The Story of Constitutions, Constitutionalism and Reconciliation: A Work of Prose? Poetry? Or Both?

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A great variety of normative conceptions of constitutionalism have been proposed in order to mend Canada's broken relationship with Turtle Island's Indigenous peoples. Many are rooted in deeply aspirational perspectives orbiting around the idea of a dialogic democracy according to which, if we could collectively construct a new vocabulary and a more embracing kind of shared understanding, a non-imperialist form of constitutionalism would eventually blossom. I call this poetic constitutionalism. Some dismiss such normative approaches by claiming a more realist conception of constitutionalism. They argue that, if looked at from a bottom-up perspective, rather than the top-down perspective of normativists, constitutionalism as a form of government has only allowed for legally limited government when and where it served the dominant political elites. I call this prosaic constitutionalism. My claim is that both the poets and the prosaists are partly right. I argue that, although fragile and reversible, a form of imperfect, diffuse and reflexive constitutionalism has grown out of Canada's non-Indigenous constitutional tradition. One that, under certain circumstances and conditions, has the potential for helping Indigenous peoples obtain greater self-governing powers than our constitutional structure now allows.

Un grand nombre de conceptions normatives du constitutionnalisme ont été proposées afin de réparer les relations entre le Canada et les peuples autochtones qui le composent. Plusieurs d'entre elles sont enracinées dans des perspectives ambitieuses gravitant autour de l'idée d'une démocratie dialogique qui, si seulement nous pouvions construire collectivement un vocabulaire plus inclusif fondé sur une compréhension plus partagée, pourrait donner naissance à une forme non impérialiste de constitutionnalisme. L'auteur appelle cette approche le « constitutionnalisme poétique ». Certains écartent ces approches normatives en revendiquant une conception plus réaliste du constitutionnalisme. Ils soutiennent que, si on le considère d'un point de vue empirique, plutôt que du point de vue des normativistes, le constitutionnalisme, entendu comme une forme de gouvernement limité, n'a historiquement vu le jour que là où il fut mis au service des élites politiques dominantes. L'auteur appelle cette approche le « constitutionnalisme prosaïque ». Il soutient que les poètes, tout comme les prosateurs, ont raison en partie. Il est d'avis que la tradition constitutionnelle non autochtone canadienne a donné le jour à une forme de constitutionnalisme imparfaite, diffuse et réflexive. Une forme de constitutionnalisme qui, bien que fragile et réversible, pourrait, dans certaines circonstances et conditions, aider les peuples autochtones à obtenir davantage d'autonomie que ne le prévoit actuellement notre structure constitutionnelle.

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Reconciliation is a profoundly political matter; politics has to do with power and so does true reconciliation. First, reconciliation relates to the constitution of power. In the famous words of Harold Lasswell: "Who gets what, when, and how?"[1] Second, inasmuch as reconciliation is generally associated with claims for greater participation in a State's political arrangements or for greater autonomy within the State, it raises the question of how the power of dominant social and political elites can be limited.[2]

These are precisely the questions that constitutions and constitutionalism have been designed to address. The study of constitutions and constitutionalism (i.e., the business of constituting and limiting power) has a very long history.[3] In the non-Indigenous universe, however, constitutionalism, understood as legally limited government, is the rather recent by-product of the historical evolution of (some) polities.

A great variety of normative conceptions of constitutionalism have been proposed in order to mend Canada's broken relationship with Turtle Island's Indigenous peoples. These normative conceptions of constitutionalism form the cornerstone of reconciliation. Many are rooted in deeply aspirational perspectives orbiting around the idea of a dialogic democracy according to which, if we could collectively construct a new vocabulary and a more embracing kind of shared understanding, a non-imperialist form of constitutionalism would eventually blossom.[4] I call this constitutional idealism or poetic constitutionalism, because it is not so much concerned with constitutionalism and democracy as *forms of government* (i.e., as a means of organizing power), as it is with constitutionalism and democracy as *values*[5] (i.e., broadly speaking, their relation to the Good).[6]

1 Harold Lasswell, *Politics: Who Gets What, When, and How* (Cleveland: Meridian, 1958).

2 For the purpose of this discussion, I will confine myself to an examination of constitutions and constitutionalism in the context of liberal-democratic States, it being understood that even authoritarian regimes have constitutions and that some do find it expedient, in particular circumstances, to limit their own power in minimal ways.

3 For a classic study, see Charles H McIlwain, *Constitutionalism*: *Ancient and Modern* (Ithaca, NY: Cornell University Press, 1947).

4 The most famous example of such an approach is James Tully's *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

5 I borrow this distinction between constitutionalism as a mode of government and as a value from John Dunn, who applied it to democracy in *Setting the People Free: The Story of Democracy* (London: Atlantic Books, 2005) at 173.

6 There is plenty to admire in James Tully's book. However, since constitutionalism is about limiting power, one is struck by the lack of discussion about how the elites' capacity to broadcast power over people and territory radically transformed itself over time. In other words, while much is said about the different normative discourses relating to the setting-up and the limitation of power, next to nothing is mentioned about the practical dimension of constitutionalism, i.e., how, in very

Some dismiss such normative approaches by asserting a more "realist" conception of constitutionalism. They argue that, if looked at from a bottom-up perspective, rather than the top-down perspective of normativists, constitutionalism as a form of government has only allowed for legally limited government when and where it served the dominant political elites[7] (I use the word in a neutral manner as opposed to a praising one). I call this constitutional realism or prosaic constitutionalism, because it generally explains the advent of legally limited government (constitutionalism), as the product of compromise measures, *unsupported by aspirational principles*, adopted by dominant political elites in order to reinforce, rather than limit, their own power.

My claim is that both the poets and the prosaists are partly right. In what follows, I will argue that a form of imperfect, diffuse and reflexive constitutionalism, however fragile and reversible, has grown out of Canada's non-Indigenous constitutional tradition. Under certain circumstances and conditions, this reflexive constitutionalism has the potential of helping Indigenous peoples obtain greater self-governing powers than our constitutional structure currently allows for.

I refer to Canada's non-Indigenous constitutional tradition, because, as I will endeavour to demonstrate, I agree with the realists when they imply that, if

concrete terms, individuals and communities succeeded in taming brute power over the course of time. Reading Tully, I can't help recalling Charles H McIlwain's comment (*supra* note 3 at 93): "Looking backward at this struggle [between the legal rights of the subject and the arbitrary will of the prince] one is amazed by its desperate character, the slowness and the lateness of the victory of law over will, the tremendous cost in blood and treasure, and the constitutional revolution required to incorporate the final results in the fabric of modern constitutionalism." Furthermore, there is, again, much to be said about Tully's understanding of constitutionalism as based on on-going forms of intercultural dialogues, where citizens "are always willing to listen to the voices of doubt and dissent within and reconsider their present arrangement, just as *The spirit of Haida Gwaii* asks us to listen to the voices of cultural dissent around the world": Tully, *supra* note 4 at 27. Nonetheless, to paraphrase Chantal Mouffe, if one wishes to study constitutionalism, one should "acknowledg[e] [at least minimally] the ambivalent character of human sociability and the fact that reciprocity and hostility cannot be dissociated": Chantal Mouffe, *On the Political* (London: Routledge, 2005) at 3. And finally, it would have been interesting to learn more about the conditions under which we can stop dialoguing and ultimately make a decision. Constitutions and constitutionalism are certainly about dialogue, but they are also concerned with decision-making, and decisions, as well underlined by Jeremy Webber, are always made against a background of disagreement: "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167 at 195; see also Jean Leclair, "Nanabush, Lon Fuller and Historical Treaties: The Potentialities and Limits of Adjudication" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 325.

7 See for instance, Stephen Holmes, "Constitutions and Constitutionalism" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 189.

reconciliation is to happen, it will have to happen within the larger realm of the dominant Western-based notion of constitutionalism. As beautiful as it might be, Indigenous constitutionalism will not, in and of itself, by the simple force of its appeal, transform the dominant understanding of constitutionalism.[8]

However, I believe that the realists downplay the importance of normative discourses in the mobilization of the political forces that have slowly, painfully, and not yet completely, pried open the realm of the dominant political elites. And, as I will argue, normative discourses mobilized nowadays in the quest for reconciliation and greater autonomy for Indigenous polities can certainly themselves be influenced by Indigenous normative understandings that would benefit us all.

What I assert, in short, is that our understanding of constitutionalism must conjugate, rather than separate, constitutionalism both as a value and as a form of government. When thinking in terms of values, the questions arise: what is constitutionalism from the point of view of the ethical and the desirable? In what way is it related to ideas of democracy, liberty and equality, or to Indigenous ideas of consensus and interrelatedness? When considering constitutionalism as a form of government, we might also ask: how did legally limited government historically come to be within both Indigenous and non-Indigenous polities? How is it operationalized and institutionalized in this messy world of ours where power is unevenly distributed?

To lay the groundwork for my argument, I must describe some of the basic premises of Western-based constitutionalism. Some of these premises are irreconcilable with many Indigenous constitutional tenets based on the idea that, in pre-colonial times, authority was "diffuse and persuasive, not centralized and coercive."[9] In other words, power understood as the capacity to make others act against their personal interests appears to have been unknown in pre-Columbian times; consensus-seeking and the willing deference of the people were, it is argued, the sole foundational pillars of authority.[10]

8 For an eloquent examination of Anishinaabe "rooted constitutionalism", see Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847. See also John Borrows, *Canada's Indigenous Constitution* (Toronto: Toronto University Press, 2010); and John Borrows, *Freedom & Indigenous Constitutionalism* (Toronto: Toronto University Press, 2016).

9 Mills, *ibid* at 851, n 7.

10 Such might have been true in small, face-to-face societies where individual survival was dependent on strong family ties and willing deference to communal authority, but what of modern contexts where greater numbers of people (including Indigenous people) that do not know one another as intimately as before are involved? Is seeking the consensus of all still possible? And if not, isn't the recourse to some form of representation inevitable? And if consensus-seeking is applicable among these representatives of the people, is it synonymous with a truly consensual decision-making pro-

The constitutionalism of which I will speak is not strictly understood as limited government through dialogue and consensus, but rather as the pursuit of limited government in contexts where consensus is precisely not always possible or is simply unattainable.

Contemporary Western-based constitutionalism is premised on five key ideas: 1) individuals certainly have the potential to be good, but, as James Madison puts it: "[…] there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust."[11] 2) Power within large polities has always been, is always, and will always be unequally divided. 3) Because of radical transformations of the social and political orders during the 17th and 18th centuries, the State's legitimacy is no longer thought to be derived from a transcendental or traditional source, but from the immanent power of the people.[12] However, in large polities, democracy does not mean that power is exercised by the people; rather, it refers very generally, in the words of philosopher Tom Christiano, "to a method of group decision-making characterized by a kind of equality among the participants at an essential stage of the collective decision-making";[13] and that is so because 4) power, in large polities, has always been, is always, and will always be exercised by the few and not the

cess or with the recognition of every representative's right to express him or herself before a majority decision is taken? Discussing the "consensus style" parliamentary government of the Government of Nunavut in "Traditional Aboriginal Values in a Westminster Parliament: The Legislative Assembly of Nunavut" (2006) 12:1 J Legislative Studies 8 at 21, Graham White provides a good example of what consensus might mean in a contemporary environment: "On the question of what 'consensus' entails in reaching a decision, the overwhelming view was that it did not mean unanimity or near-unanimity. It did mean respectful exchange of ideas and open-mindedness but, assuming that an open and extensive discussion had taken place, MLAs were prepared to accept the majority opinion. One minister commented that consensus government must work in terms of a clear majority: 'you never get all 19 to agree… at some point the ministers have to make decisions', adding that this is an elemental fact of government life but not all MLAs understand it."

11 James Madison, "The Federalist No 55" in Alexander Hamilton, James Madison & John Jay, *The Federalist* (Pennsylvania: Franklin Center, The Franklin Library, 1977) 399 at 405 [*The Federalist*] ; see also James Madison, "The Federalist No 10" in *The Federalist*, *ibid*, 61 at 63-64: "So strong is this propensity of mankind, to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts"; See also James Madison, "The Federalist No 51" in *The Federalist*, *ibid*, 372 at 374: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

12 Jean Leclair, "L'avènement du constitutionnalisme en Occident : fondements philosophiques et contingence historique" (2011) 41 RDUS 159.

13 Tom Christiano, "Democracy", *The Stanford Encyclopedia of Philosophy* (Spring 2015 Edition), Edward N Zalta, ed, online: <https://plato.stanford.edu/archives/spr2015/entries/democracy/>.

many; this is what I call the oligarchic fact of politics. The 17th and 18th century revolutions did not change that reality. Finally, the Western constitutionalism tradition came to life not because it embraced what Filippo Buonarroti famously described in 1828 as "the Order of Equality"; on the contrary, it harnessed itself, at least in part, to "the Order of Egoism", or in the words of Buonarroti, a "system… [where] the … spring to sentiments and actions is the selfish one of mere personal interest, without any regard whatever to the general good."[14] A more generous and, I believe, more accurate description was given by Benjamin Constant, who argued in 1819 that, because of the intellectual and political upheavals of the 18th century, "the Liberty of the Moderns" had displaced "the Liberty of the Ancients."[15] "The aim of the moderns," he said, "is the enjoyment of security in private pleasures; and they call liberty the guarantees accorded by institutions to these pleasures,"[16] whereas for the Ancients, liberty "consisted in exercising collectively, [and] directly, several parts of the complete sovereignty. … But," Constant stresses, "if this was what the ancients called liberty, they admitted as compatible with this collective freedom the complete subjection of the individual to the authority of the community."[17] In other words, Western constitutionalism and democracy arose from a wish to reconcile the desire for collective freedom with the enjoyment of private pleasure.

One might ask how democratic institutions could have grown out of such uninviting grounds? How could normative discourses about democracy and equality even emerge, let alone influence such an apparently dystopian universe? Be that as it may, however imperfect and however incomplete they might be, democratic institutions and limited government *did* grow out of Western civilization's tormented historical trajectory.

Why? First, let us recall why political communities in the West chose to adopt constitutions (which for the most part were unwritten until the end of the 18th century). They mostly chose to adopt binding rules to make collective action more efficient so as to ensure their collective survival.[18] They therefore

14 Phillippo Buonarroti, *History of Babeuf's Conspiracy for Equality* (translation from the French by Bronterre), (London: H Hetherington, 1836) at 10, n ‡. The work was originally published under the title *Histoire de la Conspiration pour l'Égalité dite de Babeuf* (Bruxelles: La Librairie Romantique, 1828) at 9 ("*ordre d'égalité*" et "*ordre d'égoïsme* ou d'*aristocratie*").

15 Benjamin Constant, "The Liberty of the Ancients and the Moderns" (1819) in Robert Leroux & David M Hart, eds, *French Liberalism in the 19th Century: An Anthology* (New York, Routledge, 2012) 68.

16 *Ibid* at 74.

17 *Ibid* at 70.

18 Holmes, *supra* note 7 at 194-96. The link between constitutions, power, and collective survival is an old one. For instance, during the Second Century BCE, the Greek historian Polybius sought to determine "…how it was and by virtue of what peculiar political institutions that in less than

set up power in order to better defend themselves against their foes. This appears to hold true just as much in the case of Indigenous peoples.

For instance, according to Haudenosaunee tradition, when the Tree of Great Peace (or, the Tree of the Great Long Leaves) was planted in Onondaga territory, an eagle was placed atop it, invested with the task of warning the people of the League if it saw any danger threatening in the distance.[19] The idea of uniting the five Haudenosaunee nations together under the Gayanashagowa (Great Law of Peace) was therefore closely tied to that of collective survival. And one of Peacemaker Deganawida's arguments to convince the members of the League to unite in a Confederacy and to live according to the principles of the Great Law of Peace was to take out an arrow and split it easily in two and then to bring out five arrows and show how much more difficult it was to break them.[20]

In non-Indigenous contexts, war (and revenue seeking to make war possible) has always played a role in the advent of constitutions, as well as in their evolution and their overthrow. These phenomena are also entwined with the eventual growth of limited government. Constitutionalism in the West came about with the advent of the State as we know it today. War, economic transitions, the rise of trade, and ideology all played a role in this complicated

fifty-three years nearly the whole world was overcome and fell under the single dominion of Rome, a thing the like of which had never happened before": Polybius, *The Histories*: *Books 5 - 8*, translated by WR Paton, vol 3, ed by FW Walkbank & Christian Habicht (Cambridge, MA: Loeb Classical Library, 2011) at 293, online: <https://www.loebclassics.com/view/LCL138/2011/volume.xml>. He found the answer in the strength and stability provided by Rome's mixed constitution (*ibid* at 329, 331). According to him (*ibid* at 295): "…the chief cause of success or the reverse in all matters is the form of a state's constitution; for springing from this, as from a fountain head, all designs and plans of action not only originate, but reach their consummation." Polybius claimed that the superiority of Rome's constitution had to do with the Romans having learned to value Lycurgus' wisdom, the latter being the first to have elaborated a constitution that was not "simple and uniform", but that, on the contrary, "united in it all the good and distinctive features of the best governments, so that none of the principles should grow unduly and be perverted into its allied evil, but that, the force of each being neutralized by that of the others, neither of them should prevail and outbalance another…": *ibid* at 317. On Polybius and his understanding of the Roman Republican Constitution, see Jean Leclair, "Les silences de Polybe et le Renvoi sur la sécession du Québec" in Jacques Boisneau, ed, *Personne et Res Publicam*, vol 2 (Paris: L'Harmattan, 2008) 135.

It also comes as no surprise then that one of the very first issues of the *Federalist Papers* is dedicated to examining "whether the people are not right in their opinion that a cordial Union, under an efficient national government, affords them the best security that can be devised against *hostilities* from abroad": John Jay, "The Federalist No 3" in *The Federalist, supra* note 11, 14 at 15.

19 Beverly Jacobs, *International Law/The Great Law of Peace*, LL.M. thesis, University of Saskatoon, 2000, at 26, online: <www.collectionscanada.gc.ca/obj/s4/f2/dsk3/SSU/TC-SSU-07042007083651.pdf>.

20 *Ibid* at 167.

story.[21] As Stephen Holmes bluntly puts it, prosaic constitutionalists (as he is himself), argue that "…the most 'democratic' reason why elites have proved willing to impose limits on themselves is that such limits help to mobilize the voluntary cooperation of non-elites in the pursuit of the elite's most highly prized objectives, especially revenue extraction and victory in war, but also information gathering and the timely correction of potentially fatal errors of judgment."[22] Holmes continues: "Full-fledged democracy has always been and will always remain more an aspiration than a reality; but genuinely democratic episodes occur when powerful actors discover, as they sometimes do, a palpable advantage in popular participation, government transparency, protections for minorities, and uncensored debate."[23]

In short, constitutionalism was the product of the following paradox: "limited power generates more power." For instance, the English Parliament was born, not as the result of a spontaneous self-realization of the Order of Equality, but out of an act of royal will.[24] Parliament was created because it served the King's interests. In the 16th century, the English Parliament did not suffer the fate of its continental counterparts because it *assisted* rather than opposed Henry VIII in his quest to undo the medieval privileges constraining the exercise of his royal authority.[25] Parliament also proved essential in the financing of the ever more expensive wars in which the King was embroiled. Kings realized that allowing a measure of political representation in Parliament to those who produced wealth was an astute political investment, much more efficient than predation. By protecting the interests of the wealth-producers and letting them have a say in the political arena, kings were able, in exchange, to obtain the producer's consent to the taxation that generated the revenue stream they needed to consolidate their power.[26]

The paradox according to which "limited power generates more power" also explains why, in June 1755, Chief Justice Belcher of Nova Scotia found no

21 See Hendrik Spruyt, "War, Trade, and State Formation" in Robert E Goodin, ed, *The Oxford Handbook of Political Science* (Oxford: Oxford University Press, 2011) 567; Charles Tilly, *Coercion, Capital and European States, A.D. 990 - 1992* (Oxford: Wiley-Blackwell, 1992); Robert H Bates, *Prosperity & Violence: The Political Economy of Development*, 2nd ed (New York: WW Norton & Company, 2010).

22 Holmes, *supra* note 7 at 191.

23 *Ibid*.

24 Martin Loughlin, *The British Constitution: A Very Short Introduction* (Oxford: Oxford University Press, 2013) at 46.

25 *Ibid* at 47-48.

26 Douglass C North, *Structure and Change in Economic History* (New York: WW Norton, 1981); Spruyt, *supra* note 21; Bates, *supra* note 21.

difficulty in declaring perfectly legal the deportation of thousands of Acadians,[27] whereas, both James Murray[28] and Guy Carleton[29] refused to implement the *Royal Proclamation of 1763* requiring them to introduce the entirety of English law in the Province of Québec. Frederick Haldimand would later be severely reprimanded by London for having disobeyed the secret instructions ordering him to give the most restrictive interpretation possible to the *Quebec Act*.[30]

27 Reproduced by the Honourable Michel Bastarache in "The Opinion of the Chief Justice of Nova Scotia Regarding the Deportation of the Acadians" (2011) 42:2 Ottawa L Rev 261 at 264-68.

28 In an ordinance enacted on 17 September 1764, while Governor James Murray did introduce English law in the Province of Québec, he allowed for the application of the law of New France in the newly created Court of Common Pleas, justifying this decision in the following terms: "[N]ot to admit of such [application of the law of New France] until they [the Canadians] can be supposed to know something of our Laws and Methods of procuring Justice in our Courts, would be like sending a Ship to sea without a Compass; indeed it would be more cruel — the ship might escape, Chance might drive her into some hospitable Harbour, but the poor Canadians could never shun the Attempts of designing Men; and the Voracity of hungry Practitioners in the Law; they must be undone during the First Months of their Ignorance; if any escaped, their Affections must be alienated and disgusted with our Government and Laws" (Explanatory observations of James Murray on *Ordinance Establishing Civil* Courts (17 September 1764), reproduced in Adam Shortt & Arthur G Doughty, *Documents relating to the Constitutional History of Canada (1759-1791)*, vol 1, (Ottawa: J de L Taché, printer to the King's Most excellent Majesty, 1918) at 206, n 4 [Shortt & Doughty, *Documents* vol 1]). See also Ann McManus, *Governor James Murray's Views on the Problems of Canada During his Administration, 1760-1766*, Thesis, Master of Arts, Department of History, University of Ottawa, 1966, at 43.

29 In a letter dated 24 December 1767 to Lord Shelburne, after having underlined that the "Laws and Customs [of New France] were widely Different from those of England, but founded on natural Justice and Equity, as well as these", Lieutenant-Governor Guy Carleton (who had replaced James Murray in April 1766) stated the following: "This System of Laws established Subordination, from the first to the lowest, which preserved the internal Harmony, they enjoyed until our Arrival, and secured Obedience to the Supreme Seat of Government from a very distant Province. All this Arrangement, in one Hour, We overturned, by the Ordinance of the Seventeenth of September One Thousand Seven hundred and sixty four, and Laws, ill adapted to the Genius of the Canadians, to the Situation of the Province, and to the Interests of Great Britain, unknown, and unpublished were introduced in their Stead; A Sort of Severity, if I remember right, never before practiced by any Conqueror, even where the People, without Capitulation, submitted to His will and Discretion. How far this Change of Laws, which Deprives such Numbers of their Honors, Privileges, Profits and Property, […] is agreeable to the natural Rights of Mankind, I humbly submit; This much is certain, that it cannot long remain in Force, without a General Confusion and Discontent": Letter from Guy Carleton to Lord Shelburne (24 Dec 1767) in Shortt & Doughty, *Documents* vol 1*, ibid* at 288-89; see further Arnaud Decroix, David Gilles & Michel Morin, *Les tribunaux et l'arbitrage en Nouvelle-France et au Québec de 1740 à 1784* (Montreal: Éditions Thémis, 2012). Notice that when Carleton refers to "their Honors, Privileges, Profits and Property" he refers to the landed *seigneurs* and clergy and not to the general population.

30 "The Lords of Trade and Plantations to Haldimand", Letter to Frederick Haldimand (10 April 1781) in Adam Shortt & Arthur G Doughty, *Documents relating to the Constitutional History of Canada (1759-1791)*, vol 2, (Ottawa: J de L Taché, printer to the King's Most excellent Majesty, 1918) 722 at 724 [Shortt & Doughty, *Documents* vol 2]: "The instructions in question were founded upon the most convincing necessity, and his Majesty's Pleasure was conveyed in terms so peremptory and express, that we are at a loss to conceive, how it was possible for you to hesitate upon an instant obedience to them."

In the case of the Acadians' deportation, since troops were available to handle the job and the British Fleet was in Halifax harbour, the political elites had no need to concede anything or limit their own power. However, in the Province of Québec, about 65,000 French-speaking, Catholic *Canadiens* coexisted for many years with approximately 2,000 English-speaking Protestant "old subjects." Military considerations, not least of which were the revolutionary convulsions slowly bubbling up to the surface in the thirteen colonies, made concessions to what London believed to be the conquered dominant social elites, the *seigneurs* and the clergy, absolutely essential.[31] The tithe and the *Coutume de Paris* which respectively were the legal basis of the clergy's and of the *seigneurs*' access to revenue were therefore reintroduced by the *Quebec Act*.[32]

Hence, there is some undeniable truth in the realists' depiction of the advent of constitutionalism as the realization by dominant political elites that limits to their own power helped them in "mobiliz[ing] the voluntary cooperation of non-elites in the pursuit of [their] most highly prized objectives, especially revenue extraction and victory in war [and their holding on to power]."[33] In the words of Hamilton and Madison, "[e]xperience is the oracle of truth"[34] and we should not ignore what lessons it can teach us.

However, the story of constitutionalism is one that intermingles human *purposes* aimed at this or that result (the wish of the rulers to remain in power and gain revenue) and the mostly *unintended* consequences of human *actions* actually taken to fulfil these purposes. In other words, brute power might unknowingly be the source of limited power and it might be the triggering device for the advent of new and powerful normative discourses about limited government, democracy, liberty, and equality.

31 G P Browne, "Carleton, Guy, 1st Baron Dorchester," in *Dictionary of Canadian Biography*, vol 5, University of Toronto/Université Laval, 1983, online: <www.biographi.ca/en/bio/carleton_guy_5E.html>. In a letter dated October 25th, 1780 to Lord Germain — a letter which sparked the strong rebuke evoked in footnote 29 — Governor Haldimand (who replaced Carleton in 1777) had underlined that "…the Quebec act alone has prevented or Can in any Degree prevent the Emissaries of France and the Rebellious Colonies from Succeeding in their Efforts to withdraw the Canadian Clergy & Noblesse from their Allegiance to the Crown of Great Britain. For this Reason amongst many others, this is not the time for Innovations and it Cannot be Sufficiently inculcated on the part of Government that the Quebec Act is a Sacred Charter, granted by the King in Parliament to the Canadians as a Security for their Religion, Laws and Property": Letter from Governor Haldimand to Lord German (25 Oct 1780) in Shortt & Doughty, *Documents* vol 2, *ibid*, 711 at 720.

32 *Quebec Act, 1774*, 14 Geo III, c 83 (UK), s 5, 8. Under section 7, a new oath of allegiance was introduced enabling Catholics to assume public duties.

33 Holmes, *supra* note 7 at 191.

34 Alexander Hamilton & James Madison, "The Federalist No 20" in *The Federalist, supra* note 11, 134 at 139; see also Alexander Hamilton, "The Federalist No 15" in *The Federalist*, *supra* note 11, 96 at 103.

For instance, even though the English kings' purpose in allowing Parliament to endure was only aimed at securing greater revenue, the unintended consequences flowing from this decision was a transformation of the institution itself over time and the rise of new normative discourses about sovereignty, democracy, equality, and liberty. It even led to the decapitation of the ruler himself at the hands of parliamentarians.

My point here is to stress that, although the purpose of kings might have been devoid of principle, the consequence of their actions was the establishment of an institution that eventually claimed more and more power for itself — Parliament. And it did so, not simply by force of arms, but by harnessing its demands to powerful new normative discourses claiming that sovereignty no longer stemmed from a heteronomous source, but from the people itself.

In turn, this discourse would provide the basis for further political collective action initiated by the non-elites still excluded from prevailing definitions of "the people." And this would lead to more institutional changes (the extension of the franchise for example). Constitutionalism as a value and constitutionalism as a form of government therefore actually reinforce one another in a diffuse and *reflexive* manner.[35]

The history of Canada's evolution prior to 1867 provides another good example of the interplay of these two facets of constitutionalism. It is true that the *Royal Proclamation of 1763* and even imperial statutes (think of the *Union Act* of 1840) were often used to deny any collective freedom to the *Canadiens*. It is equally true that, as I explained, the concessions made by London were inspired by a desire to co-opt the conquered elites in order to better maintain the metropole's hold on the colony.

Be that as it may, some among the discarded social elites of the *Canadiens* discovered a number of unknown normative treasures inherent in the British legal tradition: the right to petition, the right to be secure in their seigneurial property and the right to seek representative institutions and eventually responsible government. When reading the works of my colleague Michel Morin[36]

35 I have explored this idea in Jean Leclair, "Michael Oakeshott ou la recherche d'une politique dépourvue d'abstractions", online : (2014) 12 *Jus politicum. Revue de droit politique* <juspoliticum.com/article/Michael-Oakeshott-ou-la-recherche-d-une-politique-depourvue-d-abstractions-881.html>.

36 "The Discovery and Assimilation of British Constitutional Law Principles in Quebec, 1764-1774", (2013) 36:2 Dal LJ 581; "Les revendications des nouveaux sujets, francophones et catholiques, de la Province de Québec, 1764-1774", in G Blaine Baker & Donald Fyson, eds, *Essays in the History of Canadian Law: Quebec and the Canadas* (Toronto: Osgoode Society, 2013) 131; "La découverte du droit constitutionnel britannique dans une colonie francophone : la Gazette de Québec, 1764-1774",

and of historian of ideas Yvan Lamonde,[37] one realizes that the *Canadiens* cunningly constructed a normative discourse inspired by the tenets of the British Constitution to secure rights granted to "old subjects." In doing so, they were piggy-backing on the victories obtained by the British themselves after their civil war.

The British constitution helped these *Canadien* non-elites, with the help of non-elites of British stock, to build the political capital needed to advance their cause and to secure representative government and, eventually, responsible government.

Let us not exaggerate. If circumstances had been different, the *Canadiens* might have suffered the fate of the Acadians or a less dismal one, that of the French inhabitants of Grenada, the other French colony subjected to the *Royal Proclamation of 1763*.[38] And even if they have not suffered that fate, their gains were the result of a hard struggle during which the first reflex of the British authorities was always to systematically deny to the *Canadiens* the democracy they boasted they had established in 1688. After describing what democracy meant in the Province of Canada prior to 1867, Yvan Lamonde himself concludes that it was "a democracy based on the power of the stronger, the colonizer."[39]

This might be so. However, by mixing political action, strategic alliances, and normative discourses about equality and liberty, the *Canadien* elite helped bring about a political reconciliation in the form of limited autonomy within a federal regime in 1867. Even though some might radically disagree with me, it seems that the federal solution achieved in 1867, modified by further struggles that led to changes to the material (although not to the formal) Constitution,

(2013) 47:2 RJTUM 319; and "Blackstone and the Birth of Quebec's Distinct Legal Culture, 1765-1867", in Wilfrid Prest, ed, *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts* (Oxford: Hart Publishing, 2014) 105.

37 Yvan Lamonde, *The Social History of Ideas in Quebec, 1760-1896* (Montreal: McGill-Queen's University Press, 2013).

38 Let us not forget historian Hilda Neatby's conclusion about *The Quebec Act* of 1774: "In short, if the Act and all the instructions are read together and thought of as equally expressing the policy of the ministry, that policy can be seen only as one of gentle but steady and determined anglicization. The recognition of 'the liberty of non-English people to be themselves' as an imperial principle was discovered by historians in the Quebec Act after this principle had necessarily been developed by Britain in relation to the other and truly alien peoples which were to become part to the empire during the next century. If this principle is in the Quebec Act, it got in without the knowledge of the men who framed it": Hilda Neatby, *Quebec: The Revolutionary Age, 1760-1791* (Toronto: McClelland and Stewart Limited, 1966) at 140.

39 Lamonde, *supra* note 37 at 424.

still succeeds in preventing a large majority of Quebecers from wishing a complete exit from the Canadian constitutional fold.

After 1867, more and more non-elite groups conscripted the normative vocabulary of democracy, equality, and liberty to claim their share in the exercise of political power. This was not the result of a well-thought-out plan or a mystically propelled evolution, but rather the result of a diffuse constitutionalism, where the latter is in part the result of the unintended consequences of human actions that are not necessarily designed to do good.

If the wielders of power did make concessions to a growing number of people over time, it is also because every victory made in the name of equality prepared the terrain for the next one. And, it was difficult to deny to newcomers on the political field what had been granted to their predecessors. As more non-elites gradually got to participate in the exercise of political power, new normative discourses were generated promoting the creation of new types of shared understandings concerning political arrangements. These new beliefs, in their turn, fed into the political struggles leading to new transformations of our democratic form of governance. Hence, my use of the qualifiers *diffuse* and *reflexive* constitutionalism.

What lessons can be learned from this where Indigenous peoples are concerned? First, I believe that Stephen Holmes is right when he claims that "If you wish a constitutional norm to govern the way politicians behave, you need to organize politically to give ruling groups an incentive to pay attention and accept restraints on their own discretion for their benefit and yours."[40]

The Crees of Northern Québec had success at negotiating the *James Bay Agreement* and the *Paix des Braves* because of: their ability to remain united; their political acumen (during the *Paix des Braves* negotiations, they played the PQ government like a master violinist plays his instrument); and, their masterful use of normative discourses on the international plane as a means to pressure the dominant political elites. But, they also succeeded in convincing those elites that true political autonomy for them might mean better policies for their people and hence, less responsibility for the Québec and Federal governments and maybe, just maybe, less resentment towards them by the Cree people.

Building the political clout necessary to give ruling groups an incentive to pay attention is a difficult task for Indigenous peoples since they only make up 4% of the population and they do not all sit on billions of dollars of hydro-

40 Holmes, *supra* note 7 at 215.

electricity. However, as Indigenous peoples, they benefit from an ever-growing capital of sympathy that provides them with considerable power. These last years, many Canadians woke up to the atrocious reality of residential schools and are more aware of the manner in which Canada's Indigenous collective and individual lives where crushed during the last 200 years and how Indigenous peoples are still suffering from the aftershock of the cultural genocide that took place during the 20th century.[41] The urban-based, women-initiated *Idle No More* movement has also demonstrated the vibrancy of the modern Indigenous civil society and its determination to be heard. In addition, legal instruments such as the *UN Declaration on the Rights of Indigenous Peoples* serve as powerful levers in the Indigenous peoples' political struggle for greater autonomy. More and more extractive project proponents realize the financial and reputational benefits they could garner from supporting a "free, prior and informed consent" regime in Canada and elsewhere. Finally, the Supreme Court is getting more and more entangled in its own conceptual nets. By recognizing aboriginal rights and titles as collective rights allowing their bearers to take decisions as to "who gets what, when, and how?", it is bound to eventually recognize a generic right to self-government to Indigenous communities over their internal affairs.[42]

It is in this context that normative discourses stand a chance of influencing the evolution of Canadian constitutionalism. They can provide the ideas necessary to make mobilization possible. Once they permeate the public discourse, they become powerful tools in the Indigenous peoples' political struggle for greater autonomy. And it is my claim that normative discourses mobilized in the quest for reconciliation and greater autonomy for Indigenous polities can certainly themselves be influenced by Indigenous normative understandings that would benefit us all; normative understandings such as the need to set up power in a less anthropocentric manner so that our interconnectedness with other living beings be truly acknowledged.[43]

41 See *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Toronto: James Lorimer & Co, 2015).

42 For more on this, see Jean Leclair & Michel Morin, *Peuples autochtones et droit constitutionnel*, in Stéphane Beaulac & Jean-François Gaudreault-Desbiens, eds, *JurisClasseur Québec — Collection Droit public — Droit constitutionnel* (Montréal : LexisNexis, 2014) (loose-leaf 2017 edition) ch 15, no 64.

43 For an attempt at resorting to Indigenous epistemologies in the interpretation of constitutional law, i.e., envisaging "constitutions" as verbs rather than nouns, as metaphors for relationships rather than as abstract entities, see Jean Leclair, "Invisibility, Wilful Blindness and Impending Doom: The Future (If Any) of Canadian Federalism" in Peter John Loewen, Carolyn Hughes Tuohy, Andrew Potter & Sophie Borwein, eds, *Canada and its Centennial and Sesquicentennial: Transformative Policy Then and Now* (Toronto: University of Toronto Press, forthcoming in 2018).

However, for these normative discourses about reconciliation to better convince the dominant political elites that it is to everyone's advantage that Indigenous peoples be recognized as having greater autonomy, they must address constitutionalism, not just as a value, but as a form of government. And not just as a form of government from the State's perspective, but as a form of government for contemporary Indigenous communities themselves.

Many Indigenous and non-Indigenous intellectuals are doing just that. I'm thinking for instance of the extensive literature written about the fundamental role played by treaties in Canada's constitutional tradition. I have in mind John Borrows, Val Napoleon, Hadley Friedland, and many others who search for means of revitalizing Indigenous legal traditions and, in doing so, reveal their relevance for solving contemporary problems.[44] I am also thinking of Emily Snider, whose work, in cooperation with John Borrows and Val Napoleon, on violence against Indigenous women focuses on Indigenous ways of tackling this issue.[45] I have in mind the University of Victoria's proposed joint degree in Canadian Common Law and Indigenous Legal Orders.[46] I am also thinking of initiatives such as the Kahnawà:ke Community Decision Making Process developed under the aegis of the Kahnawà:ke Legislative Coordinating Commission in 2005. This initiative might not have bred all the success as hoped for, but it was a courageous attempt at revitalizing traditional forms of governance.[47] All these initiatives are more than just *assertions* of the Indigenous peoples' right to self-government, but demonstrations of their capacity to address the challenge, sometimes with very limited resources, of actually *exercising* that right.

All these initiatives, and similar ones in Québec, indirectly and directly played a part, for instance, in the adoption last August of section 543.1 of the *Civil Code of Quebec* which states that, "conditions of adoption under any Québec Aboriginal custom that is in harmony with the principles of the interest of the child, respect for the child's rights and the consent of the persons

44 John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) at 222; Val Napoleon "Thinking About Indigenous Legal Orders" (2007), Research paper prepared for the National Centre for First Nations Governance, online: <fngovernance.org/ncfng_research/val_napoleon.pdf>; Val Napoleon & Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories" (2016) 61:4 McGill LJ 725. For more on this, see Michael Coyle, "Indigenous Legal Orders in Canada - A Literature Review" (2017) Western University Law Publications 92, online: <ir.lib.uwo.ca/lawpub/92>.

45 Emily Snyder, Val Napoleon & John Borrows, "Gender and Violence: Drawing on Indigenous Legal Resources" (2015) 48:2 UBC L Rev 593.

46 See University of Victoria, "Dual Degree Program in Canadian Common Law and Indigenous Legal Orders JD/JID", online: <https://www.uvic.ca/law/about/indigenous/jid/index.php>.

47 Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process" (2013) 18:1 Rev Const Stud 111.

concerned may be substituted for conditions prescribed by law." This small opening by the Québec State apparatus might bring forth unexpected results. As such, it is an encouragement for those nations who wish to do so to address the task of identifying their own customary adoption rules. But, more importantly, it might also constitute an incentive to extend these inquiries to fields other than adoption.

This is how constitutionalism operates: in a diffuse and reflexive fashion. It was and still remains a struggle between the values and ideals it embodies and the forms of government that instantiate them. No doubt, the latter always fails to meet the standard fixed by the former. However, in this constant struggle, "the ideal feeds the real and the real the ideal" in the sense that normative discourses provide the ideas around which non-elites can ally themselves to one another — and to willing members of the elite, so as to exert on dominant political elites the pressure required for something like reconciliation to happen. In other words, poetic and prosaic constitutionalisms must always be conjugated if any real change is to ever happen.

* * *

This might sound like a depressing conclusion and, in some ways, it is, especially for those who, legitimately outraged by the snail-paced process of change, seek the immediate fulfilment of their desire to obtain as much autonomy as possible. The thoughts expressed here might sound equally irrelevant to those who think that there is nothing to learn from the Western tradition. However, the West — whatever that word encompasses today — is too often depicted as a monolithic block that sprung out fully armed, like Athena from Zeus' head, with the sole mission of crushing the rest of the world under its heel. That *is* certainly a part of Western history, but not the whole of it.[48]

I thought it would be worthwhile to underline that the Western constitutional tradition itself was born out of the struggle of generations of European non-elites, including a lot of women, who shed rivers of blood to achieve the imperfect form of limited government that is now ours. In other words, not everyone is all powerful in "the Western world." There are alliances to be made between Indigenous peoples and other Canadians who seek a world where "being" is of more import than "having." These alliances are worth nurturing, if we wish to learn from one another and achieve reconciliation.

48 For some thoughts about Indigeneity and Modernity, see Jean Leclair, "Envisaging Canada in a Disenchanted World: Reflections on Federalism, Nationalism, and Distinctive Indigenous Identity" (2016) 25:1 Constitutional Forum constitutionnel 15 at 18-19.

One last word; anyone, be they Indigenous or non-Indigenous, who witnesses what is happening today in the USA or in Turkey should think twice before wishing the Western constitutional tradition away.