

Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism

G. Alan Tarr*

For citizens of Quebec, the relation between provincial constitutions and minority rights is a topic of more than scholarly interest. The idea of an separate, entrenched constitution for Quebec has periodically been a subject of discussion, leading to the enactment in 2000 of *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*¹. The introduction in the Quebec National Assembly in 2007 of Bill 196, which contains the draft of a *Québec Constitution*², suggests that it continues to be a political issue. However, my contribution to this discussion is designed to be altogether apolitical. It offers a framework for thinking about subnational constitutionalism and minority rights. It places Canadian subnational constitutionalism in broader context, by comparing the Canadian approach with that in other federal systems, and it then draws conclusions about what these diverse experiences suggest about the role that subnational constitutions can play in protecting minority rights.³

Two points should be made at the outset. The first is terminological. Although the term “subnational” is generally used to denote the constitutions of constituent units in federal systems, its use in the Canadian context is problematic, because a Quebec Constitution would be the constitution of a nation, albeit one situated within the borders of Canada. However, rather than

* Director, Center for State Constitutional Studies (<http://camlaw.rutgers.edu/statecon>), and Distinguished Professor, Department of Political Science, Rutgers University, Camden, NJ, USA. Research on this paper was conducted while the author was a Fulbright scholar in Ottawa, and he wishes to acknowledge the generous support of the Fulbright Program. The views expressed in the paper, however, are exclusively the author's and do not necessarily represent the views of the Fulbright Program.

¹ *Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Quebec People and the Quebec State*, R.S.Q. c. E-20.2 (2000). The debate over a Quebec Constitution has attracted the attention of American, as well as Canadian, scholars. See, e.g., James T. McHugh, “The Quebec Constitution,” *Quebec Studies* 28 (1999): 3-26.

² National Assembly, First Session, Thirty-Eighth Legislature, Bill 196, *Québec Constitution*, presented by Daniel Turp, Member for Mercier (Québec Official Publisher, 2007). Available at <http://www.assnat.qc.ca/eng/38legislature1/Projets-loi/Publics/07-a196.pdf>.

³ For country-by-country analyses, see G. Alan Tarr, Robert F. Williams, and Josef Marko, eds., *Federalism, Subnational Constitutions, and Minority Rights* (Westport, CT: Praeger, 2004).

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

invent an entirely new vocabulary for this paper, I will continue to use the term in my discussion. The second point is more substantive. This paper focuses on subnational constitutions and minority rights, not on the protection of minority rights in federal systems more generally. A leading federalism scholar, Daniel Elazar, has suggested that federalism involves both self-rule and shared rule.⁴ My paper focuses exclusively on the former. Hence, there is no discussion of representation of constituent units or minorities in the councils of the federal government or of other mechanisms designed to protect groups in the formulation and implementation of federal policy or in the process of federal constitutional revision or amendment.⁵ With these caveats, let me turn to my topic.

1. The Distinctiveness of Canadian Provincial Constitutionalism

Like most scholars of comparative constitutionalism or comparative federalism, I began as a student of constitutionalism and federalism within my own country and then branched out. When I shifted my focus from American state constitutions to subnational constitutions in other federal systems, I quite reasonably looked north of the border, to examine Canadian provincial constitutions. After a diligent but fruitless search for the texts of these constitutions, I concluded that Canada did not have subnational constitutions.

This conclusion of course was not altogether accurate: Canadian provinces are not literally “constitution-less.”⁶ There are elements of provincial constitutions in Part V and in other provisions of the *Constitution Act, 1867*⁷—for example in its Section 133.⁸ Other elements are found in the

⁴ Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987).

⁵ The literature on this topic is extensive, to say the least. For a useful short treatment, see Nicole Topperwien, “Participation in the Decision-Making Process as a Means of Groups Accommodation,” in *Federalism, Subnational Constitutions, and Minority Rights*. For a collection addressing the broader connections between federalism and rights, albeit with a primarily American focus, see Ellis Katz and G. Alan Tarr, eds., *Federalism and Rights* (Lanham, MD: Rowman & Littlefield, 1996).

⁶ When I suggested to an eminent Canadian federalism scholar, Ronald Watts, that Canada had no provincial constitutions, he responded that this was not true but that the constitutions were found in the federal constitution rather than being external to it. More generally, see Ronald L. Watts, “Provinces, States, Lander, and Cantons: International Variety among Subnational Constitutions,” *Rutgers Law Journal* 31 (Summer 2000): 941-959.

⁷ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁸ For a striking confirmation of the effect of Section 133, see *Attorney General of Quebec v. Balikie*, 2 S.C.R. 1016 (1979).

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

*Constitution Act, 1982*⁹, and more specifically in its *Canadian Charter of Rights and Freedoms*¹⁰ - for example, Section 5 mandates that provincial legislature must sit at least once every twelve months. Still other elements can be found in ordinary provincial statutes, such as electoral laws, bills of rights, etc. Indeed, some provincial laws are even denominated by the term “Constitution”—for example, the British Columbia’s *Constitution Act*.¹¹ And unwritten elements of provincial constitutions, such as responsible government, are enshrined in constitutional conventions.

From a Canadian perspective, this approach to subnational constitutionalism may not seem unusual. After all, the federal constitution, like its provincial counterparts, is not enshrined in a single document. According to Section 52 of the *Constitution Act, 1982*, at least twenty-six documents are said to be part of the “supreme law of Canada.”¹² Moreover, much that is of constitutional dimension is found in constitutional conventions rather than in any constitutional text. Still, from a comparative federalism perspective, the Canadian approach is distinctive—the state constitutions in other former British colonies, such as the United States and Australia, are written documents separate from the federal constitutions. In addition, given the close historical connection between constitutional government and popular sovereignty, it is striking that there are no provincial constitutional arrangements that are adopted by the people of a province directly, rather than through their representatives, and no provincial constitutional arrangements that are changeable by the people of a province directly.

This is not to suggest that Canada’s approach to subnational constitutionalism is altogether idiosyncratic. Some other federal systems—Belgium, Nigeria, and India, for example—do not have separate subnational constitutions. And some federal or quasi-federal systems, such as South Africa, allow subnational constitutions but either actively discourage their creation or permit constituent

⁹ *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 reprinted in R.S.C. 1985, Appendix II, no 54.

¹⁰ *Ibid.*, [hereafter referred to as the *Canadian Charter*].

¹¹ *Constitution Act*, R.S.B.C. 1996, c. 66. For discussion, see Campbell Sharman, “The Strange Case of a Provincial Constitution: The British Columbia Constitution Act,” *Canadian Journal of Political Science* 17 (March 1984): 87-108. Sharman notes, however, that “there is no indication in format or wording that the Act is anything more than an ordinary act of the legislature.” (p. 97).

¹² Section 52 refers to a list found in the Schedule to the *Constitution Act, 1982*. See Rainer Knopff and Anthony Sayers, “Canada,” in John Kincaid and G. Alan Tarr, eds., *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queen’s University Press, 2005), p. 106.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

units only minimal discretion in designing their political arrangements. Nevertheless, finding Canada in this grouping is somewhat surprising. The practice of allocating very limited constitutional space to constituent units is most common in centralized federations, such as Nigeria and Malaysia, or in federations seeking to forge a single national identity and discourage diversity, such as South Africa and India.¹³ Neither description seems to apply to Canada.

Pointing out Canada's distinctive approach to provincial constitutionalism of course invites the so-what question: does it really matter that Canada has chosen not to authorize separate, written provincial constitutions? Certainly one can defend or criticize that choice, but one can hardly deny its importance. Choices in constitutional design do have consequences, and Canada's approach to subnational constitutionalism does have consequences that may affect the rights and interests of minorities. Let me elaborate on this by focusing on four issues: entrenchment, the locus of authority for the interpretation of subnational law, the political role played by subnational constitutions, and subnational constitutional change

¹³ "Constitutional space" refers to the range of discretion available to subnational constitution-makers. Subnational constitutional space would seem to include, though it might not be limited to, the following:

- a. the power to draft a constitution
- b. the power to amend that constitution
- c. the power to replace that constitution
- d. the power to set goals of government
- f. the power to define the rights that the constituent unit will protect
- g. the power to structure the governmental institutions of the constituent unit, including whether the legislature shall be bicameral or unicameral
- h. the power to define the process by which law is enacted in the constituent unit
- i. the power to create offices
- j. the power to divide powers among the governmental institutions of the constituent unit
- k. the power to determine the mode of selection for public officials of the constituent unit
- l. the power to determine the term of office and the mode of and bases for removal of officials of the constituent unit prior to the completion of their term of office
- m. the power to establish an official language
- n. the power to institute mechanisms of direct democracy
- o. the power to create and structure local government
- p. the power to determine who are citizens of the constituent unit
- q. the power to establish qualifications for voting for officials of the constituent unit

2. Entrenchment

One obvious function of a written constitution is to entrench limitations on government. Some limitations may be designed to protect rights and are characteristically enshrined in bills or charters of rights. The *Canadian Charter of Rights and Freedoms*, which imposes restrictions on both federal and provincial governments, is an obvious example. Yet entrenched provisions other than rights guarantees can also indirectly help safeguard rights. For example, constitutionalizing popular government and a system of checks and balances may prevent those in power from abusing their authority—what Alexander Hamilton likely had in mind when in Federalist No. 84 he claimed that “the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.” Constitutionally entrenched requirements may advance the right of popular government, as well as personal rights. Looking to the American experience, during the mid-nineteenth century, provisions were inserted in American state constitutions to require that the titles of legislative bills reflect their contents, that bills address only a single subject, that they be given multiple readings before passage, and so on.¹⁴ These regulations of the legislative process were designed to promote greater transparency in government and, thereby, to encourage greater accountability to voters. Beginning in the late nineteenth century, requirements were inserted in American state constitutions for balanced operating budgets, and in the late twentieth century for other limitations on state taxing and spending.¹⁵ These amendments reflected a perception that representatives could not be trusted to tax and spend in ways consistent with the wishes of their constituents and that effective popular government therefore required restrictions on their actions.

What is striking about these limitations imposed on the process and substance of state legislation in the United States was that they were state constitutional restrictions, without parallel or precedent in the federal Constitution. Indeed, efforts to amend the U.S. Constitution to impose a balanced budget on the federal government have all failed. The restrictions imposed also varied considerably from state to state. Having separate state constitutions, with provision for a popular role in the amendment or revision of those constitutions, enabled citizens within the various states to devise their own processes of government, and having written, entrenched constitutions

¹⁴ For discussion, see G. Alan Tarr, *Understanding State Constitutions* (Princeton, NJ: Princeton University Press, 1998), p. 118-121.

¹⁵ *Ibid.*, p. 157-161.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

enabled them to make their choices effective as restraints on those holding political office.

Let us turn back to express guarantees of rights. Even if rights guarantees are entrenched in the federal constitution, there are reasons why constituent units may wish to safeguard rights beyond those protected in that document. One reason has to do with timing: constituent units may be constitutionalizing rights guarantees at a different point in time. In the United States, for example, the *U.S. Bill of Rights* was adopted in 1791 and reflected the rights understanding dominant in the late eighteenth century. Over time, as understandings of rights shifted, states acted to secure social and economic rights not contemplated in the *U.S. Bill of Rights*. For example, the *New York Constitution* guarantees a right to housing, the *New Jersey Constitution* a right to collective bargaining, the *Montana Constitution* a right of access to governmental information, and seventeen states a right to gender equality.¹⁶ In addition, constituent units may wish to safeguard rights that are of particular concern to their residents. Again, drawing on the experience of the American states, New Mexico has mandated that teachers be prepared to instruct students proficient in either English or Spanish, Hawaii has an entire Article of its constitution devoted to the concerns of native Hawaiians, and Montana “recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.”¹⁷

It should be emphasized that differences between federal and subnational rights guarantees are not limited to the United States. For example, in Germany the *land* constitutions that preceded the adoption of the Basic Law tended to include “the whole array of political and social provisions, including basic human rights.” Those drafted after the adoption of the Basic Law focused on organizational principles, because social concerns and rights guarantees had already been dealt with in the Basic Law. Finally, the *lander* constitutions drafted since 1990 have reflected “modern values,” seeking to guide political practice through the inclusion of social rights and state goals. This social democratic emphasis is particularly evident in the constitutions of

¹⁶ *New York Constitution*, Art. XVIII, sec. 1; *New Jersey Constitution*, Art. I, sec. 19; *Montana Constitution*, Art. II, sec. 9; and on gender equality, G. Alan Tarr and Mary Cornelia Porter, “Gender Equality and Judicial Federalism: The Role of State Appellate Courts,” *Hastings Constitutional Law Quarterly* 9 (Summer 1982): 919-973.

¹⁷ *New Mexico Constitution*, Art. XII, sec. 8; *Hawaiian Constitution*, Art. XII; and *Montana Constitution*, Art. I, sec. 2, para. 2.

those *lander* that became part of a united Germany following the collapse of the German Democratic Republic.¹⁸

In fact, as can be seen in the Quebec *Charter of Rights and Freedoms*¹⁹, differences between federal and subnational rights protections are a feature of Canadian federalism as well. Unlike the *Canadian Charter*, the *Quebec Charter* does not limit its focus to civil and political rights. It also safeguards social and economic rights, such as rights to housing, to education, to information, and to social assistance. Even in its treatment of “first-generation” rights, it diverges from the *Canadian Charter* (which of course it preceded), by including distinctive provisions relating to rights to one’s dignity and reputation, to privacy, to property, and to professional secrets.

Yet, given the system of subnational constitutionalism in Canada, the status of the guarantees found in the *Quebec Charter* (and hence their efficacy) remains problematic. In the United States and in Germany, the two examples used above, the rights guaranteed by state and *lander* constitutions operate as substantial checks on government action. They enjoy a status superior to ordinary legislation, they are enforceable in the courts, and they cannot be changed without the extraordinary procedure of constitutional amendment. Thus, the entrenchment of rights protections ensures non-changeability and enforceability. In contrast, the *Quebec Charter* is merely a statute enacted by the National Assembly. It is in legal theory not superior to other enactments and therefore could presumably be superseded by subsequent inconsistent legislation. To its credit, the *Quebec Charter* recognizes the issue posed by non-entrenchment and seeks to deal with it. Section 52 provides that no provision of any other act passed by the Quebec National Assembly may derogate from the Charter’s provisions, unless such act expressly states that it applies despite the Charter. This doubtless has moral force, but it may not have legal force. To an outside observer, at least, it is unclear how legislators

¹⁸ Arthur B. Gunlicks, “Land Constitutions in Germany,” *Publius: The Journal of Federalism* 28 (Fall 1998): 111-112, and more generally, Peter E. Quint, *The Imperfect Union: Constitutional Structures of German Unification* (Princeton, NJ: Princeton University Press, 1997): 73-99. Protection of minority rights in Germany is less of an issue, given the relative homogeneity of the population. For consideration of how Germany has addressed minority rights, see Norman Weiss, “The Protection of Minorities in a Federal State: The Case of Germany,” in *Federalism, Subnational Constitutions, and Minority Rights*.

¹⁹ R.S.Q., c. A-12 [hereafter referred to as the *Quebec Charter*].

can restrict the power to legislate of their successors through the enactment of a piece of ordinary legislation, even if it is one of constitutional dimension.²⁰

3. The Locus of Authority for the Interpretation of State Law

Let me turn from the creation of guarantees of constitutional rights to their interpretation and enforcement. In Canada the authoritative interpreter of provincial law, as of federal law, is the Supreme Court of Canada, whose members are appointed by the Governor General on recommendation of the Prime Minister. For cases that do not get to the Supreme Court, the definitive interpretation usually comes from the courts of appeals of the various provinces, whose members are likewise appointed on the recommendation of the Prime Minister. Thus, the ultimate resolution of questions of provincial law resides with judges who owe their appointment to the federal government without formal provincial input and who receive their salaries from the federal government—in short, with federal officials.

Canada's centralization of judicial authority is hardly idiosyncratic. Whereas the constituent units in most federal systems choose their own legislators and executives, the same does not necessarily hold for judges. Some federations—India and South Africa, for example—dispense with subnational courts altogether, opting for a single court system. Other federations, such as Brazil and Nigeria, provide for lower state courts but not for a full hierarchy of state courts paralleling the federal hierarchy. And most federal systems lodge the final interpretation of both the federal constitution and subnational constitutions in the federal supreme court or constitutional court.²¹

The alternative to this centralization of interpretive authority can be seen if one contrast Canada's approach with that of the United States. In the United States, the ultimate interpreter of state (subnational) law, including the state's constitution, is the state supreme court. The justices of that court are chosen within the states, according to procedures established by state constitutions,

²⁰ A number of jurisdictions have—New Zealand, the United Kingdom, and the Australian Capital Territory—have begun to examine an alternative approach to rights protection, often referred to as the “parliamentary rights model.” For elaborations and assessments of that model, see Janet L. Hiebert, “Parliamentary Bills of Rights: An Alternative Model?” *Modern Law Review* 69 (2008): 9-28; Julie Debeljak, “Rights protection without judicial supremacy: a review of the Canadian and British models of bills of rights,” *Melbourne University Law Review* 26 (2002): 285-324; and Mark Tushnet, “Weak-Form Judicial Review and ‘Core’ Civil Liberties,” *Harvard Civil Rights-Civil Liberties Law Review* 41 (Winter, 2006): 1-22.

²¹ For information of the court systems of various federal countries, see Kincaid and Tarr, *Constitutional Origins, Structure, and Change in Federal Countries*.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

they are paid from the state treasury, and they hold their office during terms prescribed by those constitutions. Thus, if a case does not raise a “federal question” (i.e., a matter of federal law) and is resolved on “independent and adequate state grounds” (i.e., based on state law exclusively), then the decision of the state supreme court is final and cannot be appealed to the United States Supreme Court.

The implication of this decentralization of interpretive authority for the protection of rights becomes apparent when one examines the so-called new judicial federalism in the United States. The new judicial federalism involves the increased reliance by state judges on state declarations (bills) of rights to secure rights unavailable under the U.S. Constitution.²² This phenomenon developed in the 1970s in reaction to personnel shifts on the U.S. Supreme Court that seemed to threaten that the Court would abandon its liberal activism and erode the gains made by civil liberterians during the chief justiceship of Earl Warren. To safeguard these gains and to pursue further civil-liberterian objectives, groups that had previously sought Supreme Court review began to litigate their constitutional claims in state courts rather than in federal courts, framing their constitutional arguments in terms of state constitutional rights.

Several factors made this change in approach attractive to civil-liberties groups. For one thing, state declarations of rights included guarantees not found in the federal Constitution. For example, some state constitutions expressly protected privacy rights, others specifically prohibited race and gender discrimination, still others guaranteed a right to a legal remedy, and some guaranteed positive rights. Thus, state constitutions offered the possibility of extending rights protections beyond those recognized by the Warren Court. In addition, even when state guarantees were analogous to those found in the *U.S. Bill of Rights*—for example, state guarantees of freedom of speech and of religious liberty—often they were framed in quite different language, and these textual differences could provide the basis for interpretations diverging from those emanating from the U.S. Supreme Court. In addition, state guarantees might have different generating histories or reflect different values that could likewise provide a basis for rulings that afforded more expansive protections than those based on the *U.S. Bill of Rights*. Most importantly, under the doctrine of “independent and adequate

²² There is a vast literature on the new judicial federalism. For a summary discussion with reference to highlights in the academic literature on the subject, see G. Alan Tarr, “The Past and Future of the New Judicial Federalism,” *Publius: The Journal of Federalism* 24 (Spring 1994): 63-79. My account in this and succeeding paragraphs relies on this article.

state grounds,” rulings based solely on state law could not be appealed to the Supreme Court. This meant that rights-enhancing state rulings, if based on rights guarantees in state constitutions, would be insulated from reversal by a more conservative Supreme Court.

If the new judicial federalism began as a tactical response to political shifts on the Supreme Court, it no longer has that character. Rather, over time the new judicial federalism, now decidedly middle-aged, has become institutionalized as an element of American federalism. State courts throughout the nation regularly rely on state declarations of rights to resolve disputes, and although particular rulings may be controversial—for example, the California Supreme Court’s ruling that banning same-sex marriage violated the state constitution—the controversy centers on whether the judges properly interpreted the state constitution. Their reliance on state law is now fully accepted.²³ Moreover, one has seen over time the emergence of a distinctive state constitutional jurisprudence and a focus on state constitutional issues, such as tort reform and environmental rights, that do not reflect disappointment about the rulings emanating from the nation’s capital.

The relevance of this American experience for thinking about subnational constitutions and the protection of rights can best be appreciated by engaging in a simple thought experiment: could a new judicial federalism arise in Canada? Assuredly, the *Canadian Charter of Rights and Freedoms* protects against both federal and provincial violations of fundamental rights, and it is likely that these guarantees, like their analogues in *the U.S. Bill of Rights*, will continue to play the paramount role in safeguarding rights. Nonetheless, some of the preconditions for a Canadian new judicial federalism seem in place. Quebec has adopted its own *Charter of Rights and Freedoms*, and analogous human rights laws have been enacted in other provinces as well. Moreover, the *Quebec Charter* seems to exhibit several of the same characteristics that justified the development of a distinctive state civil-liberties jurisprudence. American state judges have grounded their innovative rulings in guarantees that were found exclusively in state declarations of rights, and certainly Quebec’s protections of social and economic rights have no analogue in the *Canadian Charter of Rights and Freedoms*. American state judges have also emphasized the distinctive wording of state constitutional protections, and to some extent one finds this textual distinctiveness in the *Quebec Charter* as

²³ This ruling was overturned in November, 2008, with the popular ratification of an amendment to the California Constitution defining marriage as the union of one man and one woman. The California Supreme Court subsequently upheld this amendment against constitutional challenge in *Strauss v. Horton*, S168047 (2009).

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

well. American state judges have further relied on the distinctive generating history of state guarantees to justify divergent interpretations, and the fact that the *Quebec Charter* preceded the *Canadian Charter* indicates that it did not merely copy federal guarantees. Finally, American state judges have grounded rulings in the distinctive values found within their states, and obviously Quebec can claim a more distinctive set of values than can any American state.

Why, then, has a new judicial federalism not developed in Canada, and why is it unlikely to do so? In part, the answer lies in the non-entrenched character of provincial charters of rights. But beyond that, it lies in the structure of the Canadian judiciary and the locus of interpretive authority. In the United States, having different authoritative interpreters for federal law and state law encouraged different interpretations of those two bodies of law. But perhaps unsurprisingly, the converse is also true. In Canada, the same judges serve as authoritative interpreters of both federal and provincial law, and having the same interpreters of those two bodies of law encourages similar interpretations of these two bodies of law. Or, put differently, Canadian judges have tended to assimilate federal and provincial charters rather than emphasizing the differences between them and drawing legal conclusions from those differences. In addition, as Sébastien Grammond has suggested, “the Supreme Court’s position at the apex of the Canadian judiciary may induce it to prefer uniform solutions based on norms applicable throughout the country.”²⁴ Also, the federal judges’ greater familiarity with and reliance upon the *Canadian Charter of Rights and Freedoms* may discourage them from vigorously reviewing challenges rooted in protections not found in that Charter, such as the social and economic guarantees of the *Quebec Charter*.²⁵ If Grammond is correct, the Supreme Court of Canada has not undertaken aggressive enforcement of the unfamiliar social and economic rights provisions found in the *Quebec Charter*.²⁶

In sum, federalism may permit constituent units to enshrine in bills or charters of rights those guarantees that they find most important. But this does not ensure that those rights will have practical effect. As our comparison of the

²⁴ Sébastien Grammond, “Canadian Federalism, Cultural Diversity, and Conceptions of Fundamental Rights,” p. 17, unpublished paper presented at the Diversity, Federalism and Fundamental Rights conference, University of Ottawa (2007).

²⁵ This was a problem in the early years of the new judicial federalism in the United States as well, as state judges were far more familiar with the *U.S. Bill of Rights* than with their own declarations of rights.

²⁶ Sébastien Grammond, *supra* note **Erreur ! Signet non défini.**, p. 16-19.

American and Canadian experiences shows, the structure and jurisdiction of the judiciary can be crucial in vindicating (or not vindicating) those rights valued by minorities concentrated in particular constituent units.

4. The Political Role of Subnational Constitutions

Subnational constitutions serve important political purposes, regardless of the content of the documents. They may be instruments of conflict management during periods of political instability, as was the case in KwaZulu Natal during the transition from apartheid to democracy in South Africa.²⁷ The process of subnational constitution-making itself can provide opportunities for political involvement and thus contribute to political socialization.²⁸ It may also help forge a sense of common political identity.

Yet these instrumental purposes pale in comparison with the fundamental purpose of subnational constitution-making. Perhaps the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination--the power to determine the fundamental character, membership, and future course of their political society. This right of self-determination is inevitably limited when nations are constituent members of a larger political entity, but it is not effaced.

Bill 196 clearly reflects this understanding, subordinating particulars of institutional design to the broader purpose of “entrench[ing] the fundamental values of Quebec in a Quebec Constitution.” The Bill acknowledges the identity of Quebecers as a French-speaking nation and affirms that “it is the prerogative of the Québec nation to express its identity through the adoption of a Québec Constitution.” It bases this prerogative on the “inalienable right [of a nation] to freely choose its political system and determine its legal

²⁷ For an insightful discussion of how the processes of national and sub-national constitution-making in South Africa served these purposes, see Jonathan L. Marshfield, “Authorizing Subnational Constitutions in Transitional Federal States: South Africa, Democracy, and the KwaZulu-Natal Constitution,” *Vanderbilt Journal of Transnational Law* 41 (March 2008): 585-638.

²⁸ Subnational constitution-making may also lead to the emergence of a new cohort of political leaders. To take a favorite American example, when a constitutional convention was called in Montana to draft a new state constitution in 1972, members of the state legislature were barred from serving as delegates. A consequence of this was that women who had previously been confined to supportive or less visible political roles had the opportunity to serve as delegates. Thus, whereas in 1972 the two houses of the Montana Legislature included only five women, the constitutional convention the same year included nineteen, and several female delegates used their convention experience as the stepping-stone to political careers within the state.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

status.” Whatever one’s assessment of the wisdom or prudence of such declarations, they certainly underscore the importance of a subnational constitution as a vehicle for asserting and exercising the political rights of minorities in federal systems.

Two points about the political role of subnational constitutions deserve mention here. First, although subnational constitutions may provide an opportunity for articulating a constituent unit’s self-understanding and its view of the character of the federation, they are not the only means for doing so. In a system without separate subnational constitutions, other documents may likewise serve this function. In the Quebec case, the *Charter of the French Language*²⁹ to some extent already serves the purpose of providing a definitive statement of political and social identity, what defines Quebec as a nation. Thus, the Preamble of the Charter affirms that in Quebec “the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity.” The political, social, and economic structures of the Quebec polity thus become mechanisms to support and enhance that national identity. Or put differently, aims precede and give direction to institutional arrangements, the same prioritizing as found in Bill 196.

Second, to reiterate, the right of self-determination is inevitably limited within a multi-national federation, as it is within federations more generally. Federal law circumscribes the constitutional space available to subnational constitution-makers, and federal systems have devised various mechanisms to ensure that constituent units do not go beyond the constitutional space available to them. This is a vast subject, on which I have written previously, so I will limit myself to some general observations.³⁰

Federations have developed two non-exclusive approaches for ensuring that constituent units do not exceed the constitutional space available to them. They may seek to minimize the occasions for conflict prior to the exercise of choice by subnational constitution-makers, and/or they may create mechanisms for federal review of the choices made by those constitution-makers.

²⁹ R.S.Q., c. C-11.

³⁰ See Robert F. Williams and G. Alan Tarr, “Subnational Constitutional Space: A View from the States, Provinces, Regions, *Lander*, and Cantons,” in *Federalism, Subnational Constitutions, and Minority Rights*, especially p. 6-11.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

One way to minimize conflicts is for the federal constitution to give the federal government some control over the content of subnational constitutions at the time they are being created. For example, the United States Constitution implicitly confers on Congress the power to impose such conditions. In empowering Congress to admit new states to the Union, it in effect gives Congress the power to establish the conditions under which they will be admitted.³¹ And in countries in which the national legislature has responsibility for crafting the functional equivalent of the subnational constitution, such scrutiny is built into the ordinary process of legislation. This is true, for example, in quasi-federations such as China, Italy, and Spain. In addition, Switzerland requires that the Federal Parliament guarantee that cantonal constitutions be consistent with federal law, and this mandate has had real force: in the late nineteenth century, the Parliament rejected several cantonal constitutions that failed to provide equal political rights.³² And in South Africa the Constitutional Court reviews proposed provincial constitutions and proposed amendments to those constitutions before they take effect.

Another mechanism used to minimize conflicts between federal and subnational constitutions is to prescribe the contents of the subnational constitutions in the federal constitution. This may obviate the need for separate subnational constitutions altogether, as in Nigeria and India. Or it can dramatically restrict the range of choice available to subnational constitution-makers. This has been the Canadian approach. Likewise important are the supremacy clauses found in many federal constitutions, which confirm that federal law is superior to state law, so that in cases of conflict, valid federal enactments--be they constitutional provisions, statutes or administrative

³¹ The main provision dealing with the admission of new states is Article IV, section 3 of the U.S. Constitution. Further constitutional support for congressional conditions on admission is provided by Article IV, sect. 4 of the U.S. Constitution, which directs the federal government to "guarantee to each State in the Union a Republican Form of Government." In addition to imposing conditions on prospective states, Congress also supervised the constitutions that Southern states adopted in the aftermath of the Civil War, requiring an acceptable constitution as a condition for "readmission" to the Union. However, the effects of these congressional efforts were short-lived. Most Southern states repudiated their Reconstruction constitutions as soon as they could, typically replacing them with documents that by the late nineteenth century entrenched white political control, and Congress did nothing to prevent this undermining of republican government. See Don E. Ferenbacher, *Constitutions and Constitutionalism in the Slaveholding South* (Athens, GA: University of Georgia Press, 1989); Kermit L. Hall and James V. Ely, Jr., eds., *An Uncertain Tradition: Constitutionalism and the History of the South* (Athens, GA: University of Georgia Press, 1989).

³² Giovanni Biaggini, "Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Switzerland," in *Federalism, Subnational Constitutions, and Minority Rights*, p. 220.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

regulations--prevail over state enactments, including state constitutional provisions. This, of course, limits subnational constitutional space—consider, for example, how Section 23 of the *Canadian Charter of Rights and Freedoms* limits provincial policy with regard to minority-language schools. It also may deter subnational constitution-makers from proposing some provisions that they would have wished to adopt. Likewise important may be the lists of competences awarded either exclusively or concurrently to the federal government. The broader the range of competences granted exclusively to the federal government, the fewer the opportunities available to sub-national units to address matters in their constitutions or statutes.

Complementing strategies for preventing disputes over subnational constitutional space are mechanisms for policing or resolving disputes when they arise. One widely used mechanism for policing constitutional boundaries is federal review of subnational constitutional provisions. Such review can occur before the provisions take effect, as in South Africa, or during the course of ordinary litigation, as in the United States. In most federal systems the federal judiciary exercises this responsibility, but this is not the only possible approach. The constitution of the Russian Federation, for example, authorizes the president of the Federation to suspend the acts of subnational executives if he believes them in violation of the federal law or human rights. The Justice Ministry also has the power to revoke regional laws that are in violation of the Federation Constitution, and even before the accession of President Putin, it had used that power to revoke nearly 2000 regional laws and constitutional provisions.³³

In sum, the power to define oneself constitutionally is perhaps the fundamental political right, and the creation of subnational constitutions provides an opportunity to exercise that right. Yet the autonomy of constituent units is limited in a federal system, and this holds true even if the units coincide with internal nations in a federation. A federation may limit this autonomy either by prescribing the contents of subnational constitutions, in whole or in part, or by policing what constituent units place in their constitutions. Canada appears to employ a combination of these two

³³ *Constitution of the Russian Federation*, Article 85, section 2. The estimate of subnational laws invalidated was supplied by State Prosecutor Yuri Skuratov, quoted in "Constitution Watch," *Eastern European Constitutional Review* 7 (Winter 1998): 32. Indeed, President Putin identified harmonization of the constitutions and laws of the Federation's constituent units with those of the Federation as a major element in his federalism initiative. See Mark A. Smith, "Putin: An End to Centrifugalism?" in Graeme P. Herd & Anne Aldis, eds., *Russian Regions and Regionalism: Strength through Weakness* (London: Routledge Curzon, 2001), p. 27-28.

approaches. It prescribes much of the content of subnational constitutions in federal constitutional documents and constitutional conventions, and it provides for federal judicial review of provincial enactments, including enactments of constitutional dimension. Beyond that, as noted previously, it provides for the authoritative interpretation of provincial law by federal judges.

5. Subnational Constitutional Change

As important as the power to create one's own fundamental law is the power to change it, to alter or replace that law in response to changes in conditions, in political outlook, or even in identity and self-understanding. This option of constitutional renewal is crucial at both national and subnational levels. Yet constitutional change in federations is complicated and often contentious, because of potentially conflicting interests between the federation and its constituent units or among the constituent units. Devising procedure(s) for amending the federal constitution may generate conflict, because decisions about who can change the terms of the federation agreement may themselves depend on contested understandings about who the parties to that agreement are and what the nature of the federation is. Canada is a case in point: there is, to put it mildly, a lively debate about whether the federation is rooted in two founding nations or in provincial equality.

Whatever the resolution of such fundamental issues, in practice the provisions for amending federal constitutions are usually designed to provide some protection for the continued existence and autonomy of constituent units. Thus, it is common for constitutional changes in federations to require the approval of both the national legislature and a large proportion of constituent units, either for all amendments or at least for those of particular importance to the constituent units. In addition, federal constitutions may grant extraordinary protection to the territorial integrity of existing constituent units and to their participation in the processes of the federal government. For example, the *United States Constitution* forbids tampering with either state borders or the equal representation of states in the Senate not only by congressional legislation but also by the ordinary processes of constitutional amendment.³⁴

Although one might view provinces, states, and cantons as made up of local units of government, these constituent units are usually not understood as

³⁴ *United States Constitution*, Art. IV, sec. 3, para. 1, and Art. V.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

mini-federations of local units.³⁵ As a result, many of the concerns that complicate the system of constitutional amendment at the federal level do not apply at the subnational level. So constitutional amendment at the subnational level tends to be easier and more “popular.”³⁶ Often, there are more mechanisms for constitutional change available at the subnational level—in Florida, for example, there are five separate procedures for amending the state constitution. Constituent units tend to make greater use of alternatives to legislative proposal, such as conventions or constituent assemblies (for example, in Argentina, Mexico, United States and Switzerland) and referenda (for example, in Australia, Germany, Mexico, Russia, Spain, Switzerland, and the United States). Even within a single federation, the constituent units of a federation may establish different mechanisms for amending their constitutions, although in general there is a greater tendency to involve the populace directly in the proposal or ratification of constitutional changes (for example, in Brazil, Mexico, Switzerland, and the United States). And although there may be notable exceptions, it appears that overall subnational constitutions are amended more frequently than are their federal counterparts.

In Canada the process of provincial constitutional change is complicated by two factors. First, insofar as provincial constitutional provisions are contained in provincial legislation, no special procedure is required for their amendment--the entrenchment issue once again. Second, insofar as components of provincial constitutions are contained in federal constitutional documents, the mechanisms for constitutional change must be prescribed at the federal rather than the provincial level. Section 45 of the *Constitution Act, 1982* is designed to deal with this, mandating that “[s]ubject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.”

Let me offer a few observations about the Canadian resolution of the issue of subnational constitutional change. The Section 45 delegation of the amendment power to provincial legislatures assimilates the procedures for provincial constitutional change, regardless of the location of the provision to

³⁵ This is in fact possible. For example, in some Mexican states the approval of more than half the municipal councils is required before a change may be made to the state constitution. See Juan Marcos Gutiérrez González, “United Mexican States,” in *Constitutional Origins, Structure and Change in Federal Countries*, p 215.

³⁶ The analysis of modes of subnational constitutional change relies on Anne Twomey, “The Involvement of Sub-national Entities in Direct and Indirect Constitutional Amendment within Federations,” unpublished paper delivered at the VIIth World Congress of the International Association of Constitutional Law (2007), available at <http://camlaw.rutgers.edu/statecon>.

be amended. Whether the provincial constitutional provision is found in federal constitutional documents or in provincial statutes, the same procedure for change—that is, an enactment by the provincial assembly—suffices. Still, the Section 45 delegation of power is not a complete delegation. There are some potential changes at the provincial level, identified in Section 41, that would have implications beyond the borders of the province.³⁷ These changes require the concurrence of the federal Parliament and of the legislative assemblies of the various provinces. This recognition that some political arrangements within a single constituent unit may affect the federation as a whole is hardly unusual—consider, for example, the homogeneity clauses of the Austrian and German constitutions or the guarantee of a republican form of government in the *United States Constitution*.³⁸ Nonetheless, the Section 45 delegation confirms that some constitutional matters relating to provinces found in the Constitution of Canada do not have federal implications, and that therefore their inclusion in the federal constitution is a matter of choice—or possibly historical accident—rather than necessity.

Comparison of Section 45 with the provisions governing the amendment of the Constitution of Canada shows that Canada has made it easier to amend provincial constitutions than to amend the federal constitution. As noted previously, this is consistent with how other federal systems have treated amendment of subnational and federal constitutions. Yet what seems like an enhancement of provincial power in Section 45—authorizing the provincial legislature to unilaterally amend the provincial constitution—may simultaneously be read as a restriction on provincial authority. Although this may not have been the original intent, by lodging the power of amendment “exclusively” in provincial legislatures, Section 45 may preclude provinces from devising alternative mechanisms for amending those components of their constitutions found in the federal constitution.³⁹ If this is true, it is despite the

³⁷ These include: “(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province; (b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force; (c) subject to section 43, the use of the English or the French language; (d) the composition of the Supreme Court of Canada; and (e) an amendment to this Part.”

³⁸ For a particularly insightful discussion of how this operates in the Austrian context, see Anna Gamper, “The Principle of Homogeneity and Democracy in Austrian Federalism: The Constitutional Court’s Ruling on Direct Democracy in Vorarlberg,.” *Publius: The Journal of Federalism* 33 (Winter 2003): 45-58.

³⁹ A provincial legislature can impose upon itself “manner and form” requirements with regard to the amendment of a provincial constitution, so it may be able to establish a super-majority requirement for constitutional amendments. If, however, a provincial legislature decided to provide for amendment by referendum, it would be necessary to decide whether this decision

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

fact that Section 45, by delegating this authority to provinces, acknowledges that the federal government has no vested interest in whether or how those provisions are amended. Certainly, Section 45's authorization of amendment of provincial constitutions by provincial assemblies stands in marked contrast to the special procedures established by the federal constitution for the amendment of many of its own provisions. The absence of supermajority requirements or popular ratification procedures for provincial amendments may suggest that provincial constitutions are viewed as different in dignity than the federal constitution, more akin to ordinary statutes than to fundamental law.⁴⁰

Subnational constitutions have considerable potential as vehicles for safeguarding the rights of geographically concentrated minorities and the rights of internal nations within multi-national federations. These rights include first and foremost political rights, particularly the rights (within parameters established by the federation) to affirm one's own identity, to set one's own social and political goals, and to devise those institutional arrangements best suited to the achievement of those goals. These matters are typically enshrined in the subnational constitution, the fundamental law of the constituent unit. This act of political creation is not typically a one-time endeavor. The subnational constitution also establishes procedures whereby, as conditions or views change, subsequent generations can engage in constitutional re-creation, amending or altogether revising the constitutional arrangements under which they choose to live. And those living under subnational constitutions in a wide variety of federations have not been reluctant to exercise the constitution-changing power lodged in them.

Subnational constitutions can also protect the right of groups to maintain their own distinctive identities, through provisions dealing with such bulwarks of identity as religion, language, and ethnicity. In most federations the range of discretion available to constituent units is circumscribed by federal rights guarantees that restrict both federal and subnational governments. These federal guarantees can serve as a baseline, safeguarding basic rights for all

was merely a "manner and form" regulation (and hence constitutional) or a delegation of a power assigned exclusively to the legislature.

⁴⁰ The absence of supermajority requirements or popular ratification could, alternatively, simply reflect Canadian political culture, which has shown a distrust of referenda and unmitigated popular sovereignty.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism »

and ensuring that assertions of identity do not lead to oppression of those who do not share the identity. But local conditions and values may lead particular constituent units to use their subnational constitutions to go beyond the federal minimum. This is demonstrated by subnational provisions establishing official languages in various Ethiopian states, by provisions safeguarding the language rights of minority populations in some German *lander*, and by provisions acknowledging the rights of native peoples concentrated in the constituent unit, as in Mexico.⁴¹

Finally, subnational constitutions provide a vehicle whereby those within a constituent unit can determine what rights they deem most essential and give constitutional recognition and protection to those rights. In federations in which there are both federal and subnational bills of rights, doubtless there will be considerable overlap between federal and subnational guarantees. Yet this overlap need not be complete. Within a federation there may well be different views about the constitutionalization of, for example, social or economic rights. Local circumstances and values may also dictate that particular rights be given constitutional protection in some constituent units but not in others. And there may be disagreement about what “reasonable limits” on rights “can be demonstrably justified in a free and democratic society.”⁴² In the United States the *U.S. Bill of Rights* is often described as a floor rather than a ceiling. It establishes a standard below which constituent units cannot go, but it does not otherwise limit state initiatives in expanding rights—they can build on that floor.

Yet nothing guarantees that this building project will occur. As this paper makes clear, the opportunities that constituent units enjoy for identifying and promoting rights depend on political circumstances within their federations. And even when such opportunities exist, constituent units may fail to take advantage of the constitutional space available to them.⁴³ Given the

⁴¹ On Ethiopia, see Yonatan Tesfaye Fessha, “Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia” (unpublished Ph.D. dissertation, University of the Western Cape, 2008), p. 399-406; on Germany and the protection of language rights of minorities within particular *lander*, see Weiss, “The Protection of Minorities in a Federal State,” p. 80-81; and on Mexico, where the Oaxaca Constitution extended protections for native people before the federal constitution did, see Gonzalez, “United Mexican States,” p. 214.

⁴² The quoted language is, of course, from the *Canadian Charter of Rights and Freedoms*, art. 1.

⁴³ For discussion of this point, see Robert F. Williams and G. Alan Tarr, “Subnational Constitutional Space: A View from the States, Provinces, Regions, *Lander*, and Cantons,” in *Federalism, Subnational Constitutions, and Minority Rights*.

G. Alan Tarr, « Subnational Constitutions and Minority Rights: A
Perspective on Canadian Provincial Constitutionalism »

constitutional choices made by Canada with regard to provincial constitutionalism, the challenge for citizens of Quebec is to determine what opportunities exist for provincial initiatives aimed at extending and securing rights.