G. Alan Tarr, Robert F. Williams, and Josef Marko, eds., *Federalism, Subnational Constitutions, and Minority Rights* (Westport, Conn.: Praeger, 2004). Pp. viii, 247.

A book devoted to an analysis of "how federalism and subnational constitutions have served to safeguard the rights of minorities ... [and] of the conditions under which they are likely to do so" (vii-viii) is a rarity deserving of attention. Professor Tarr and his collaborators have produced a book well worth reading.

Part I provides an overview of some "horizontal" issues involved in subnational constitutionalism in federal states. The next three parts are devoted to case studies of countries, divided between "mature federal systems": Austria, Germany, and the United States of America (Part II); "regional systems in transformation": Italy and Spain (Part III); and "multinational federations": Belgium, Bosnia and Herzegovina, India, and Switzerland (Part IV).

To examine all twelve essays in detail is not possible here. And so, after pointing to some of the deficiencies of this work, my aim will be to emphasize some of the ideas it contains that are particularly worthy of attention for a Canadian audience, especially for those scholars interested in Aboriginal legal issues.

Professors Williams and Tarr's introductory essay (Robert F. Williams & G. Alan Tarr, "Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons" 3) examines, from a comparative law perspective, the question of how subnational entities are recognized (or tolerated) in national constitutions or constitutional space. They first rightfully underline that a subnational perspective allows for a study of constitutional federalism that is not obsessed by the sole examination of the national constitution's provisions nor by the univocal perspective of the national government. It also enables one to envisage "the relationship of national and subnational constitutions in federal systems as interdependent [rather than hierarchical]" (4). With that in mind, the authors then analyze issues such as: "the amount of subnational constitutional space, competency, or autonomy that the component units are allotted within the federal system" (6); the policing of the outer limits of subnational constitution making (whether the federal constitution invests the central government with some control over the content of subnational constitutions, whether such control should be exercised by a constitutional court, or whether the national constitution should prescribe the contents of subnational constitutions); the manner in which different subnational entities have exercised their constitutional powers and the reasons for the differences among subnational constitutions. The authors then enumerate a number of questions that could be pursued usefully in studying subnational constitutions. In their conclusion, Williams and Tarr note that "subnational units in federal systems more often underutilize their constitution-making competency than they overutilize it" (15). They lament this underutilization because in an era of "reawakening of political awareness and regional identity ... the allocation of power to subnational units, including the power to determine their own constitutional arrangements, might provide a form of self-determination that can serve as an alternative to illegal movements for secession" (*ibid.*) and "may also be crucial for minorities, who might find it easier to gain recognition of their rights at the subnational constitutional level" (15-16).

One problem with the authors' approach has to do with their definition of "constitution", one that seems confined to a formal rather than a material understanding of the concept of constitution. The reader is left with the impression that the case studies that follow only provide an in-depth examination of subnational formal constitutional provisions as opposed to subnational material constitutional provisions.[5] This is definitely not the case since most of the contributors insist on the protection provided by both formal and informal subnational constitutions.

Two essays also seem to fit awkwardly within the general theme. The Spanish contribution (Eduardo J. Ruiz Vieytez, "Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Spain" 133) has next to nothing to say about the protection afforded by this country's subnational constitutions,[6] as it only deals with those provided by the national constitution. Furthermore, Kristin Henrard's essay dealing with the equality principle ("Equality Considerations and Their Relation to Minority Protections, State Constitutional Law, and Federalism" 25)—although interesting—is mostly concerned with a general discussion of the concept, leaving aside its particular application in the context of subnational constitutions.[7]

Although all of the essays are worth reading, some do stand out, especially those that tackle the definition of the word "minority". For instance, Francesco Palermo's essay "Asymmetric, 'Quasi-Federal' Regionalism and the Protection of Minorities: The Case of Italy" (107) underlines that, in a federation, the notion of minority is a variable one. He accurately insists on the fact that "[m]inorities, as such, do not exist" (122 [footnotes omitted]).[8] Rather, "[t]hey only become relevant in relationship to other groups having a dominant position ..." (*ibid.*). As he underlines, "[o]ne could ... argue that groups of people become minorities inasmuch as they are disadvantaged in the decision-making process at a certain level of governance. Thus, the concept of minority will probably become a variable one, depending on the level of government involved" (*ibid.* [footnotes omitted]).

Jens Woelk's essay entitled "Federalism and Consociationalism as Tools for State Reconstruction? The Case of Bosnia and Herzegovina" (177) underlines the need, in certain circumstances, to differentiate the notion of minority with that of "constituent

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[5] For instance, they insist on the fact that, in Canada, there are no "subnational constitutions independent of the federal constitution" (5) and that this country has shown that "federal systems can get along quite well without subnational constitutions" (10). There might not be any provincial constitutions in the formal sense, but many legal rules (common law, constitutional conventions, and statute law) would qualify as constitutional in a material sense. For example, provincial human rights codes, defined as quasi-constitutional documents, certainly play an important role in the protection of human rights in Canada.

[6] With the exception of the second to last paragraph of the essay (150).

[7] With the exception of the following conclusion: "[T]he prohibition of discrimination does not stand in the way of subnational units adopting constitutions that have their own additional measures pertaining to human rights and minority protection ..." (35). See also 30.

[8] See also 130, n. 68.

peoples". It deals with situations "where the term 'minorities' cannot be applied, in a technical sense, to the main constituent groups [of a country]" (179 [footnotes omitted]). For example, in recognition of the fact that Bosniaks, Serbs, and Croats are not simply minorities in the Republic of Bosnia and Herzegovina, that state's constitution recognizes their status as "Constituent Peoples". Such distinction has lead the Supreme Court of that country to conclude, in the words of Woelk, that:

> [t]he Entities thus have a constitutional obligation not to discriminate against those constituent peoples of the state who are as a matter of fact a numerical minority within their territory (i.e., Serbs in the Federation, Bosniaks and Croats in the Republika Srpska). The principle of nondiscrimination thus applies not only to individuals, but also to groups as such, prohibiting special adverse treatment. For the Court, a principle of "collective equality" of the constituent peoples exists that "prohibits any special privilege for one or two of these peoples, any domination in governmental structures or any ethnic homogenization through segregation based on territorial separation" (188-189 [references omitted]).

In "A Dynamic Federalism Built on Static Principles: The Case of Belgium" (157), Wouter Pas addresses the same distinction, although he does not speak specifically of constituent peoples. This interesting distinction between minorities and constituent peoples bears a lot of similarities to Will Kymlicka's distinction between "ethnic groups" and "national minorities".[9] For Canadian scholars interested in accommodating Québécois and Aboriginal nationalisms, such distinction merits closer examination.

Another series of essays, while emphasizing federalism's capacity to promote the collective equality of groups, stress that federalism also aims at promoting the democratic integration of these groups within the overall state. In addition, these essays emphasize that federalism should be conceived of as a power-sharing exercise and not just a mask for subnational majoritarian leadership. In what I believe to be the most interesting of all the essays, "Participation in the Decision-Making Process as a Means of Group Accommodation" (41), Nicole Töpperwien examines how local minorities in culturally heterogeneous subnational states can be integrated politically through participation rights. Such integration in the decision-making process, she argues, might "enhance the loyalty to and identification with the state and prevents the alienation inherent in the feeling of being a perennial loser" (42 [footnotes omitted]). After an interesting discussion of who should be allowed to exercise participatory rights, and an examination of the particular nature of these rights, Töpperwien underlines the danger of putting too much emphasis on the rights of groups:

> When all institutions are constituted so as to represent the groups and there is not a counterweighing representation of the citizenry as a whole, there can as well only be direct legitimacy of decisions in respect to the groups. In such a

[9] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995).

> case, state legitimacy derives from and depends on group legitimacies. Disputes between groups can put the state as such in question because the state does not have legitimacy on its own to justify its existence and thus has no basis through which it could counterweigh, bridge, or mediate conflicts. Though participation rights aim at ameliorating legitimacy of groups, this must not be done in detriment to an overall legitimacy (47 [footnotes omitted]).

The author then concludes that "[i]n the end, only participation rights that find the acceptance of all concerned groups and that are not in opposition to an overall or overarching legitimacy will have chances of being effective" (48). Readers familiar with Alan C. Cairns' thesis in *Citizens Plus: Aboriginal Peoples and the Canadian State*[10] will find Professor Töpperwien's essay particularly illuminating.

Finally, in an essay entitled "Federalism and Nonterritorial Minorities in India" (199), Arshi Khan underlines the dangers inherent in the implementation of federalism in a nonliberal community such as India, where "religion has become the fundamental basis of identification for the individual and group ..." (205). In such a context, federalism must

> not only [serve] to allocate power among governing institutions but also to encourage a commitment to the interests and well-being of all segments of society. On the one hand, federalism empowers subnational units within their specified area of influence. On the other, it may be reasonable to limit the powers and autonomy of these units in order to safeguard the well-being of all the people ... (208).

In other words, federalism should be concerned with the sharing of power and not simply with the division of power:

> [Federalism] can ... serve as the impetus for considering all viable mechanisms, be they minority rights, regionalism, consociationalism, proportional representation, or other steps, that can ensure power sharing. Without such a concern, federalism would only serve the cosmetic purpose of division of powers and not sharing of powers. In the case of India, a full commitment to this understanding of federalism would mean that both the Union and state governments would create mechanisms to protect minorities not only from threats of violence but also from majoritarianism. Otherwise, the federal arrangements would be merely a constitutional mask for the majoritarian leadership in the Union and the states to violate the rights of minorities (209).

Again, this essay provides food for thought for those who examine the question of the protection of individual rights within autonomous Aboriginal political entities.

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[10] (Vancouver: University of British Columbia Press, 2000).