one another to constitutional account, than in a system in which those who hold political power are not required to justify their exercises of power in constitutional terms. In addition, some authors argue that because state and local governments are most accessible to citizens, they are the primary vehicles through which citizens can engage deliberatively in political life.<sup>51</sup> Hoke, for instance, argues that “subnational governments’ primary role should be to serve as the vehicles through which citizens attempt to shape their world — not merely their locality”.<sup>52</sup> When citizens engage in deliberation through these sub-federal

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49. See e.g. Philip PETTIT, *On the People’s Terms: A Republican Theory and Model of Democracy*, Cambridge, Cambridge University Press, 2012, p. 433.

50. See e.g. C.R. SUNSTEIN, “Revival”, prec., note 45.

51. See S.C. HOKE, prec., note 45, 712-13.

52. *Id.*, 713.

legislative bodies, the republican argues, they exercise self-rule and reduce the risk of domination by factions.<sup>53</sup>

How, then, should we distinguish the general republican conception of federalism from the multinational one discussed above? The distinction turns on notions of affiliation. In the United States, residents of particular states do not typically conceive of themselves as compatriots by virtue of their state citizenship. Instead, these residents locate their sense of patriotism at the federal level, and thus the nation that they belong to is the American nation. There is only one nation, whose locus of authority and loyalty lies in the federal government.<sup>54</sup> Authors have argued in the Canadian context that citizens who reside in provinces other than Quebec similarly conceive of themselves as members of the Canadian nation, for whom the locus of authority and loyalty is the federal government.<sup>55</sup>

Nonetheless, under the more general republican conception of federalism that I have just sketched out, citizens of any Canadian province or U.S. state would resist domination by the federal government because such domination exacerbates the risk of factional rule. A federation in which the federal government is unconstrained would lack checks that safeguard citizens against legislation enacted from a perspective which fails to account for their local interests. In addition, an unconstrained federal government would be empowered to act in response to the exigencies of political will alone, rather than for reasons that are

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53. This deliberative argument can be tied to the perspectival one. One might argue that because sub-federal governments are the primary loci of citizen deliberation, there should be a presumption that they have jurisdictional authority. That presumption would, however, be defeated and the federal government would have jurisdiction when a provincial government fails to consider the interests of citizens who live in other provinces. For an argument along these lines, see the discussion of YOUNG, *infra*, note 62.

54. See S.G. CALABRESI, *prec.*, note 23.

55. See e.g. Jeremy WEBBER, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution*, Montreal, McGill-Queen's University Press, 1994. See also Jacob T. LEVY, "Self-Determination, Non-Determination, and Federalism", (2008) 23 *Hypatia* 70.

expressed in constitutionally defined jurisdictional terms. Moreover, the division of powers is necessary, according to the robust republican conception articulated by Hoke, because provincial or state legislatures are forums of deliberation in which citizens are best able to exercise their deliberative capacities and therefore resist domination by factions within the provinces or the states.

In this Part, I have argued for two versions of the republican conception of federalism. The first, multinational version conceives of jurisdictional boundaries as limits on the capacity of the federal government to dominate sub-federal national communities. The second, general version conceives of jurisdictional boundaries as mechanisms to check factional will and to induce political deliberation. In both cases, the principle of non-domination specifies when the values entailed by the concept of subsidiarity are threatened. According to a multinational republican conception of federalism, local diversity in a multinational federal state is preserved if the politically avowable interests of sub-federal national communities are protected. Similarly, the general republican conception of federalism identifies means by which the principle of subsidiarity is safeguarded. According to this conception, the constitutional division of powers (1) limits the risk that a federal government will fail to adopt a relevant, local perspective and cannot be justified in constitutional terms, and (2) enables provincial legislatures to function as deliberative forums for citizens. The argument in this Part has been presented at a high level of abstraction. In the next Part, we shall see how these abstract arguments about republicanism and the principle of subsidiarity play out in concrete doctrinal terms.

## **Part II: Republicanism, Subsidiarity, and Federalism Doctrine**

It is perhaps helpful to begin our discussion of the relationship between the principles of non-domination and subsidiarity on the one hand, and federalism doctrine on the other, by recalling the effects of being subject to domination. One who is subject to the arbitrary will of another individual or of the state



suffers in three ways: (1) from uncertainty about when her interests will be interfered with, (2) from having to constantly act with strategic deference towards the dominating party, and (3) from not being able to engage with the dominating party as an equal.<sup>56</sup> We saw above that the constitutional entrenchment of the jurisdiction of Quebec aimed in part to protect French Canadians from the effects of being subject to the arbitrary will of the English Canadian majority. We saw also that under a general republican conception of federalism, provinces have an interest in protecting their jurisdiction, because unconstrained federal authority increases the risk that federal power will be exercised without considering relevant provincial interests. Yet mere entrenchment is not sufficient to safeguard against domination. The rules that police jurisdictional boundaries may subject a province to domination by giving federal powers an unlimited scope or by permitting the federal government to act for reasons that are unrelated to the constitution's norms. Open-ended federal powers place the federal government in the position of being able to interfere persistently with provincial interests, while constitutionally unconstrained powers enable the federal government to act for reasons of political will alone. Such action, according to the republican theorist, is arbitrary. Such arbitrary action violates the principle of subsidiarity because it undermines the capacity of provinces, as the governments closest to the people, to be responsive to their needs. It also undermines the provincial governments' capacity to protect the distinctiveness of their political communities and to safeguard diversity within the federation. Federalism doctrine can constrain this form of arbitrary action and thus serve the aims of subsidiarity in at least two ways.

A. *Federalism Doctrine and Non-Domination*

First, federalism doctrine can ensure that no order of government has so extensive a *scope* of jurisdiction that it eliminates the other jurisdiction's effective regulatory capacity. The

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56. See P. PETTIT, *Republicanism*, prec., note 22, p. 87.

very purpose of the *Parsons* doctrine of mutual modification is to protect against this outcome. The reasoning in *Citizens Insurance Co. v. Parsons*<sup>57</sup> aims to prevent either the broadly phrased federal trade and commerce power or the broadly phrased provincial property and civil rights power from being interpreted so expansively that the other power has no meaningful content.<sup>58</sup> Moreover, in federations with conflict rules that favor the federal order, it is particularly important to ensure that the federal powers are not over-weaning, even if provincial powers have a similarly broad scope. If the federal government has an effective capacity to regulate without constitutional constraint in areas where the provinces also have jurisdiction, provincial regulation will be under constant threat of being rendered inoperative because of the conflict rule.<sup>59</sup> Such a constant threat of interference exposes all provinces to a risk of domination and is particularly harmful to sub-federal jurisdictions that are loci of national identity, as it undermines the capacity of provincial governments to regulate in ways that affirm that identity.

In addition to limiting the *scope* of jurisdictional authority, federalism doctrine can specify what *kinds of reasons* governments may consider when legislating. In particular, federalism doctrine in Canada controls the risk that a government will act for reasons of political will alone, and not be constrained by constitutionally imposed jurisdictional limits. These risks give rise to republican concerns because each order of government has what Pettit would call a common perceived interest in ensuring that the other order's actions be limited by constitutional norms. Controversies in Canadian federalism often arise when the scope of jurisdictional

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57. *Citizens Insurance Co. v. Parsons*, [1881] 7 A.C. 96 (P.C.).

58. On this point, see William Ralph LEDERMAN, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada*, Toronto, Butterworths, 1981, p. 274.

59. For this concern, see generally Bruce RYDER, "The End of Umpire? Federalism and Judicial Restraint", (2006) 34 *Sup. Ct. L. Rev.* (2d) 345; Eugénie BROUILLET, "The Federal Principle and the 2005 Balance of Powers in Canada", (2006) 34 *Sup. Ct. L. Rev.* (2d) 307.

authority and the degree of deference to be given to the political branches' judgements about jurisdiction are at issue, and such controversies sound in the language of domination.<sup>60</sup> Because of the doctrine of paramountcy, the threat of domination is particularly acute for the provinces. If the federal government is given extensive jurisdiction to regulate in areas that touch on provincial interests, and if, because it has been granted essentially unlimited deference with respect to its jurisdictional judgments, it can do so for reasons of political will alone, then the provinces will be vulnerable to persistent and arbitrary interference from the federal government. This kind of interference would be arbitrary, in the sense articulated by Pettit, because the reasons behind the governmental action would not track the common perceived interests of the provinces in having their jurisdiction safeguarded by constitutional limits. And because Quebec is a vehicle for national aspirations, this degree of vulnerability places it in a specific relationship of domination vis-à-vis the federal government.

Before I demonstrate how Justice Deschamps's jurisprudence has sought to limit the scope of federal authority and controlled the reasons for which the federal government can act, and thereby sought to advance the principle of subsidiarity, by reducing the risk of domination in the Canadian federation, I will address a debate between political theorists about whether the concept of non-domination can assist in deciding jurisdictional questions. If skepticism about the concept's utility in this respect is warranted, then we would have reasons to doubt whether it should be incorporated into judicial doctrine, irrespective of whether existing doctrine can be interpreted to incorporate it. In what follows we shall see that this skepticism is unwarranted.

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60. For analyses of the criminal law and spending powers that exhibit a similar concern for the scope, justification and application of open-ended federal powers, see H. KONG, "Beyond Functionalism", *prec.*, note 16; Hoi KONG, "The Spending Power, Constitutional Interpretation and Legal Pragmatism", (2008) 34 *Queen's L.J.* 305.

B. *Non-Domination and Non-Interference: Levy's Objection to Young*

In her later writings, Iris Marion Young articulated a theory of federalism as non-domination that has been criticized by Jacob Levy.<sup>61</sup> Young argued that a "prima facie principle of non-interference in the internal jurisdiction of a self-determining unit may be suspended" under four conditions: (1) to prevent domination by one unit of another; (2) to prevent the domination within a unit of some members of that unit; (3) to prevent one unit's engaging in self-regarding activities that harm other units; and (4) to facilitate the capacity of particular units to meaningfully pursue autonomy and interact and negotiate with other units.<sup>62</sup> Levy challenges the claim that non-domination can function as a jurisdictional principle.

According to Levy, jurisdictional rules are by their very nature institutionalized decision-making rules, and these cannot reliably function "if, in order to know who has the authority to decide a particular question, the merits of the question must first be decided".<sup>63</sup> The use of non-domination as a jurisdictional principle, argues Levy, requires a decision-maker to decide the merits of political units' actions in order to apply the decision rule and therefore introduces an unacceptable level of uncertainty and instability into decision-making. By contrast, Levy contends, a rigid and clear rule of non-interference is a true decision rule that allocates rights to political units.<sup>64</sup> Finally, Levy suggests that non-domination may function as the standard that decides *ex ante* which polity within a federation ought to have jurisdictional authority over which matters, but once that determination is made,

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61. For a description of the theory and a statement of the criticism, see J.T. LEVY, *prec.*, note 55.

62. Iris Marion YOUNG, *Global Challenges: War, Self-Determination and Responsibility for Justice*, Cambridge, Polity Press, 2007, p. 66 [I.M. YOUNG, *Global Challenges*].

63. J.T. LEVY, *prec.*, note 55, 70.

64. *Id.*, 72.

the question of who has jurisdiction over a particular quotidian matter should be governed by a strict rule of non-interference.<sup>65</sup>

I would like to engage Levy over the question of the role that the principle of non-domination can play in the judicial resolution of federalism disputes. The first thing to note is that jurisdictional rules as they actually exist in federations are persistently open to interpretation. Even relatively bright line rules of jurisdiction, such as those the Privy Council articulated, were open to interpretation in difficult cases.<sup>66</sup> Because no jurisdictional rule is so rigid that it can be applied without interpretation, the question in any given constitutional dispute is how a jurisdictional rule *should be* interpreted. The question courts typically answer in constitutional disputes over the division of powers is whether a particular political unit has jurisdiction over a specific area of regulation. Of course, once that area has been allocated to a particular unit, one might say that that unit has a presumptive right of non-interference, but the principle of non-interference cannot enter into the determination of whether the unit has jurisdiction in the first place. Non-interference is the *result* of the application of a jurisdictional principle. It cannot provide the content of the jurisdictional principle itself.

Moreover, circumstances inevitably arise in federations when one piece of legislation, validly enacted by one political unit, enters into conflict with another piece of legislation, which is validly enacted by a second political unit. In these circumstances, one of the pieces of legislation prevails and, as a result, the prevailing legislature regulates in an area that the other legislature had jurisdiction to regulate. That second legislature therefore has its rights of non-interference compromised and, moreover, its legislative autonomy is limited because it is prevented from pursuing legislative ends that are within its jurisdiction to pursue. What is at issue in such cases is how to determine when

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65. *Id.*, 75.

66. See Hoi KONG, "The Forms and Limits of Federalism Doctrine", (2008) 13 *Rev. Const. Stud.* 241, 250 [H. KONG, "Forms and Limits"] and the examples cited therein.

interference is *justified*. The jurisdictional rules do not, therefore, enforce a rigid rule of non-interference.

The positive law suggests that the principle of non-domination can operate in conjunction with a presumption of non-interference to yield a relatively stable set of institutionalized decision rules for a federation. The manner in which this set of rules operates is suggested by Young when she states that non-interference is a *prima facie* rule.<sup>67</sup> In Canada, provinces enjoy a presumption of non-interference in their areas of jurisdiction, but that presumption is subject to an exception when there is jurisdictional conflict. Moreover, the content of the rules defining provincial jurisdiction and regulating conflicts can sometimes be shaped by the principle of non-domination. In the Canadian federation, an ensemble of doctrinal rules orders the relationship between the federal and provincial governments, and we shall soon see that the incorporation of the principle of non-domination into specific rules does not render that framework unacceptably unstable. Now that we have answered a general theoretical objection to the invocation of non-domination as a jurisdictional principle, we can turn our attention to a specific doctrinal illustration of how this principle functions.<sup>68</sup>

C. *Non-Domination and the Federalism Jurisprudence of Justice Deschamps: the Criminal Law Power*

In the *AHRA Reference*, Justice Deschamps, writing with Justice Lebel, reasoned that in order for legislation to fall within the criminal law power, its purpose must be to “suppress an evil”.<sup>69</sup> The Justices added that this purpose requirement can only be satisfied

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67. Young argued that the principle of non-interference for political units was “the *prima facie* principle in the internal jurisdiction of a self-determining unit” (I.M. YOUNG, *Global Challenges*, prec., note 62, p. 66).

68. The following discussion of the *AHRA Reference*, prec., note 4, draws on material previously published in H. KONG, “Beyond Functionalism”, prec., note 16.

69. *AHRA Reference*, prec., note 4, at par. 233.

if the federal government has “a concrete basis and a reasoned apprehension of harm”<sup>70</sup> and if the conduct targeted is “inherently harmful”.<sup>71</sup> The Justices fleshed out what they meant by “inherently harmful” conduct as they worked through the precedents and identified specific conduct in each of the cases considered that gave rise to risks of harm that could be reasonably apprehended.<sup>72</sup> Justices LeBel and Deschamps that with respect to the impugned provisions of the *Act* being *ultra vires*, Parliament did not act on the basis of a concrete and reasoned apprehension of harm. This comes out most clearly when the Justices wrote that “all activities related to assisted human reproduction are regulated, not just specific ones that Parliament could theoretically have considered — but in fact did not consider — reprehensible”.<sup>73</sup> This passage suggests that in the Justices’ view, it *would have been possible for* Parliament to have had as its legislative purpose the targeting of activities that gave rise to a risk of harm. However, on the present facts, Justices LeBel and Deschamps reasoned that Parliament did not have such an objective and, therefore, that the impugned provisions were not supported by a valid criminal law purpose.<sup>74</sup>

Justices LeBel and Deschamps’s reasons have implications for how broadly they read the criminal law power and how they understand the role of judges in constitutional adjudication. For Justices LeBel and Deschamps, the requirement of suppressing evil applies to all the specific examples of valid public purposes that are invoked in the case law, including the public purpose of morality.<sup>75</sup> By contrast, for the Chief Justice the valid public purpose requirement can be satisfied if legislation aims simply to address “a

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70. *Id.*, par. 238.

71. *Id.*, par. 251.

72. *Id.*, par. 237.

73. *Id.*, par. 250.

74. I believe this reading of the reasoning answers concerns that Justices LeBel and Deschamps’s definition of the criminal law power is overbroad. For such a concern, see Barbara VON TIGERSTROM, “Federal Health Legislation and the Assisted Human Reproduction Act Reference”, (2011) 74 *Sask. L. Rev.* 33.

75. *AHRA Reference*, prec., note 4, at par. 238.

moral concern of fundamental importance”.<sup>76</sup> Justices LeBel and Deschamps’s version of the public purpose requirement is narrower and therefore more restrictive of Parliament’s power to legislate under the criminal power than is the Chief Justice’s version. Moreover, the reasons of Justices LeBel and Deschamps evidence their greater faith in the capacity of judges to make categorical distinctions. In applying the test proposed by those Justices, a court would be obliged to distinguish inherently harmful conduct from other kinds of conduct and would have to identify a concrete basis for a reasonable apprehension of harm. The Chief Justice’s deferential test requires much less of courts; it is the additional burden imposed on courts by her colleagues that leads her to charge them with “substitut[ing] a judicial view of what is good and what is bad for the wisdom of Parliament”.<sup>77</sup> According to the Chief Justice, her colleagues’ approach would “break new ground in enlarging the judiciary’s role in assessing valid criminal law objectives”.<sup>78</sup> The Chief Justice’s concern can be understood to bear on the Court’s capacity to undertake such an expanded role, or the democratic legitimacy of its doing so. Justices LeBel and Deschamps do not in their reasons express these concerns, and in what follows, we shall see the republican significance of their stance.

The reasons of Justices LeBel and Deschamps control both the scope of the criminal power and the reasons for which the federal government can act under that power. Their definition of the criminal law power would limit the number of instances in which Parliament could validly legislate and be in a position to render provincial legislation inoperative. Moreover, one concern with a highly deferential and open-ended criminal law standard, such as the one that the Chief Justice adopts, is that it might permit

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76. *Id.*, par. 50.

77. *Id.*, par. 76. For the division of power significance of this constraint, see John D. WHYTE, “Federalism and Moral Regulation: A Comment on Reference Re *Assisted Human Reproduction Act*”, (2011) 74 *Sask. L. Rev.* 45.

78. *Id.*, 76.



Parliament to act for reasons that do not take into consideration the relevant constitutional interests. By contrast, a more exigent standard would compel Parliament to formulate purposes that are relevant to the applicable constitutional norm.<sup>79</sup> It is, of course, one consequence of a highly deferential judicial posture that courts do not examine closely the reasons that motivate government action. In the *AHRA Reference*, such a posture would not require courts to examine closely the reasons behind Parliament's invocation of a valid criminal purpose, and as a result would not impose a significant burden on Parliament to offer a constitutional justification for its actions. It is worth noting that a requirement to provide jurisdictional reasons would not on its face create an unacceptably wide scope of judicial discretion. Indeed, the multi-factored balancing tests that the Court has enunciated under the peace, order and good government power and the general trade and commerce power have been applied by courts for decades.<sup>80</sup> If judges are able to apply those tests without usurping legislative power or introducing an unacceptably high level of uncertainty into the constitutional framework, it is unclear why the LeBel-Deschamps version of the criminal law power would be problematic.

The effects of the LeBel-Deschamps definition of the criminal law power can be understood as evincing the general and the multinational republican conceptions of the Canadian federation and as giving content to the principle of subsidiarity. Under the general conception, these effects preserve a sphere of legislative autonomy which allows provincial legislatures, and enables citizens exercising their democratic agency through those legislatures, to check over-weening exercises of federal power and the threats of domination to which these give rise. Moreover, under the multinational republican conception of the federation, the fact of the jurisdiction of Quebec facilitates the flourishing of a national

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79. In this respect, I aim to avoid the costs of what Joseph Arvay called the "positivist perspective" of the criminal law power. See Joseph J. ARVAY, "The Criminal Law Power in the Constitution: And Then Came *McNeil* and *Dupond*", (1979) 11 *Ottawa L. Rev.* 1, 5.

80. For a formalist critique of these multi-factor doctrinal tests and its implications, see H. KONG, "Forms and Limits" *prec.*, note 66, 249-50.

interest and protects that interest from the threat of domination. Yet the mere existence of the jurisdiction will not protect that interest if judicial doctrine is formulated in ways that give the federal government powers that enable it to regulate deeply in areas of provincial jurisdiction and for reasons of political will alone, rather than for reasons that have constitutional significance. Such broad and unconstrained powers, when combined with the doctrine of paramountcy, would subject the provinces to persistent uncertainty about when their constitutionally significant interests would be interfered with. To suffer from this degree of uncertainty is to be subject to domination. Reasons that limit the scope of federal powers and subject to meaningful scrutiny the kinds of justifications that Parliament invokes protect the provinces against such domination. And by protecting Quebec, these types of reasons protect a key multinational element of Canadian federalism. Indeed, a multinational concern was present in the *AHRA Reference* insofar as the federal legislation implicated matters regulated by the Civil Code of Quebec, which is itself a “civil constitution”.<sup>81</sup> Those who understand the Civil Code to be an essential element of the national character of Quebec might see the multinational significance of Justices LeBel and Deschamps’s concerns<sup>82</sup> about federal duplication of Civil Code provisions in the *AHRA Reference*.

We have seen that the principle of subsidiarity aims to preserve local variation and diversity within a federation. The principle of non-domination, in its general and multinational forms, gives content to this aspiration by specifying what counts as a constitutionally significant form of diversity. And the constitutional reasoning of Justice Deschamps in the *AHRA Reference* provides a concrete example of how a multinational form of diversity can be preserved in the Canadian federation. The general case suggests that other forms of diversity can also be preserved by constitutional doctrines that aim to limit federal powers and to impose on Parliament a meaningful burden of justification. The arguments in this Part are therefore applicable across the full range of

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81. See Jean CARBONNIER, “Le Code civil”, in Pierre NORA (ed.), *Les lieux de mémoire*, vol. 2, *La Nation*, Paris, Gallimard, 1997, p. 1331.

82. *AHRA Reference*, prec., note 4, par. 225.

constitutional doctrines and should not be understood to be limited to the illustrative example selected for this paper.

## **Conclusion**

This paper has drawn on the resources of republican political theory in order to explain features of Canadian federalism and to offer prescriptions about how the federation should be structured, in ways that accord with the principle of subsidiarity. In addition, the paper has attempted to offer a normatively defensible version of nationalism that can provide theoretical and doctrinal resources for resolving disputes that arise in multinational federations. There are potential pitfalls that are associated with the approach adopted in this paper. One might, for instance, be tempted to adopt a normative theory that is ill-suited for the legal order under analysis. This pitfall can, however, be avoided by carefully attending to the specific characteristics of the relevant legal order and modifying the normative theory selected in light of them. Another pitfall lies in assuming that one can apply a normative theory directly to legal disputes, without considering the limits of legal institutions. An analysis that is insensitive to such limits may ask of courts more than they are capable of delivering. One might, for example, expect judges to redress conditions of injustice that lie beyond their capacity to address. The jurisprudence of Justice Deschamps provides an example of how this pitfall can be avoided. Her reasons exhibit a deep understanding of the normative theories that are relevant to the interpretation and application of constitutional provisions, and an acute awareness of the limits of judicial competence. This principled pragmatism is one of the many reasons for which her jurisprudence is worthy of celebration, and it is evident in her adept handling of the principle of subsidiarity and its republicanism-related virtues.