Introduction

My paper concerns jurisprudential understandings of the Canadian constitutional division of powers between federal and provincial levels of government. The constitutional framework for division of powers is set out in the Canadian Constitution Act 1867. While both the text of the constitutional provisions and the case law focus almost exclusively on the federal/provincial binary, my objective is to explore the role of social movements and other entities in both shaping and claiming the spaces of jurisdiction. The principle animating my analysis is that of democracy, a principle that is explicitly given, at least at a rhetorical level, a central role in the division of powers jurisprudence. In short, my argument is that in certain circumstances, a commitment to democratic principles requires that the adjudication of jurisdictional boundaries be resolved in a way that recognizes and facilitates the political engagement and participation of those who are systemically excluded from the formal institutions of representative democracy.

In a previous paper, I explored this thesis in relation to a harm reduction movement in Vancouver’s Downtown Eastside that mobilized in support of a safe injection site for users of illicit narcotics. The site was set up under the aegis of a provincial health authority. The federal position that the site contravened federal provisions prohibiting the use of certain narcotics threatened the continued operation of the site and led to constitutional litigation on both the jurisdictional and individual rights dimensions of the dispute. My argument was that the jurisdictional dispute between levels of government should be resolved in a manner consistent with jurisdictional justice, namely in a manner that takes account of the political engagement and exercise of a measure of self government, at a functional level, by an otherwise politically marginalized group. In this paper, I would like to explore whether a similar argument can be advanced with respect to division of powers disputes that directly engage with issues that pertain to women’s reproductive citizenship and that have been the focus of political mobilization and institution building by women’s movement organizations. I am using the term reproductive citizenship to encompass matters such as the regulation of contraception, abortion, human reproduction, and public supports for unpaid social reproductive work. I plan at a later point to examine the way that Canadian indigenous groups have used constitutional division of powers arguments to, in effect, claim jurisdictional space for their laws, institutions and practices. From these three case studies, I hope to provide the foundation for a more textured and nuanced approach, within the division of powers jurisprudence, to the linkage between jurisdiction and democracy. However, here I will focus

2 The dispute has since been resolved in favour of Insite on the basis of the impact on individual rights to life, liberty and security of the person protected in section 7 of the Canadian Charter of Rights and Freedoms. The jurisdictional arguments put forward by those advocating for Insite were rejected by the Court.
on the conceptual underpinnings of the argument and on preliminary questions about the history and nature of the Canadian women’s movement that raise particular difficulties for the argument.

In developing this project, I am curious about whether the descriptive claim of multilevel governance scholars that “jurisdictions are linked in a web of interdependence that allow other levels of government and organized interests to shape policy” can be given more normative content. I am also curious about whether the European experience with multilevel governance may offer a framework for rethinking Canadian federalism in a way that incorporates non-governmental actors. To the extent that the European approach not only attends to vertical, hierarchical relations between nested governments but also looks, as the Background Paper puts it, “sideways across different sectors and spheres including states, markets and civil society”, it facilitates a much richer notion of jurisdiction and democratic accountability. The commitment within European processes to this richer, horizontal conception of governance may be only imperfectly realized; nevertheless, the existence of the debate can helpfully expand the parameters of conceptions of legal authority, jurisdiction, and democracy in Canada.

In the rest of this summary, I will briefly elaborate the key theoretical concepts that underpin my argument, namely jurisdiction and democracy. I will then turn to a discussion of the Canadian women’s movement and the ways in which federalism debates have become entangled in abortion litigation and politics.

I. Jurisdiction

Key to my discussion is the concept that lies at the heart of division of powers disputes, namely that of jurisdiction. As Mariana Valverde has observed, “the sorting and ordering work of jurisdiction is only noticed by ‘technical’ legal experts, not by social and political theorists.”5 The key question in division of powers jurisprudence concerns authority to govern, namely which of the two levels of government, federal or provincial, assigned jurisdiction in the Constitution Act 1867 over legislative ‘subject matters’ has authority to govern in any particular factual situation. Doctrinal fictions such as watertight compartments, trumping or suspension of one law by another, zones of immunity that protect entities from regulation, and regulatory fields that have double jurisdictional aspects are crafted to orchestrate, as smoothly as possible, the co-existence and meshing of governmental powers. The upshot of the focus on assigning authority – questions about who and where – is “that the crucial question of how governance is done ends up being decided without explicit discussion.”6 For example, by answering the question about who (or what level of government) has constitutional jurisdiction over restrictions made in the name of public morality on access to an abortion clinic in Halifax, courts also settle the question of whether many women in Halifax and throughout the Maritimes can continue to obtain abortions.7 The latter is what Valverde calls a “how” question, namely a question about the political consequences for

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4 Background Paper for Presenters at “Comparing Modes of Governance” Conference at 1.
6 Ibid.
women or “how we might govern and be governed.”

While such ‘how’ questions or concerns about political impacts surface in division of powers judgments, they feature either as contextual background or as evidence of the ‘real’ intent of the level of government that has entered the regulatory field. The ‘how’ question is never given primary importance on its own terms. My argument is that jurisdictional disputes in democratic polities are fundamentally about ‘how’ as well as ‘who/where’ questions and therefore the former questions should be more centrally and directly addressed. In Canadian constitutional jurisprudence, the explicit invocation of democracy as a key animating principle invites such a focus on the ‘how’ and on the experience of governance and democratic legitimacy. Within our current jurisprudence, the occasional resort to the concept of subsidiarity provides some ground for engaging with the governance dimension of jurisdictional disputes. However, so far subsidiarity remains relegated to a very minor role and is understood exclusively in terms of formal levels of government.

II. Democracy

Canadian courts when faced with jurisdictional disputes between federal and provincial levels of government typically resort to a highly technical discussion of legislative subject matters and purposes. Occasionally, however, especially when confronted with a particularly politicized dispute, they invoke the fundamental importance of the principles of federalism – the reconciliation of unity with diversity – and democracy. In the case law, both democracy and diversity tend to be articulated in formal terms that cast Canadians as voters configured into differently shaped and overlapping majorities.

My argument is that, when two crucial elements are present, a more textured and substantive account of political relations should be embarked upon. The first element is the political marginality of the group or community in question in relation to established institutions of democratic representation. The second is the fundamental character of the claims advanced by the group or community. In developing this argument, I rely on Iris Marion Young’s conception of democracy that incorporates a place for both reasoned deliberation within formal democratic institutions as well as for the political struggles, outside those institutions, of civil society and social movement groups - what she describes as a “more rowdy, disorderly and decentred politics.”

Young’s thesis is echoed in Wendy Brown’s critique of freedom and of the difficulty of formulating a post-individualist conception of freedom. With respect to the latter, Brown urges that we embrace a “formulation of the political that is richer, more complicated, and also perhaps more fragile than that circumscribed by institutions, procedures and political representation.”

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8 Ibid.
9 See 114957 Canada Ltee (Spraytec, Societé d’arrosage) v. Hudson (Town) [2001] 2 SCR 241 which included municipal levels of government in the jurisdictional calculus and endorsed a conception of subsidiarity in terms of “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.” Ibid at per L’Heureux-Dubé for the majority at para 3. However, recently in Reference Re Assisted Human Reproduction Act [2010] 327 DLR (4th) 257, McLachlin C.J. in a minority set of reasons, firmly rejected the notion that the principle of subsidiarity affects the configuration of federal criminal law jurisdiction in relation to provincial health jurisdiction. Ibid at para 69.
10 Quebec Secession Reference.
James Tully has suggested a similar expansion of the field of democratic politics in terms of “any activity in which people assemble and negotiate the way and by whom power is exercised over them.”

III Canadian Women’s Movement and the Division of Powers

When one invokes a feminist constitutional politics in Canada, discussion inevitably turns both to the process leading up to the drafting of the Charter of Rights and to the record of strategic litigation under Charter of Rights provisions, in particular s. 15, the provision guaranteeing equality rights. The division of powers plays a less prominent role in Canadian women’s constitutional politics. Nevertheless, the women’s movement has engaged with division of powers issues within the frames of both the amending process and of adjudication. In this case study, I am focusing on adjudication of division of powers disputes which directly affect women’s reproductive citizenship. There are a range of cases that fall within this category. However, at this initial stage, I shall focus on the most prominent line of cases, those concerning access to abortion, while emphasizing that this case law must be placed in a much broader historical framework. In short, women’s movement activism around abortion access is viewed here as part of a set of objectives that encompass the ability to control fertility through access to contraception, to have children, to not have children, to have children and paid work at the same time, and, more generally, to have the social and economic supports that enable full citizenship including full reproductive citizenship.

Part of my argument rests on the claim that the language of jurisdiction better fits the democratic concerns that underlie much social movement activism than the language of rights. This claim is relatively easy to demonstrate in the context of my first case study, that of users of illicit narcotics in the Downtown Eastside of Vancouver. Much of the direct action and institution building engaged in by the harm reduction movement was spurred by the inaction of governments with respect to rising rates of death and chronic disease related to drug addiction. The shift in focus from a very localized, albeit globally interconnected, struggle over harm reduction to the more historically prolonged and geographically dispersed struggles of women in Canada for reproductive citizenship raises two difficulties. The first goes to the question of whether women are in fact outsiders to the institutions that constitute the formal channels of democratic change. The second arises out of the fraught nature of abortion politics and of the federalism framework within which the politics is played out. More particularly, women’s movement advocates have made counter intuitive arguments, for very sound strategic reasons, when resorting to division of powers language to defend abortion access.

Are women outsiders?

Much social movement theory defines such movements in terms of their outsider status. Social movements operate outside the realm of the state and pursue actions in channels other than those of

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14 A. Dobrowolsky, Politics of Pragmatism at 43-44 on women’s movement resistance to the proposal to transfer divorce jurisdiction from the federal to the provincial level of government in the late 1970s; and at 75-188 on women’s movement engagement and debates surrounding the Meech and Charlottetown Accords.
established institutions of representative government. However, accounts of women’s movements in Canada and elsewhere portray activists as both insiders and outsiders with a complex history of working both within and without established channels of democratic representation. As well, women’s movement efforts are often splintered and divided, most notoriously between Quebec groups and groups outside of Quebec. This is especially so where issues concerning jurisdiction and the division of powers are involved. Constitutional issues have also driven wedges between Indigenous women’s groups and other groups. In addition, the social and cultural diversity of women in Canada within and across these larger cleavages positions various women’s groups on different points along the spectrum of political inclusion and exclusion. Thus it would be inappropriate and inaccurate to make a generalized claim about women’s outsider status. Rather, it seems to me, any argument to that effect has to reflect the particulars of the historical juncture and the nature of the specific issue. That said, there are both general observations that one can make about women’s political status within Canada as well as specific observations that are rooted in the current politics of abortion that point to outsider status in this contextualized and limited sense.

First with respect to constitutional design, Jill McCalla Vickers and other comparativists make the argument that an important factor shaping the position of women within federal arrangements is whether women were full citizens at the moment of founding when key institutions and texts were created. The answer is no in both Canada and the US but yes in Australia. Consequently, institutions in Canada and the US are inscribed with values that have left out women’s perspectives and are harder to disrupt. Central to this argument is the gendered nature in both jurisdictions of the distinction between the local and the national. Of particular relevance to this paper, is the relegation in Canada of many questions of women’s reproductive citizenship to provincial jurisdiction over “local and private matters.” What is significant is not the assignment of jurisdiction to the provinces but the implicit statement that such matters are actually beyond anything to which legislatures, either provincial or federal, should attend. In short, the mid 19th century assumption underlying the design of the text is that relations between the family, the market and the ordering of reproduction are presumptively private and not a matter for public deliberation of the kind that occupies governmental agendas.

However, Vickers also argues that women in Canada were able to contest separate spheres ideologies much more quickly than women in the US where the private nature of gender power was entwined with the private nature of white racial power, and both were sanctified by an overarching, ostensibly neutral principle of limited government which still powerfully shapes American conceptions of their political

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15 Touraine, Tilly, Melucci.
18 Section 92(16) of the Constitution Act 1867.
19 Section 92(16) is often described as a clause for residual matters and is often relied on in conjunction with the more important provincial power in relation to “Property and Civil Rights” in Section 92(13). Assisted Human Reproduction Reference para 264.
community and their freedom. Vickers and Miriam Smith also argue that other features of the Canadian division of powers, most notably the assignment of the criminal law power and of the power over marriage and divorce to the federal level of jurisdiction, has facilitated progressive change for women and assisted in challenging the public/private ideologies that function to preserve patriarchal and heteronormative conceptions of the family.

In short, the Canadian constitutional division of powers does not pose serious barriers to women’s inclusion at the level of design, and in some respects has facilitated advancing women’s citizenship agenda. Nevertheless, if one looks at more functional indicators of women’s political presence and voice, the outlook is much bleaker. In Canada, there is a persistent underrepresentation of women within legislative bodies. It reached a high of 25% in the recent federal election, up from 22% in 2009. The norm for western democracies is 35%, with Canada placing 37th. As well the work by Jane Jenson and Susan Phillips on the Women’s State and its undoing during the late 1980s and 1990s tells a story of women’s groups enjoying a brief period as ‘outsiders’ deliberately brought into the channels of law and policy making and then equally deliberately being barred and recast as illegitimate ‘interest groups’ that interfere with the access of individual citizens to Parliament.

With respect to the issue of abortion, in recent years pro-access women’s groups have ultimately been ‘winners’ in the courtroom with respect to the federalism issue. However this legal success has been coupled with a much more complex and, depending on where you are, more disheartening politics. The violence of the anti-abortion movement has sparked protective legislative and judicial measures in Ontario and BC respectively. The hostility of provincial governments in the Maritimes to abortion has significantly curtailed access for women, particularly rural women, aboriginal women on reserves, and poor women. Finally, despite a universal public health care system, abortion across the country has been extensively privatized creating barriers that disproportionately affect socially and economically marginalized women. As a consequence, women’s movement organizations and groups continue to build on a long history of creating and running their own clinics and health centres.

The picture also should include the general defunding of women’s groups by the Canadian government and the decision last year not to fund organizations that facilitate access to abortion in the Harper global maternal health initiative, the continual ripple of anti-abortion private members bills through the

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20 Vickers, Publius article at 416.
21 Ibid and Smith...
23 Bagshaw and Everywomen’s Health Centre in Vancouver; the Jane Collective; Dr Elizabeth Bagshaw and first illegal birth control clinic in Hamilton 1932-69; criminal prosecution of Dorothea Palmer, nurse and contraception activist in Ottawa, in 1936.
24 However, note recent decision to fund International Planned Parenthood despite opposition within conservative caucus.
House of Commons, and the more successful and ongoing efforts of provincial governments to curtail abortion access.

In sum, the question of women’s outsider status cannot be answered in a definitive manner but ultimately has to be contextualized in terms of the relevant historical factors relating to political voice and presence, and the complexities of the social impacts on women of any particular issue. Although this overview of the politics of abortion is too brief to provide a definitive answer to the more specific question, I propose to treat it as sufficient, “for the sake of argument”, to support a tentative claim that women are ‘outsiders’ with respect to the legal ordering of abortion.

*The tangled knot of abortion politics and federalism discourse*

The legal discourse surrounding abortion, especially in the constitutional arena, portrays abortion issues almost exclusively in terms of personal and social morality. Twenty three years ago, in *Morgentaler 1988*, the Supreme Court of Canada struck down the provisions in the federal *Criminal Code* which combined the criminalization of abortion with a cumbersome committee structure. The committee structure limited access to the procedure and subjected women to long delays. The Court struck the provisions down under the *Charter of Rights*, at the same time affirming abortion regulation’s constitutional character as a criminal law matter which is the subject of federal jurisdiction. In the years since then, a number of provincial governments have taken steps to make access to abortion more difficult. Some of these interventions have been challenged under the *Charter* and the division of powers. To this extent the issue is similar to that which confronted the harm reduction movement in Vancouver. Indeed, on the division of powers dimension, interjurisdictional disputes regarding abortion and safe injection are similarly framed in terms of federal criminal jurisdiction versus provincial health jurisdiction. However, the abortion issue has some additional twists.

From the perspectives of diversely situated women, abortion can be a physical, mental, or psychological health matter, a family planning matter, an economic/workforce engagement matter, a personal morality matter, a children’s well being matter, a paid work/unpaid social reproductive work balance matter, a family financial security matter and a host of other things. Roughly, they are all in pith and substance matters that fall within provincial jurisdiction. Only pro-life, and socially conservative women’s and Christian groups think of abortion exclusively in terms of fundamental norms of morality that are, jurisdictionally speaking, properly the subject of the criminal law. Similarly the personal morality/individual moral choice dimension is best captured by the language of Charter rights and the political language of choice. If one moves abortion out of that moral/individual decisional frame and looks at it in terms of broad social interests and structural relationships of inequality, it resonates most directly with matters found within provincial jurisdiction. However, the location of the regulation of abortion under the federal criminal law power, has led to an emphasis on its moral character in order to explain and justify its characterization as a criminal law matter.

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26 Another wave of activity may be about to unfold. On September 29th, Conservative MP Brad Trost, reacting to the IPPF decision, asserted that the Canadian Anti-Abortion movement “must be more aggressive” and implied that he and other like minded MPs within the Conservative caucus will be more vocal and less polite.


27 The division of powers issue was settled in favour of federal Criminal Law jurisdiction in *Morgentaler 1976*.

28 Note explaining criminal law purposes.
importance. Within this frame, the tension is between individual moral choice/security and collective moral norms.

In the wake of the Supreme Court of Canada’s 1988 holding that the specific architecture of the committee structure in the Criminal Code was unconstitutional, most provinces put in place barriers to abortion access. They did so on moral grounds and proceeded in a number of ways: defunding it under Medicare, restricting it to hospitals, not providing it at all, or replicating a version of the committee structure under provincial legislation.\(^{29}\) At the federal level there was an initiative in 1992 to recriminalize abortion that was defeated in Senate. This was followed by a period of federal indifference toward, some would say complicity in, the obstructionist activity at the provincial level. The passive stance of the feds was, however, better than the hostility at the provincial level. As a consequence, in the court challenges to provincial interventions that have followed in the post-\textit{Morgentaler 1988} years, it has been strategically useful from the perspective of the women’s movement to stress the criminal law character of abortion regulation and to characterize provincially generated obstacles to abortion, under the guise of health regulation, as unconstitutional intrusions into the federal criminal law field. This is the opposite of the strategy pursued by the harm reduction movement in the Insite case. In this latter situation, the strategy was to insist on provincial health jurisdiction in the face of federal narcotic prohibitions. In most instances, in the abortion context, the argument that provinces are invading criminal law jurisdiction has not been a distortion of the nature of such interventions as they have been inspired, in fact, by conservative moral beliefs rather than concern about health and medical practices. This has allowed the courts to strike down those provincial interventions as unconstitutional without too many doctrinal shenanigans. However, in a way, the terms of federal/provincial dispute has obscured what is at stake collectively for women in this area and reinforced the characterization of abortion as exclusively an issue of individual security and personal moral choice. Although, the division of powers challenges are about jurisdiction, they have, in this way, both been shaped by and have reinforced the dominant rights frame.

The fact that women have, for good strategic reasons, channelled their legal arguments in a way that leaves out the broad social equality dimension of their position, renders my theoretical argument both more difficult and more urgent. It makes it more difficult because to the extent that the abortion issue remains framed in terms of morality and choice, it is more difficult to argue that women are outsiders. Morality and choice are the grounds on which abortion is discussed within legislative and judicial institutions. Although women lack political presence within both these arenas, it would be difficult to claim that their position is unrepresented in those morality/choice debates. One has to continually step outside the arena of constitutional litigation into the broader arena of political struggles to reframe abortion as a social equality/reproductive citizenship issue. However, to the extent that the jurisdictional frame of federalism is, at least theoretically, more compatible with stories about democracy and citizenship than the frame of individual rights, the strategic conundrum makes it just that much more urgent to claim that space in order shift the terms of the constitutional conversation. In short, an insistence on viewing jurisdiction through the lens of democracy should help shift abortion debates out of the vocabulary of individual choice or morality and into the vocabulary of democratic accountability to women with respect to the legal ordering of their reproductive lives.

\textbf{Conclusion}

\footnote{Erdman}
Jurisdiction has been described as a technical legal mechanism that “organizes legal governance, initially, by sorting and separating.”\textsuperscript{30} The rhetorical linkage between democracy and federalism so often invoked in division of powers cases can be marshalled to uncover the linkage between jurisdiction and governance that lies beneath the technicalities of the “sorting and separating” work performed by jurisdiction. To do so requires an embrace of a radically asymmetrical, contextually grounded, and historically qualified conception of the federal relationship. As well, the language of multilevel governance may assist in providing a set of key questions and terms for understanding this more complex mapping of jurisdictional relationships.

\textsuperscript{30} Valverde, supra n., at 141. Douzinas.