

Socrates, Odysseus, and Federalism

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This essay briefly develops an epistemological, anthropological, normative, and legal/constitutional theory of federalism through which we could envisage anew the complexity of the relationships between Aboriginal peoples and Euro-Canadians or that of Quebecers and Anglo-Canadians. According to this understanding, federalism is not only characterized by a recognition of the inescapable pluralism of Canadian society, but also of the close interaction between the constituent parts of that plural society — an interaction constantly torn between centrifugal and centripetal forces. Because of the bi- or multifocal perspective commanded by this understanding of federalism, none of these interlaced components may be ignored. Concepts such as sovereignty, nationalism, and rights revolve around a single centre. Federalism requires the recognition that the Self is not of one essence and that a community cannot be envisaged in ignorance of other legitimate collectivities surrounding it. In the perspective defended here, federalism is not a monoconceptual but rather a hyphenated notion forcing one to reconcile dyads such as self–other, us–them, autonomy–solidarity, power–justice, etc. Federalism also acknowledges an uncertainty in our world and in ourselves that other concepts tend to obscure. As such, federalism, at an epistemological level, requires that we be suspicious of monocular outlooks.

Cet essai présente un aperçu d'une théorie épistémologique, anthropologique, normative et juridique/constitutionnelle du fédéralisme à partir de laquelle un nouveau regard pourrait être jeté sur les rapports entre les peuples autochtones et les Euro-Canadiens ou encore, les rapports entre Québécois et Anglo-Canadiens. La conception du fédéralisme imprégnant cet essai est caractérisée par l'idée du fédéralisme, non seulement comme reconnaissance de l'indéniable pluralisme de la société canadienne, mais comme reconnaissance de l'interaction étroite existant entre les parties composant cet ensemble pluriel; une interaction constamment tiraillée par les poussées opposées de forces centrifuges et centripètes. En raison de la perspective bi- ou multifocale commandée par le fédéralisme tel qu'entendu ici, aucune de ces composantes, parce qu'entrelacées, ne peut être ignorée. Des concepts tels que souveraineté, nationalisme, droits, ne comportent qu'un seul centre. Le fédéralisme, au contraire, exige de ceux qui veulent s'y plier, la reconnaissance que le Soi n'est pas fait d'une seule essence, qu'une communauté ne peut être imaginée sans égard aux communautés environnante. Dans la perspective défendue ici, le fédéralisme n'est pas un concept monoculaire mais bien binoculaire, puisqu'il oblige à réconcilier les dyades Soi-Autre, Nous-Eux, autonomie-solidarité, pouvoir-justice. Le fédéralisme, plus que tout autre concept, reconnaît également l'incertitude caractéristique de notre appréhension du monde et de nous-mêmes. À ce titre, il exige que, sur le plan épistémologique, soit cultivée une saine méfiance à l'égard des perspectives monoculaires.

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J'aime les gens qui doutent
Les gens qui trop écoutent
Leur cœur se balancer
J'aime les gens qui disent
Et qui se contredisent
Et sans se dénoncer

J'aime les gens qui tremblent
Que parfois ils ne semblent
Capables de juger
J'aime les gens qui passent
Moitié dans leurs godasses
Et moitié à côté

Anne Sylvestre
(1934-)

The following essay will eventually form part of the preliminary chapter of a book I am presently writing aimed at developing an epistemological, anthropological, normative, and legal/constitutional theory of federalism through which we could envisage anew the complexity of the relationships between Aboriginal peoples and Euro-Canadians or that of Quebecers and Anglo-Canadians. Since a preliminary chapter is designed as an introduction to one's thesis, it is generally confined to a brief presentation of the arguments the book addresses in greater detail. So will this essay. The reader will not find here an extensive and exhaustive argumentation. I will content myself with describing some of my thesis's main underpinnings.¹

Aboriginal scholars sometimes convey abstract ideas through the use of stories. I will thus introduce my thesis with two stories illustrative of some of

1 The federal theory summarized in the following pages has slowly grown out of my research over the last few years. In addition to the articles referred to in the footnotes of this essay, the following publications delve into one or another dimension of said theory: Jean Leclair, *Military Historiography, Warriors and Soldiers: The Normative Impact of Epistemological Choices* [forthcoming in 2013]; Jean Leclair, "Il faut savoir se méfier des oracles.' Regards sur le droit et les autochtones" (2011) XLI:1 *Recherches amérindiennes au Québec* 102; Jean Leclair, "'Vive le Québec libre!' Liberté(s) et fédéralisme", online : (2010) 3 *Revue québécoise de droit constitutionnel* (<http://www.aqdc.org/volumes/pdf/Jean_Leclair.pdf>); Jean Leclair, "Les périls du totalisme conceptuel en droit et en sciences sociales", online : (2009) 14 :1 *Lex Electronica* <<http://ssrn.com/abstract=1749523>> and Jean Leclair "Forging a True Federal Spirit: Refuting the Myth of Quebec's 'Radical Difference'" in André Pratte, ed, *Reconquering Canada: Quebec Federalists Speak Up for Change* (Toronto: Douglas & MacIntyre, 2008) 29, online: <<http://ssrn.com/abstract=1749486>> [Leclair, "Radical Difference"].

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the most basic ideas that, according to me, a normative theory of federalism should entail. Those stories are not the property of any particular nation or culture. There is no need to be *authentic* to commune with them. Nor are they the best stories ever told or the only stories worth hearing. However, as stories, they translate in a deeply-felt and sometimes moving fashion the human element inextricably linked to some of the fundamental ideas that political scientists and jurists study and discuss.

* * *

He was a warrior. He had fought long and hard to save his city from its enemies. However fiercely and bravely he had battled, he and his comrades had nonetheless suffered defeat. Defeat was not the only affliction with which he had to contend. To the ignominy of military disaster was to be attached the dismal spectacle of an ensuing civil war.

He was understandably traumatized by these events. And so, from the warrior he was he turned into a “word warrior.”²² Not one knowing all the answers, but one asking questions. Not one claiming to know the Truth and desirous of imposing it on others, but one seeking it. He himself, incidentally, wrote nothing. Others recorded what he had to say.

His was a world where gods made no pretence to epistemological authority. In other words, they claimed no ultimate authority on the nature of truth. The religion of his time knew of no official doctrines, of no canonical texts. And so, since there was no need for it, no clerical body could be found with the authority to transmit and interpret a dogma.

Still, and although he was a pious man, he strongly believed that the gods were themselves subjected to the rule of reason. To a young man claiming that “what is dear to the gods is pious, what is not is impious,”²³ he would answer by a question: “Consider this: is the pious being loved by the gods because it is pious, or is it pious because it is being loved by the gods [?]”²⁴ Is something true because the gods consider it true, or do the gods consider something as true because it is true according to the higher law of Reason?

2 I borrow this expression from Dale Turner, *This Is Not A Peace Pipe: Towards A Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006), although, as I hope it will become evident through the course of this essay, I do not invest it with the same meaning.

3 Plato, *Euthyphro*, translated by GMA Grube in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997), 1 at 6:7a.

4 *Ibid* at 9:910a.

His quest for understanding was existential. He needed to know, for the gods had made an extraordinary statement about him. A friend of his had asked the Delphic Pythia whether or not there existed a wiser man than he. To his utter disbelief, the priestess answered the question in the negative. And so he spent his entire life harassing people with questions about the nature of wisdom, for he knew very well that he was not the wisest man of his time. But, as it turned out, no one gave him a satisfactory answer.

His quest was not just the avocation of an idle man. He was no sophist. As we will now see, he was willing to lay down his life for the sake of his convictions. Very few sceptics would be willing to go that far.

Indeed, one sad day, Socrates, the word warrior, was accused by his fellow citizens of not believing in the gods of the State, “but in other new spiritual things.”⁵ Having publicly propagated his impious ideas, he was, in consequence, also indicted for having corrupted the youth who followed in his wake.

After their defeat at the hands of the Spartans, after the bloodshed of the civil war, the Athenians were ready to seek vengeance on Socrates. By his constant questioning he was alleged to have compromised the traditional understanding of the gods’ relationship with men and thus to have jeopardized the fate of the city. Encouraging his young followers to cultivate their intellectual curiosity and their independence of thought had corrupted their minds. Was he not a close friend of the traitor Alcibiades?

At his trial, Socrates’ line of defence was “provocation.” He was, said he, not the least but the most pious man in Athens. By constantly seeking to determine if the god of Delphi was right, he was in fact paying him homage. In his words, “When I heard of this reply [the Pythia’s] I asked myself: ‘Whatever does the god mean? What is this riddle? I am very conscious that I am not wise at all; what then does he mean by saying that I am the wisest? For surely he does not lie; it is not legitimate for him to do so.’”⁶ And so he spent his entire life probing the mind of every one, being not unconscious of the enmity he provoked. He was said to be “a very odd person, always causing people to get into difficulties.”⁷ But his mission was more important than his reputation.

⁵ Plato, *Apology*, translated by GMA Grube in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997), 17 at 23:24b [Plato, “*Apology*”].

⁶ *Ibid* at 21:21b.

⁷ Plato, *Theaetetus*, translated by MJ Levett in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997), 157 at 166: 149a [Plato, “*Theaetetus*”].

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Eventually, he deciphered the meaning of the prophecy, which he explained in the following terms to his judges: “What is probable, gentlemen, is that in fact the god is wise and that his oracular response meant that human wisdom is worth little or nothing, and that when he says this man, Socrates, he is using my name as an example, as if he said: ‘This man among you, mortals, is wisest who, like Socrates, understands that his wisdom is worthless.’”⁸ After his trial, describing himself as a “midwife” watching over “the labour of [men’s] souls, not of their bodies” he would tell Theaetetus that “God compels me to attend the travail of others, but has forbidden me to procreate. So that I am not in any sense a wise man; I cannot claim as the child of my own soul any discovery worth the name of wisdom.”⁹

Socrates was thus being pious when he obeyed the god’s order to live, in the philosopher’s words, “the life of a philosopher, [i.e.] to examine myself and others.”¹⁰

Then he came to the gist of his argument. He told the assembled Athenians that by condemning him they would in fact be sinning against themselves: “[F]or if you kill me, said he, you will not easily find another like me. I was attached to this city by the god — though it seems a ridiculous thing to say — as upon a great and noble horse which was somewhat sluggish because of its size and needed to be stirred up by a kind of gadfly [a stinging bee]. It is to fulfill [sic] some such function that I believe the god has placed me in the city. I never cease to rouse each and everyone of you, to persuade and reproach you all day long and everywhere I find myself in your company.”¹¹

But all this eloquence, this appeal to the virtues of reflexivity, was to no avail. He was condemned. Accepting his fate, he nevertheless concluded on the following note: “Now I want to prophesy to those who convicted me... I say gentlemen, to those who voted to kill me, that vengeance will come upon you immediately after my death, a vengeance much harder to bear than that which you took in killing me. You did this in the belief that you would avoid giving an account of your life, but I maintain that quite the opposite will happen to you. There will be more people to test you, whom I now held back, but you did not notice it. They will be more difficult to deal with as they will be younger and you will resent them more. You are wrong if you believe that by killing people you will prevent anyone from

8 Plato, *Apology*, *supra* note 5 at 22: 23 a-b. He added: “So even now I continue this investigation as the god bade me — and I go around seeking about anyone, citizen or stranger, whom I think wise. Then if I do not think he is, I come to the assistance of the god and show him that he is not wise. Because of this occupation, I do not have the leisure to engage in public affairs to any extent, nor indeed to look after my own, but I live in great poverty because of my service to the god.”

9 Plato, *Theaetetus*, *supra* note 7 at 167: 150 b-d.

10 Plato, *Apology*, *supra* note 5 at 27: 28e-29a.

11 *Ibid* at 28: 30e-31a.

reproaching you for not living in the right way. To escape such tests is neither possible nor good, but it is best and easiest not to discredit others but to prepare oneself to be as good as possible."¹²

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My second story is much shorter. It pertains to another warrior, one who fought bravely and won, but whose journey home proved to be an ordeal or more to the point, an odyssey. His story was told and transmitted orally for centuries before being couched in writing some 2800 years ago.

* * *

He would be the last warrior to come home. Ten years it took him. Ten long years during which he had to face innumerable dangers.

Near the end of his journey, Calypso, a magnificent goddess, held him captive. She offered him her love, her beauty, and, the greatest gift of all, immortality. Despite her attempts, she was unable to make him forget his wife and home.

"Ah great goddess," worldly Odysseus answered, 'don't be angry with me, please. All that you say is true, how well I know. Look at my wise Penelope. She falls far short of you, your beauty, stature. She is mortal after all and you, you never age or die... Nevertheless I long — I pine, all my days — to travel home and see the dawn of my return. And if a god will wreck me yet again on the wine-dark sea, I can bear that too, with a spirit tempered to endure. Much have I suffered, laboured long and hard by now in the waves and wars. Add this to the total — bring the trial on!'"¹³

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Now, what do these stories have to do with federalism? A lot, in fact, if, as I believe, federalism can be understood, at an epistemological level,¹⁴ as a conceptual institutionalization of reflexivity and as an intellectual posture that makes it mandatory to think problems with a critical eye toward both ourselves, as internally multifaceted beings, and towards the life of others with whom for better or for worse our lives as relational beings are irremediably enmeshed. Federalism is not only characterized by a recognition of the ines-

12 *Ibid* At 34-35: 39c-d.

13 Homer, *The Odyssey*, translated by Robert Fagles (New York: Penguin Books, 1996), at 159 (Book 5; lines 236-247).

14 The reader will have guessed that I am referring here to federalism as a conceptual tool and not to its instantiation in Canada's constitutional structure.

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capable pluralism of Canadian society, but also the close interaction between the constituent parts of that plural society — an interaction constantly torn between centrifugal and centripetal forces. Because of the bi- or multifocal perspective commanded by this understanding of federalism, none of these interlaced components may be ignored. Concepts such as sovereignty, nationalism, and rights revolve around a single centre. Federalism requires the recognition that the Self is not of one essence, and that a community cannot be envisaged in ignorance of other legitimate collectivities surrounding it. In the perspective defended here, federalism is not a monoconceptual but rather a hyphenated notion forcing one to reconcile dyads such as self–other, us–them, autonomy–solidarity, power–justice, etc. Federalism is a notion premised on the belief that individuals as well as communities consist of multifarious components. Federalism also acknowledges an uncertainty in our world and in ourselves that other concepts tend to obscure. As such, federalism, at an epistemological level, requires that we be suspicious of monocular outlooks.

A true federal spirit or epistemology thus requires that we be “gadflies,” “stinging bees” always on the lookout for totalizing approaches whose conceptual coherence commands that important aspects of reality be obliterated, perspectives depriving the common person of his/her agency. Christening as “federal” an epistemology that should, in fact, be universally practised might cause some eyebrows to be raised, but I nevertheless maintain that such appellation is appropriate. “Holistic” would not be so, for the latter word too often refers to epistemologies that simply emphasize the need to embrace the totality of the influences — including, for some, spiritual ones — that forge our lives, but that abstain from seriously facing up to the incontrovertible fact of the opposing pull of these various influences. These epistemologies are also oblivious to the fallibility of the knowledge — whatever such may be — upon which theories are built. A federal epistemology is one that admits and truly tackles that frustrating reality: our understanding of the world is limited and normative consequences are derived from that reality. At a deeper level such an epistemology, by revealing the frailty of our interpretations and conclusions, serves to underline the tragic character of human life in general and of politics in particular: human beings are the main characters of history, but even though they do have reasons to behave in the ways that they do, they know not which history is theirs to shape.¹⁵ Life, history, and politics are all as aporetic as Socrates’ dialogues. Liberalism, as understood by intellectuals such

¹⁵ Raymond Aron, “Science et politique chez Max Weber et aujourd’hui” (1952) in Raymond Aron, *Les sociétés modernes* (Paris: Presses universitaires de France, 2006) 179 at 195.

as Raymond Aron, Raymond Boudon or Tzvetan Todorov,¹⁶ is precisely that intellectual posture whose fundamental premise, apart from its faith in men's capacity to reason, is the belief in the absence of any transcendental principle, be it religion, ideology, nation or state that would dictate the path of history. In other words, it is a philosophy allowing a space for tricksters such as the Raven of the Haïda myths, a creature neither human nor animal but both at the same time, displaying an "unquenchable itch to meddle and provoke things, to play tricks on the world and its creatures."¹⁷

At a more existential level, federalism, as envisaged here, is premised on the belief that, given the opportunity, human beings might choose, as Odysseus did, the frailty of humanity over the perfection of the gods. The son of Laertes chose the world he knew, embracing both its miseries and its splendours. He favoured his own wife over the goddess. He chose the ephemeral rather than the eternal. In my view, a normative and constitutional theory of federalism requires that we accept the world, at least in part, as it is. We must fashion concepts agreeing with reality and avoid ordering reality to fit our concepts. Paraphrasing Socrates, the virtue of federalism is that it forces us to give a true account of our lives.

To their conviction about the singularity — and, for some, the indubitability — of the knowledge upon which their theories are built — a feature of thought they share with nationalist thinkers¹⁸ — some Aboriginal intellectuals add a strong dose of cognitive relativism. For instance, some argue that cognition itself is culturally programmed. Not only would we be blind to what is alien to our culture, but our minds would also operate as prisons, for

16 Liberalism is not an orthodoxy. Its substantive content has been, still is, and always will be a matter of debate rather than of consensus. I am well aware that some forms of liberalism are extremely dogmatic and monocular in their outlook. During the course of my book, I intend to demonstrate that some of these schools of thought are not true to the essence of liberalism. In the words of Catherine Audard: "*Le libéralisme ne peut par définition être une doctrine dogmatique. Ce serait une contradiction dans les termes*" *Qu'est-ce que le libéralisme ? : Éthique, politique, société* (Paris : Gallimard, 2009) at 734 (Audard's italics).

17 Bill Reid & Robert Bringhurst, *The Raven Steals the Light* (Vancouver: Douglas & McIntyre Ltd., 1996) at 33.

18 As for scholars from Quebec, I have described elsewhere the methodological nationalism of legal scholars Andrée Lajoie and Eugénie Brouillet and that of political scientists Guy Laforest and Patrick Fafard, and François Rocher and Catherine Côté in Leclair, "Radical Difference," supra note 1 and Jean Leclair, "Le fédéralisme comme refus des monismes nationalistes" in Dimitrios Karmis & François Rocher, eds, *La dynamique confiance-méfiance dans les démocraties multinationales: Le Canada sous l'angle comparatif* (Québec: Presses de l'Université Laval, 2012) [Leclair, "Refus des monismes nationalistes"], an ontological and epistemological perspective according to which the Québécois nation has but one soul and, therefore, but one way of envisaging the world. Quebecers failing to embrace that perspective are, sad to say, still colonized or ill informed.

to escape and embrace another means of apprehending the world would be to betray our authentic selves.¹⁹ Socrates, on the contrary, went so far as to prove that an ignorant slave boy could be taught mathematics.²⁰ Had Greek philosophy not possessed such openness, Horace would probably never have written his famous statement: “Captive Greece took captive her fierce conqueror, and introduced her arts into rude Latium.”²¹ Admittedly, non-Aboriginals have a duty to listen and to recognize that cognition is not impervious to context, especially to the manner in which knowledge is transmitted; this is a duty they dismally failed to honour until recently. Yet if aboriginal knowledge is shut tight upon itself, it stands no chance of convincing anyone outside the circle of the initiated.²²

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- 19 James Sa'ke'j Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 *Indigenous LJ* 1 at 6: “Tragically, some students succumb and inwardly endorse Eurocentric thought, helping to lay the foundations of the relationship of domination that will entrench their thoughts.” Marie Batiste and James (Sa'ke'j) Youngblood Henderson's *Protecting Indigenous Knowledge and Heritage — A Global Challenge* (Saskatoon, SK: Purich, 2000), also provides an excellent example. In this work, “Eurocentric” cognitive theories are depicted as “unreliable... as means for arriving at truth about the natural world”; they are said to provide categories that are “arbitrary” and whose sole object is “to measure, predict or control,” never, it seems, to explain and understand. In addition, “desire” is said to be the only impetus for Eurocentric thought. Consequently, “[p]eople are subject to arbitrary desires and accept certain assumptions about the natural world. Based on their desires and assumptions, they use reason to explain and structure the world around them.” On the contrary, “Indigenous ways of knowing hold as the source of all teachings caring and feeling that survive the tensions of listening for the truth and that allow the truth to touch our lives. Indigenous knowledge is the way of living within contexts of flux, paradox, and tension, respecting the pull of dualism and reconciling opposing forces. In the realm of flux and paradox, “trudging” is a practice that enables a person to know the spirit in every relationship” (at 27-28, 42; see also 36-37). Truth is inaccessible by way of Eurocentric thought (at 27). One question out of many comes to mind when reading Batiste and Henderson: what allows them to speak on a realist mode of aboriginal concepts, while in the very same breath, they depict Western concepts as mere illusions? In the same vein, see Taiaiake Alfred, *Peace, Power and Righteousness: An Indigenous Manifesto* (Don Mills, ON: Oxford University Press, 1999) and, best of all, Claude Denis, *We are not you: First Nations and Canadian modernity* (Peterborough, ON: Broadview Press, 1997).
- 20 Plato, *Meno*, translated by GMA Grube in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997) 870 at 881-885.
- 21 Horace, *The Epistle to Augustus*, verses 157-158: “Graecia capta ferum uictorem cepit et artes intulit agresti Latio” in Niall Rudd, ed, *Epistles Book II and Epistle to the Pisones* (Cambridge: Cambridge University Press, 1989) 48; English translation by C Smart, *The Works of Horace* (London: George Bell & Sons, 1888) 284.
- 22 For a fascinating example of a reflexive approach to Aboriginal thought and Aboriginal law, see Val Napoleon, “Aboriginal Discourse: Gender, Identity, and Community” in Benjamin Richardson, Shin Imai & Kent McNeil, ed, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233. As for John Borrows' *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), an eloquent plea in favour of an integration of Indigenous legal traditions within our understanding of the Canadian Constitution, it is replete with cautionary comments about the danger of oversimplification and about the need not to dis-

From a normative standpoint, federalism is one of the few political ideas — if not the only one — whose vocation is to serve as the bedrock of a constitutional structure and of political institutions (a *federation* being the institutional materialization of federalism) that do not have monism riveted to their core. Hence, a failure to apprehend reality in a non-monistic fashion can never lead to a fruitful normative or constitutional *federal* theory. In their normative dimension, nationalistic and holistic perspectives generally end up emphasizing or legitimating the rights of only one stakeholder while at the same time having little to say about the limits of those rights. In short, to the thundering lack of self-criticism of these epistemologies must be added their inability or unwillingness to face up to the problem tied to the exercise of power upon the persons making up the collective entity. On the contrary, a normative federal theory obliges us to envisage at once the nature and the limits of our rights, an obligation that translates, for example, into the need to accompany a reflection on autonomy with one on solidarity, or rather, interdependency.

Sovereignty, nationalism, cultural authenticity, and rights, as “all or nothing” concepts, are unable to explain the complexity of the relationships between Aboriginal peoples and Euro-Canadians or that between Quebeckers and Anglo-Canadians. All these concepts call for reality to be cast into one single mould.

Instead of emphasizing the particular nature of the *relationships* between individuals, between groups, and between individuals and groups, these concepts seek to identify a quintessential substance: the existence of a “State” where sovereignty is concerned; of a *volkgeist* or “spirit of the people” where nationalism is appealed to; a cultural essence where authenticity is invoked; and, finally, the definition of what distinguishes so radically a person or a group that it deserves to be elevated to the level of a “right.”

Holistic and nationalistic perspectives tend to depict the nurturing of many allegiances as a symptom of — in a declining spectre of politeness — misinformation, “fatigue,” cowardice, neurosis, or false consciousness. However, if envisaged from the federal perspective here defined, duality and even ambivalence is no pathology, nor is the fact that some individuals might sometimes feel a stronger attachment to one particular political community or social group without wishing to sunder completely their ties with another.

card human agency. Furthermore, his willingness to compare, not only reinforces his arguments but also enables the building of epistemological bridges between Aboriginals and non-Aboriginals.

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Federalism, as defined here, is not simply a means of acknowledging the existence of the many social groups to which the citizen's multiple attachments are engrafted. It also aims at *structuring* relationships so that these groups and their members can peacefully coexist. Such peaceful coexistence is made possible because, unlike the concepts of sovereignty, nation, cultural authenticity, and rights, federalism makes compromise, concessions, and even renunciation plausible, possible, and honourable. What makes federalism a moral enterprise is the kind of interaction and participation it makes possible for both individuals and the communities they constitute. Such interaction and participation are premised on freedom and individual agency, albeit a freedom and individual agency exercised in a historically contingent context.

If, as I believe, our commitments are more complex than generally described, and if there is no unique lode-star (the nation, the "authentic" culture, etc.) guiding our every action in every circumstance, then federalism appears in tune with the reality of our daily lives. Furthermore, if our commitments and beliefs are indeed partly shaped by the contextual setting in which we are situated, federalism, once institutionalized, can help instil a pattern of living that makes collective egoism hard to promote. There is a certain dispositional character about federalism in that it encourages the seeking of the midpoint between two extremes.

The striving for a midpoint inevitably evokes the necessity of setting limits. In fact, as the concept of "federal constitutionalism" I developed elsewhere demonstrates, my thesis envisages federalism as a facet of constitutionalism and the rule of law, as one of the means of preventing abuses of power.²³ Indeed, at the very heart of federalism, and as opposed to other monocular concepts, we find the idea of limits: "Federalism ... not only allows several peoples and publics to combine self-rule and shared rule but to do so within the context of limited rule. Limited rule is a concomitant of federalism because sharing on a federalistic basis necessarily involves limits — to preserve liberty writ large for all and the specific liberties of the constituents."²⁴ Thus, not content with presenting an epistemological and normative theory of federalism, the question of its legal and constitutional configuration will also have to be addressed since "[t]he successful application of federal principles and mecha-

23 See Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31 *The Queen's Law Journal* 521; online: <<http://ssrn.com/abstract=1678795>> [Leclair, "Federal Constitutionalism"].

24 Daniel J Elazar, *Exploring Federalism* (Tuscaloosa and London: University of Alabama Press, 1987) at 233 [Elazar].

nisms must involve their constitutionalization in ways that are appropriate for maintaining limited rule as determined by the constituting elements.”²⁵

Furthermore, federalism is equally as concerned as constitutionalism with striking a balance between power and justice. Sovereignty, nationalism and culture — when the latter is understood as a coalescing ingredient — are primarily concerned with power and the means of generating and mobilizing collective power rather than with the pursuit of justice. The most rudimentary notion of federalism is always committed to a certain understanding of justice premised on the idea that a distribution of power is both indispensable and beneficial: “One of the primary attributes of federalism is that it cannot, by its very nature, abandon the concern for either power or justice but must consider both in relationship to each other, thus forcing people to consider the hard realities of political life while at the same time maintaining their aspirations for the best polity.”²⁶

In my view, however, federal constitutionalism evokes more than the need for the constitutional enshrinement of the federal principle or the abstract idea of the necessity of limits. It calls for a contextualized approach recognizing the inescapable historicity of political regimes and constitutional orders. All political regimes are typified by some specific fundamental bonds — or relationships — uniting citizens to one another and legitimating state structures and institutions. In addition, all constitutional orders provide a particular accommodation of morality and politics, a particular distribution of “fundamental baseline entitlements among legal actors.”²⁷ As a distributive enterprise, constitutional law in general — and federal constitutionalism in particular — requires an analysis of both the historical and contemporary contexts of the society within which abstract principles operate. As such, federal constitutionalism denies, for instance, that sections 91 to 95 of the *Constitution Act, 1867*, which allocate mutually exclusive legislative powers to the central and provincial governments, exhaust the scope of the federal principle. Rather than being built upon a formal conception of our Constitution, federal constitutionalism is based on an “organic” understanding — organic in the sense of a living constitutional experience.²⁸ In other words, to grapple with the present and to imagine the future, any political regime and any constitutional

25 *Ibid.* For the sake of brevity, these legal and constitutional facets will not be examined in the present essay.

26 *Ibid.* at 84.

27 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 21.

28 Not one however, as I will argue, that would be irrational and deterministic.

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order must draw on more than the formal rules of constitutional law. It must also appeal to the particular patterns of relationships that developed over time between individuals and the community(ies) they constitute. In the case of Aboriginals and non-Aboriginals in Canada, since the beginning of the 19th century, such patterns of relationships have always displayed a huge imbalance of power in favour of the state.²⁹

Furthermore, federalism and constitutionalism, understood as normative concepts, must eventually espouse a particular institutional form if they are to become tangible tools of governance. In other words, the spirit of federalism must ultimately be embodied in a federation. The same goes for constitutionalism whose institutional configuration will vary from one state to another. Not only have the above-mentioned particular patterns of relationships determined the specificity of Canada's political institutions since 1760, but, reciprocally, those institutions have forged our understanding of federalism itself: "As tangible institutional fact, [federation] cannot be reduced to the mere end product of federalism. We do not move in simple straight-line from federalism to federation. Federation itself is governed by purpose ...; its acts upon federalism, helping to shape and reshape both its expression and its goals. The relationship between federalism and federation is therefore symbiotic; each impinges upon the other in an unending fashion."³⁰

It is my belief that a constitutional and federal theory fit for Canadians must take proper account of the continuity specific to our constitutional tradition, one in which, for one, constitutions have never acquired the status of unalterable sacred icons. On the contrary, formal written documents have never been understood as the whole of Canada's Constitution. Conventions, practices, and the common law have mediated, not without setbacks, the demands of the Good (politics) and of the Right (morality), as understood over time. This constitutional tradition, at least until the late 1980s, had never conceived the writing of constitutions as an exercise in perfection and exhaustiveness but rather as the art of the reasonable. In this context, the tacit was not compelled to completely bow to the explicit.³¹ Canada, therefore, has always envisaged

29 See Jean Leclair, "Le fédéralisme: un terreau fertile pour gérer un monde incertain" in Ghislain Otis & Martin Papillon eds, *Fédéralisme et gouvernance autochtone/Federalism and Aboriginal Governance* (Quebec: Les Presses de l'Université Laval, 2013) 21.

30 Michael Burgess, *Comparative Federalism: Theory and Practice* (New York: Routledge, 2006) at 2.

31 "The tacit recognition of [Quebec's] specificity, in fact, has been the consistent theory of Canadian constitutional arrangements since the *Quebec Act, 1774*: accommodate Quebec's particularity as far as possible by provisions which, on their face, apply indiscriminately, but which, in their conception and their expected execution, are designed with Quebec in mind. For the art of Canadian constitutionalism has been to find the formulae and the practices by which these two basic federative

its constitutional order as an unfinished business. True, unsuccessful attempts at making our Constitution more explicit were made in both 1987 (*Meech Lake Accord*) and in 1992 (*Charlottetown Accord*). Such attempts could indeed be interpreted as a caesura between an organic and a more voluntarist understanding of the Constitution.³² Furthermore, one could even claim that Part V of the *Constitution Act of 1982* shackled Canada with a constitutional straightjacket. However, in spite of all that, the Supreme Court of Canada took up again the threads of a more organic understanding of our fundamental document when it underlined in 1998 that “the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution.”³³

Another feature of Canada’s constitutional tradition is that, reluctantly or willingly, tacitly or explicitly, the presence of a French-speaking majority on the territory of what would become the Province of Quebec in 1867 has always been recognized as a “fundamental characteristic of Canada.”³⁴ That such majority succeeded in being heard does not stem from any British natural disposition for magnanimity. On the contrary, it certainly originates from the resilience and the courage of some members of the francophone community. However, in their plight, they were able to adroitly mobilize the slowly expanding liberal matrix of British imperial law introduced by the conqueror. Initially, the “old subjects,” the British, were the sole beneficiaries of the limited political liberties guaranteed by imperial constitutional law. However, over the long run, the “new subjects,” the French Canadians, successfully resorted to the very same principles — some of these quite unknown under French rule — to bolster their political demands for greater autonomy and their claim for recognition as constituent actors.³⁵ Formal constitutional documents would eventually come to mirror the federal spirit that the relations between French and English Canadians had bred. When envisaged over the long term, it

themes — distinctiveness (compact) and equality (statute, and latterly states-rights) — can be reconciled”: Roderick A Macdonald, “Meech Lake to the Contrary Notwithstanding: Part II” (1991) 29 *Osgoode Hall LJ* 483 at 523-524 [Macdonald].

32 On the organic/voluntarist distinction, see Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Bruxelles: P.I.E. Peter Lang, 2009).

33 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 148, 161 DLR (4th) 385.

34 Macdonald, *supra* note 31 at 542.

35 Michel Morin, “The Discovery and Assimilation of British Constitutional Law Principles in Quebec, 1764-1774” *Dalhousie Law Journal* [forthcoming in 2014].

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seems that Canada's federal tradition was born out of the acknowledgement — however resentful by some — that no one political actor would, could, or should reap full victory. It has slowly grown to reflect what a majority of its citizens have come to recognize (some quite reluctantly), i.e. the need, if not the wisdom, to seek the midpoint between two extremes and thus to resist the temptation of pledging one's allegiance to a single government. Formal constitutional rules did not produce this federal ethos; rather, the latter begat them. At the same time, formal rules could not sustain such an ethos if it came to disappear.

Some might deplore that this ethos was not the sole product of polite political deliberation among friends. There was deliberation, indeed, but there was also acrimony and, sometimes, bloodshed. However, like democracy and tolerance, federalism is not simply an ethereal ahistorical concept; it has and it is a history in itself, something to accomplish rather than already accomplished. As I previously stated, it is a lived experience having mixed over time both appeals to justice and appeals to force. As such, it can fail. Tolerance, for instance, was not brought about by the sudden hatching of a general consensus on the need to listen and to love one another, but rather by the horrors of the religious wars of the 17th century, the Thirty Years' War taking pride of place as “certainly one to the cruelest [sic] episodes in the history of warfare.”³⁶ A closer look at history then demonstrates that good sentiments have sometimes fathered bad politics — as the “peace for our time” episode demonstrates, and that mean if not downright evil, sentiments have also, given time, forced mankind to wiser politics.³⁷

Federalism therefore might not have sprung from the goodness of men's hearts nor from a social contract duly approved and dated. Just the same, it does not follow that our ongoing cycles of conflicts and co-operation did not espouse a federal pattern and that the latter, once given an institutional form, was not itself reinforced by that very institutionalisation. Even in the absence of a formal contract between partners to a federation, “the spirit of federalism that pervades ongoing federal systems tends to infuse a sense of contractual obligation into the participating parties.”³⁸ My claim is that federalism has also succeeded in structuring our individual and collective lives in a manner

36 John Merriman, *A History of Modern Europe: From the Renaissance to the Age of Napoleon*, 3d ed vol 1 (New York: WW Norton & Company Inc., 2009) at 155.

37 For instance, Michael Howard has concluded that “war and welfare went hand in hand”: *The Lessons of History* (Oxford: Oxford University Press, 1991) at 156 cited in Tony Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005) at 73.

38 Elazar, *supra* note 24 at 185.

that has promoted with some success — since the Canadian federation has not yet disintegrated — a *modus vivendi* grounded upon a more reflexive attitude toward monistic political discourses.

Another of my contentions is that special attention should be given as to how federal constitutionalism, as opposed to aboriginal *rights* or the *right* to self-determination, could provide a normative justification for the insertion of Aboriginal peoples within the Canadian constitutional framework. The specificity of their situation, I argue, lies not so much in their cultural difference as in the particular nature of the *political relationships* they developed first with France and Great Britain and then with Canada. Whether before or after the advent of the Indian Acts in the middle of the 19th century, Aboriginal peoples were never considered, when public policies concerning them were elaborated, as simple individual subjects or citizens. Treaties were signed with bands and tribes. Individuals do not sign treaties; only political communities do.³⁹ Furthermore, even though colonial administrators certainly hoped that, under the Indian Acts regime, Indians could be “emancipated” through a process of “civilization,” to borrow the vocabulary of the time, yet, this legislation never apprehended them in their sole individual capacity. The “band,” defined as a “body of Indians,” remains to this day the main political unit of

39 It is worth noting that some of the most important “Indian treaties” were signed between 1871 and 1923, that is, well after the first Indian Acts were adopted in the 1850s. Speaking of treaties, I underline that, in the course of my book, I will examine in detail the “treaty federalism” doctrine. In many ways, this approach can be reconciled with the federal constitutionalism I advocate. However, in some of its most radical forms, “treaty federalism” does not meet with my understanding of federalism. What follows is a summary of what I consider to be some of the shortcomings of the “treaty federalism” doctrine (see Leclair, “Federal Constitutionalism,” *supra* note 23). The “treaty federalism” doctrine is based on the idea that all issues between Aboriginals and non-Aboriginals should be settled through treaties, a premise that is more confederal than federal. Such a doctrine thus oftentimes proposes a system characterized by the fragility of the links uniting the parts to the whole. In fact, in its more radical form, “treaty federalism” prohibits any direct and individual participation by Aboriginal community members in the Canadian political and governmental institutions. All contacts with the Canadian State are to be made by the community’s representatives: see for instance, James [Sakej] Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 *Sask L Rev* 241. This perspective presupposes that Aboriginals all wish to sunder their immediate, as opposed to mediate, cultural and political ties with non-Aboriginals. Furthermore, treaty federalism fails to be truly federal in character because it essentially focuses on the autonomy guaranteed by federalism, leaving aside any consideration of the federal solidarity required to maintain the viability of the system. The two-row wampum of the Haudenosaunee Confederacy is often invoked to justify this thesis of separateness. Finally, the “treaty federalism” doctrine fails to recognize that many aboriginal communities will never be in possession of the political leverage necessary to force non-native governments to sit at the negotiation table. The legal dice are currently loaded against Aboriginal peoples. Not until Canadian constitutional common law acknowledges them as constituent peoples, that is, as essential actors within the Canadian federal State, will the task of negotiating treaties prove possible for many aboriginal communities.

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the Aboriginal universe. The present version of the *Indian Act* continues to prescribe the subordination of the band members' lives, not only to the will of the Minister, but also to that of the band council, the designated mediator of the will of all.

Hence, Aboriginal peoples have always been perceived as forming political communities and not simply as aggregations of individuals; second-rate communities starting in the middle of the 19th century, but political nevertheless. "Political community" is understood here as a collectivity capable, within a specific territory, to ensure respect for the rights it recognizes to its members, the latter, in return, being willing to fulfil the duties imposed upon them. The fact that the power exercised was no longer inherent but delegated changes nothing to the matter. The Government's hope was that the band council could exercise sufficient authority to ensure the implementation of its will upon the members of the band. The Canadian State, then and now, has itself therefore contributed to maintain Aboriginal peoples, as collectivities, on the margin of the Euro-Canadian universe. Non-Aboriginals have willingly erected barriers, both cultural and territorial, between themselves and aboriginal political communities. The State's casting aside of whole societies combined with resistance from Aboriginals to the policy of assimilation induced behaviours, expectations, and relations which cannot be brutally dis severed without any damage. Our political concepts and the institutions called upon to incarnate them transform reality and we cannot remain oblivious to the concrete consequences of their implementation and operations. This historical pattern of State marginalization conjugated to the persistent resistance of the Aboriginal peoples themselves explains why we must still reckon today, within the Canadian political universe, with aboriginal political communities. These arguments, among others, lead me to defend the idea that Aboriginal peoples should not simply be envisaged as cultural minorities or as first occupants but rather as constituent actors in the advent of a federal State whose construction was and is still an on-going process.⁴⁰

The advantage of highlighting relationships over aboriginal cultural difference is that the former has normative significance for both Aboriginal *and* non-Aboriginals. What is of importance politically then is not so much the elusive quest for some quintessential authenticity (however important that might be), but rather the undeniable failure of a colonial enterprise aimed at negating and crushing the Aboriginals' individual agency (as manifested

40 For a similar approach, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 157-158.

in their private lives and as members of political communities) and the fact that this pulverizing policy was enshrined in laws and institutions that still perpetuate colonialism.

Envisaging a normative position that emphasises the particular nature of our relationships with one another also enables us to avoid the trap of cultural essentialism. Indeed, as will be argued, behind the abstraction of the expression “Aboriginal peoples” — or Quebeckers — palpitate the hearts of real human beings whose lives, willingly and sometimes most unwillingly, have been entwined with that of non-Aboriginals or non-Quebeckers.⁴¹ Denying that would also be tantamount to closing our eyes to an undeniable reality.

By the same token, recognizing the importance of relationships, and more specifically of power relations, implies the recognition of their importance not only *between* political communities, but also *within* them. A federal constitutionalism theory resting on the need to honour each individual’s agency cannot close its eyes to the manner in which such a need is addressed within the federated entities whose recognition is precisely aimed at expressing and institutionalizing the citizens’ divided loyalties. Any attempt at sealing off — as opposed to regulating — the porous internal frontiers without which a state could not be said to be federal would be tantamount to an infringement of an individual’s right to such divided loyalty.

In conclusion, I wish to come back once again to Socrates’ *Apology* because it also illustrates one of my theory’s fundamental underpinnings: the importance of cultivating one’s independence of mind. When majorities, or to be more precise, individuals speaking in the name of such majorities, command one to conform or to speak the language of a specific *doxa*, one can fortify oneself by echoing the words of the philosopher: “I [do not] regret the nature of my defense. I would much rather die after this kind of defense than live after making the other kind.”⁴² Federalism allows someone to legitimately and willingly belong to two or more communities without partaking to any monistic discourses that would force him to choose one community over the other(s), and thus to lose himself in the process. In other words, it enables a person to fully participate in a political regime that legitimates the rejection of all nationalist or cultural authenticity discourses dwarfing the luxuriant complexion of her personal identity.⁴³

41 Rather than non-Quebeckers, I should more appropriately say non-Francophone Quebeckers.

42 Plato, *Apology*, *supra* note 5 at 34: 38e.

43 Leclair, “Refus des monismes nationalistes,” *supra* note 18 at 209; online: <<http://ssrn.com/abstract=1927356>>.