Une approche exclusivement territoriale du fédéralisme n'est pas innocente, car elle propage une culture d'épuration ethnique, de génocide, de transfert de populations ou, dans le moins pire des cas, d'intégration forcée.

remercions M. Stephane Volle, étudiant de l'Institut d'études politiques d'Aix-en-Provence, stagiaire à la Fondation libanaise pour la paix civile permanente, pour sa contribution documentaire couvrant les années 2000-2002.

Chapter 7

Kaleidoscopic Federalism

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Abstract

The idea of federalism, just like the idea of the unitary nation-state, is a metaphor for imagining the manner in which citizens conceive who they are and how they organise the relationships through which they pursue their purposes and ambitions in concert with others across the entire range of human interaction.

Most scholars would find this to be a surprising way to characterise federalism. For them, federalism presumes the political state. They do not consider the federal aspects of the family, the neighbourhood or the workplace. Moreover, they see federalism only in rational structures of institutional decision-making, and canonical texts meant to attribute constitutional virtue. Finally, their conception of federalism presumes a fixed, monistic arrangement of normative institutions and normative forms.

Résumé

L'idée du fédéralisme, comme celle d'un État national unitaire, est une métaphore pour conceptualiser la façon dont les citoyens se définissent eux-mêmes et organisent les relations par lesquelles ils tentent de réaliser leurs buts et ambitions de concert avec les autres à travers la très vaste gamme des relations humaines.

La plupart des intellectuels seraient surpris de lire cette façon de conceptualiser le fédéralisme. Ils ne considèrent pas les aspects fédéraux de la famille, du voisinage ou du milieu de travail. Plus encore, ils conçoivent le fédéralisme seulement à travers des structures rationnelles de prises de décisions institutionnelles, et les textes fondamentaux comme étant destinés à lui prêter une nature constitutionnelle. Finalement, leur conception du fédéralisme suppose un arrangement fixe et moniste des institutions et des formes normatives.

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In revising this essay I have sought neither to modify the discursive style of the speech as delivered nor to burden the text with exhaustive footnotes to the obvious and self-indulgent citations to my own papers. Key thematic references are listed in a brief bibliographic essay attached as an Appendix. I should like to thank Harry Arthurs, Richard Janda, Nicholas Kasirer and Desmond Manderson for their comments on earlier drafts. None, obviously, bears any responsibility for my failure to attend to his counsel.

To see federalism only as the allocative output of a document called a constitution is to forget that federalism comprises both implicit and explicit texts and practices. These are constantly being churned by everyday interaction in multiple social settings.

A kaleidoscopic federalism, as the idea is argued in this paper, acknowledges these several dimensions and these shifting distributions of authority. It is fundamentally a federalism of aspiration, of virtue, that keeps contingent the interplay of agency and structure in the self-construction of citizens.

Concevoir le fédéralisme uniquement comme le produit d'un document appelé une constitution revient à oublier que le fédéralisme comprend à la fois des textes et des pratiques implicites et explicites. Ces textes et pratiques changent constamment puisque influencés par les interactions quotidiennes des multiples constructions sociales.

Ce texte développe l'idée d'un fédéralisme kaléidoscopique, qui reconnaît ces multiples dimensions et ces distributions changeantes de l'autorité. Ceci est fondamental pour un fédéralisme d'aspiration, de vertu, qui permet de conserver la cohérence des interactions des organismes et des structures dans la construction de l'identité des citoyens.

INTRODUCTION: THE FACES OF FEDERALISM

My adolescent children are sophisticated political actors. Their quotidian politics are just as rich, as complex, and as emotionally engaged as the public politics of the state. In fact, their everyday lives are surely richer, more complex and more emotionally engaged than the public lives they are consigned eventually to lead as Canadian citizens.

Already my children know and puzzle about power, legitimacy, due process, separation of powers, and third-party decision-making. Already they are experienced in negotiating around the federal complexities of divided sovereignty and overlapping jurisdictional attributions. Let me briefly suggest several sources and sites of their expertise.

- Behind the simple expressions "mum" and "dad" there flourish socially constructed roles and relationships of affect, authority and ambition both more intense and more nuanced in their demands than appeals to patriotism.
- Apparently natural biological links evoked through words like "aunt" and "uncle" belie strong commitments about inclusion in and exclusion from the moral community which overpower such formal group attachments as political citizenship.
- In watching the bonds of differentiated and fine-grained love that surround the new-born child of a cousin, they locate themselves as the carriers of manifold identities that constantly shift, realign, and re-order in response to aspiration and accomplishment.

- The gifts, bribes and other inducements flowing from grandparents that often (sometimes intentionally, but usually inadvertently) undermine the reciprocity of a weekly "allowance" resonate with the logic of the spending power.
- Tacit and sometimes not so tacit conspiracies between siblings, often sealed with the unstated threat of "snitching," galvanize allegiances within and over against the whole family in a manner that tracks the shenanigans of everyday federal-provincial policy negotiations.
- Awakening to the wilfulness of behaviour and the ambiguities and bivalence of agency—an agent also being one who is capable of suffering—as shaped by adolescent discovery of girlfriend or boyfriend poses the identity question: "Who am I?"
- "Wait till your father gets home" or "you better check that out with your mother" are mere hints at structures of decision-making that make the law of American federal courts and federal jurisdiction seem monochromatic.

Commitment, membership, exclusion, identity, agency, taxing, spending, administering, and decision-making are the life-blood of all relationships—and all human relationships are intensely political.

Law, whether the static law of the modern state or the dynamic law of everyday life, mediates both the politics and all the relationships themselves. Law, especially when conceived as constitutional law, provides enfranchising institutions, processes, and regimes to facilitate agency, to stabilise interaction with others, and to allocate human choice in pursuing individual and collective purposes. In this light, federalism is but one way of apprehending, organising, and construing these constitutive capabilities of the legal enterprise. Federalism is centrally about the deduction, division, and allocation of power, about multiple and competing sources of authority, and about the complex and overlapping identities of agents.

In this paper, I consider various dimensions of contemporary federalism —its motifs, its ambitions, its sites, and its modes. A key objective is to move towards an understanding of federalism that is not grounded in republican legal theory. My foundational thesis is that federalism is the normal condition of human interaction, and it always has been. The so-called unitary state of post-enlightenment legal theory is aberrant as an expression of human affect and affiliation. Abandon the fixation with territorial nation-states and new vistas of federal experience and practice appear. The expression "kaleidoscopic federalism" is meant to signal, by conjuring ever-changing colours, shapes and patterns fixed within a constructed order, the scope and scale of these vistas.

A. PLURAL MOTIFS: RECONSTITUTIVE (OR DIALOGIC) FEDERALISM

The justifications for federalism as a constitutional form are well-worked over in Euro-American legal theory. I need not repeat them here. Yet I would note that by focusing on federalism as it emerged in reaction to the national state-building project of the eighteenth and nineteenth centuries, theorists do a disservice to the earlier federal endeavours of Mesopotamia, China, Rome, the Aztec and Inca Empires, and the Iroquois confederacy, among others.

Moreover, this focus deflects attention from other domains of federal experience. For example, I take as given that the antecedents of modern federalism theory can be located in the founding myths of Western religions. Who would deny that Egyptian, Greek, and Roman polytheism is federalized theology? Some Gods have dominion over particular domains of human experience; others are ascribed a different jurisdiction. So too with monotheistic religions. Can we not see a federal intuition in the central Judaic distinction between the Talmud and the Torah? Or in the Christian doctrine of the "Holy Trinity"?

These other sites and modes of federal experience are explored later in this paper. For the moment, I simply want to use the standard politico-constitutional account of federalism to review the two main orienting motifs driving federalism projects. Conventionally, it is said that regardless of the socio-political rationales for creating a federal state, the structural outcome has to be either unifying (aggregating, integrative) or disunifying (disaggregating, devolutionary). I disagree. All federalisms emerge from both centripetal and centrifugal tendencies. In brief, all federal projects are reconstitutive and continuously reconstituting.

Consider first unifying federal projects. The United States of America is generally thought to be the archetypal contemporary federal state of this character. In the mythology of American exceptionalism, the federal constitution resulted from a compact among several previously separate constituent units—*e pluribus unum*. A like goal of unification has sustained other federal endeavours like, for example, the Australian commonwealth.

But in both these instances a disunifying motif was also present. In the case of the United States, this disunifcation had both explicit and implicit dimensions. First, the fact that large regions of British North America (notably, Quebec, New Brunswick, Nova Scotia, Newfoundland, and Prince Rupert's Land) were excluded recalls that prior to unification there was militarily contested separation from the Imperial mother country. Hence, the commonplace that the secessionist movement in the thirteen colonies (popularly, though inaccurately, known as the American Revolution) actually created two states—

the United States and after a nine decade gestation, Canada. Similarly, in the Australian case, one might note that the federal idea was preceded by a claim for colonial devolution, and initially embraced an Australasian political project that also included New Zealand and Fiji.

Second, for every explicit set of political institutions being created, a number of implicit political institutions are being overthrown or attenuated. In the United States, the new federal state ultimately destroyed the emerging federalism of the slaveholding states. While a plethora of constitutional arrangements acknowledged the sectional nature of the new union, it took a civil war to remind everyone that an explicit federation usually winds up delegitimating all manner of implicit or emerging confederacies. Those who imagine unifying federal projects as involving only official institutions would do well to ask, in each case, what implicit federations are being destroyed or disabled.

The occasions for successful disunifying federalism are fewer, in large measure because of the socio-political origins of devolutionary movements. Because disunifying federalism is frequently tied to ethnocultural claims of "blood and belonging," it is difficult to arrest the fractionating impulse once it has begun. Each newly created subnational unit tends to push for its ultimate political independence rather than embrace federal interdependence.

The break-up of the Austro-Hungarian and Ottoman Empires after World War I, and of the former USSR and Yugoslavia more recently, are instructive. It remains an open question whether devolution in the United Kingdom, and the readjustments meant to homogenize cultural-linguistic politics in Belgium will follow the same route. Those in Canada who argue for Quebec independence on the basis of the province's natural evolution (and concomitantly those who speak of the partition of Quebec should it secede from Canada) are doing no more than pursuing the logic of disaggregating federalism as it has been experienced elsewhere.

Still, disunifying federalism invariably has a unifying counter-current. The re-configured Commonwealth of Independent States as a reaction to the collapse of the Comintern, and the move to greater political integration in Europe concomitantly with separatist movements in, for example, France, Spain, and Italy, as well as devolution in the U.K. suggest that large-scale explicitly unifying (or recombinant) federalism is frequently a corollary of disunification or threatened disunification of smaller political units. Some argue that the North American Free Trade Agreement is simply another instance of this type of recombinant federalism.

Moreover, political disunification can often lead to a discovery (or rediscovery) of implicit confederacies. In what ways do informal affiliations among Slovenia, Croatia, Hungary, and the Czech Republic implicitly recreate the

Austro-Hungarian Empire to the exclusion of their erstwhile political partners —Serbia, Bosnia, Montenegro, and Slovakia? Can one find similar, but contrasting, linkages in the Visgael grouping of Poland, Hungary, Slovakia, and the Czech Republic? Were Canada to fracture, one could well imagine the emergence or reinforcement of implicit confederacies among British Columbia and Washington, Alberta and Texas, and the Maritime provinces and New England states. Again, those who imagine disunifying federal projects as exclusively the product of official institutions would do well ask what implicit federations are being simultaneously generated or enhanced.

If both unifying and disunifying motifs are present in all federal projects, then federalism must be conceived as a reconstitutive or dialogic political project. The Canadian federation is an object lesson. In Canada, the dominant motif for confederation has usually been cast as unifying or nation-building. Certainly the endeavour aimed at creating a single British North American state in counterpoint to the American republic. But however much nation-building was a goal in view, the initial project is also an example of an explicitly disunifying federalism.

Like federalism in the United States and Australia, this unifying federalism in Canada also had its exclusionary features: none of Newfoundland, Prince Edward Island, British Columbia, Prince Rupert's Land, and the Selkirk settlement was included in the Act of 1867. Again, as in the United States, there were several forms of disunification consequent upon the new federal arrangement. Recall that the Charlottetown Conference was called solely to discuss Maritime Union. What happened to that project in the interval between Charlottetown and Quebec in 1864? After 1867 the vestige of Maritime Union explicitly survived only in the regional rather than provincial basis of Senate apportionment. Perhaps the declining economic clout of the Maritimes, the blandishments of the Colonial Office and the cross-cutting centrifugal tendencies of language, religion and economics prevented a maritime sectionalism from sprouting into an ongoing separatist movement.

The further dimension to disunifying federalism in Canada found expression in the *Constitution Act, 1867* itself. Confederation explicitly embraced the apparently final dissolution of the "old province of Quebec," so labelled after the "Quebec Act" in 1774 to continue the formal Royal colony of New France (although the recurring coalition between Quebec and Ontario premiers throughout the twentieth century might suggest a continuing informal counter-current). Once previously, separatism (in the instance, the movement of English-speaking immigrants that led to the creation of Ontario) had destroyed the unity of the "old province of Quebec" and had produced a quasi-executive federalism in the person of the Governor of Canada (but not a federal legislative body) between 1791 and 1841. The Canada reconstituted by the *Act of Union* in 1841, with a unitary legislative, but dual administrative and

judicial structures, was a half-hearted attempt to recover the political unity of pre-1791 Quebec. After 1867, duality permeated all governance functions. The present disjuncture between compact theories of Confederation prevalent in Quebec and nation-building mythologies dominant elsewhere attests to the inherent bivalence, and ambivalence, of Canadian federalism—at once unifying and disunifying.

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To summarize, regardless of whether an aggregating or a disaggregating motif predominates in constitutional mythology, all federal projects are, at several levels, reconstitutive. Be the social, economic and political impulses driving a federal project integrative or devolutionary, for every explicit set of political institutions being established, there are a like number of explicit political institutions being destroyed or disabled. More than this, in every case an explicit federal project not only leads to the creation of new political institutions, it spawns several new implicit political institutions that carry the traits of these newly created federal units. Finally, just as new implicit political institutions are being generated or enhanced, so too multiple implicit political institutions are being destroyed or attenuated. Today, those who inquire into the constitutional meaning of international treaties such as those establishing the NAFTA or the International Criminal Court, international institutions like the WTO, the ILO and the WHO, and international organizations such as the Red Cross/Red Crescent, Doctors Without Borders and the ILA, and who see only the external, institutional manifestations of globalisation would do well to reflect on the necessarily reconstitutive character of all federal projects.

B. PLURAL AMBITIONS: MAPPING FEDERALISM IN SOCIETY

Federalism has typically been conceived as a structure of governance that has no essential substantive content. Its ambitions, consequently, are readily admitted to be both multiple and discordant. Social, economic, political, ethnocultural, linguistic and religious matters all appear, either individually or in combination, as organizing aspirations. For this reason, structural arguments about the character of the state being created (the scope, scale, and intensity of the federation) are not free-standing. They are intimately bound up with, and are sometimes not too subtle surrogates for, substantive arguments about the central or primary locations of human affect and belonging across a wide range of relational experience.

Hamilton and Madison in the United States, just like Galt and Brown (or Cartier and Taché) in Canada, each understood the project in which he was engaged quite differently. For the former in the pairings, a federal state was essentially an economic enterprise; for the latter it was a political and sociocultural self-defence pact. For the former, the central government was cre-

ated to arrogate and exercise authority in the pursuit of a whig agenda; for the latter, the central government was to be feared and its authority limited or diffused. Yet all saw federalism as a mechanism to layer political power: sometimes for reasons of economic sectionalism (as J.C. Calhoun would later argue in the nullification debates, and Joseph Howe would proclaim in the attempt to withdraw Nova Scotia from Canada); and sometimes to recognize and preserve ethnocultural locality (as Jefferson Davis and other Confederate apostles of disunion would claim, and as Christopher Dunkin and D'Arcy McGee would claim about the lived experience of linguistic and religious diversity in Quebec).

Closely considering these political, economic, sociocultural and psychological factors reveals a fundamental question that is begged in most federalism theory: within a given federation, why should jurisdictional fault-lines always be drawn in exactly the same place? This begged question became increasingly important as the twentieth century unfolded, principally because of the appetite of the state after World War II to claim authority over broader domains of human action. In so doing, the state purported to dismantle or disenfranchise other associations and institutions through which human beings build relationships with each other. The twin impulses of Jacobin political ideology pursuing Rousseau's general will and Marx's historical determinism provided a justification for the all-embracing or totalising state. Non-state institutions of collective action, often organized on multiple federal principles, came to be recast as state agencies whose jurisdictional competence was set by the political constitution.

In noting the expansive role of the contemporary state, I am not lamenting the era of small-government. Rather I mean to question whether eighteenth and nineteenth century federal configurations of political authority, grounded in an ideology of small-government, are still adequate to twenty-first century big-government purposes. One might usefully begin by considering how the social, economic, ethnocultural, and religious dimensions of everyday life were managed by non-state institutions—habitually acting through their own federalized processes and structures.

With few exceptions relating mostly to primary schooling, in most provinces at Confederation, social and educational services were organised and administered by religious or charitable institutions. Activities involved not just orphanages, asylums, homes for wayward youth and unwed mothers, but also soup kitchens, thrift stores, and hostels. Moreover, immigration societies, temperance unions, the Royal Institution for the Advancement of Learning, mechanics institutes, sailors' rests, the YMCA, and fraternal associations played a central role in community building. Invariably, their managerial structure followed a federal model, but the individual patterns of jurisdictional attribution did not necessarily track provincial (or other political) fault-lines.

Most often the federal organization was subprovincial, but sometimes it was regional, and occasionally intercolonial. Even hierarchically-organized institutions, such as the Roman Catholic Church, were obliged to federalize the distribution of ecclesiastical authority along ethnic and linguistic lines.

As the provinces began to allocate funding to these institutions and endeavours, they came to demand province-bounded organizational structures and to require that programmes and activities be limited to fields falling within provincial legislative jurisdiction. The Boy Scouts organisation, the Victorian Order of Nurses, the Red Cross, and immigrant aid societies can be cited in evidence. In other words, the assault on the multiple and heterogeneous federalisms of non-state agencies commenced long before the central government in Canada actually came directly to assert a social welfare agenda in the 1940s and began to engage in jurisdiction squabbles with the provinces.

A similar story may be told about economic institutions. In 1867, few business corporations traded predominantly on a provincial level. Economic activity was either local, or it was national (even Imperial). Thus, even though the Montreal business elite, as abetted by foreign railway and financial interests, succeeded in having most commercial matters—trade and commerce, weights and measures, banks and banking, bills of exchange, interest, and so on —allocated to the federal government, most national enterprises were either somewhat less than (or greater than) national in scope and scale.

The economic "logic" of a federalized Canada only began to emerge with the legislative and infrastructure projects of Macdonald's first National Policy. As entrepreneurs found in provincial governments willing collaborators in their rent-seeking behaviour—through subsidies, government contracts, favourable taxation, and transportation policies—their corporate organization frequently came to reflect the same territorial boundaries as the political state. During the early twentieth century, when the state became increasingly concerned with labour markets—unions, workers compensation, labour standards, etc.—the reconfiguration of business enterprises along lines that tracked political structures was accelerated.

Consider finally questions of language and religion. In theory, the *Constitution Act, 1867* consigned Acadians, franco-Ontarians, and francophones in Rupert's Land to the ash-can of history. Thanks to Louis Riel, the third of these managed to achieve some formal constitutional protection in the *Manitoba Act* of 1870. Not so for franco-Ontarians and Acadians—the latter of whom had to wait until almost a century later before achieving constitutional recognition in New Brunswick. Throughout the twentieth century, informal ethnic and cultural associations and organizations structured not on

provincial, but on regional lines, flourished. Moreover, for Canada's first century, the government of Quebec actually subsidized not only trans-border organizations in northern New Brunswick and along the Ottawa River, but also in the Canadian west. Religion also did not find itself trapped in logic of provincialism. The initial organization of archdioceses and of the Presbyterian Temporalities Board, whose liquidation gave rise to litigation under section 129, was driven by pastoral and not by the territorial or jurisdictional principles of the *Constitution Act, 1867*. But after World War II, as governments manufactured a role for themselves as cultural entrepreneurs, promoting, for example, the arts, bilingualism, and multiculturalism, organizations promoting language and culture came to reconfigure themselves along the same geographic and topic lines as official political agencies.

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Primarily for geographic reasons, almost every non-governmental institution involved in a citizen's everyday life in pre-Confederation British North America was organized on some sort of federal principle. And in very few cases did the jurisdictional fault-lines map directly on to provincial (even national) boundaries. Today the picture is different. Many believe that questions of social redistribution should be directly (and exclusively) handled by the state, with the consequence that one (and only one) organizing logic for service delivery survives. The jurisdictional determination is made on the basis of provincial geography. Even where state involvement is limited to subsidy and contract, there is a similar distributional logic. Whatever may be the pretence to social diversity and organizational heterogeneity reflected in the federalism of 1867, in most circumstances today, the politics of federalism is a politics of the Jacobin nation-state. Explicit, public, and unitary political ambitions control and the richness revealed in heterogeneous federalisms have disappeared from large segments of social, economic, and cultural life.

C. PLURAL SITES: MULTIPLE CENTRES OF STATE POWER

In the Western political tradition, the functional components of government are conventionally held to be three—the legislative, the executive and the judicial branches. Each can be imagined as a distinct site of federalism. Nonetheless, most early federal theorists were preoccupied with, and most federal constitutions focused upon, the distribution of legislative power—the assumption being that the delegation of power to enact laws was the true measure of a people's sovereignty. Hence, in the United States, the Constitution for the most part cast the scope of national executive and judicial power in relation to how it attributed legislative jurisdiction, even though the judiciary was also given "interstate" authority, and the President a list of specified powers (*e.g.* the war power, the nomination power).

These observations suggest that an analysis of the sites of federalism must have two objects: it is important to consider how federal principles shape the emergence or recognition of all types of legal norms—and not just statutes (*i.e.* normative federalism); and how these same considerations bear on the judicial and executive institutions that give effect to both legislative and non-legislative instruments of governance (*i.e.* institutional federalism).

Notwithstanding that the Diceyan conception of the rule of law directs attention to Parliamentary legislation as the primary legal artefact, in the modern state there are a multiplicity of normative forms. These forms embrace—to differing degrees in differing political and legal traditions—both official and non-legislative forms like judicially-declared law, administrative acts and decisions, and government tax, subsidy and contract practices; and also non-official and non-legislative forms like custom, supereminent principles, practice, contracts, industry standards, authoritative doctrinal writing, *opinio juris*, and so on. I address these in reverse order.

Consider how conceptions of federalism might bear on different expressions of legal normativity that have no official institutional source. Is it necessary to hold that everyday human interaction in matters of family law, property, contracts, and civil liability generates legal rules the scope of which must be limited by provincial boundaries? Presumably customs, usages and practices have a normative weight that does not depend on recognition by either provincial or federal governments (depending on the "pith and substance" of the rule in issue). Again, must the standards developed by Underwriters Laboratories, the Canadian Forest Products Association, the Urban Development Institute, and the International Organization for Standardization (ISO) respect the constitutional distributions of power set out in sections 91 and 92? Presumably the Urban Development Institute could promulgate standard-form contracts for use in some provinces but not others, or in some parts of a province but not others, or even in some parts more than one province. In other words, this legal character as felt in everyday lives is not (and cannot be) measured by the metric of justiciability through court-sanctioned state action.

Law is also made by non-legislative official institutions—notably, administrative agencies and courts. Of most interest is the law-making activity of the latter as reflected in the judicially-declared common law. In theory, there is but a single common law world-wide. Yet significant national (Canada as opposed to Australia or the United Kingdom), regional (Western Canada as opposed to the Maritimes), provincial (British Columbia as opposed to Alberta), federal (the provincial common law in a given province as opposed to the federal common law operative in that province), and even inter-court (the small claims courts as opposed to the superior courts in a province) variations exist in this common law. Upon what federal principle do courts determine the boundaries of these diverse common laws, or in appropriate cases, the principles of equity, ecclesiastical law, admiralty law, and so on?

The same question may be asked of the several institutions by which law is administered or applied. As noted, the distribution of judicial jurisdiction in the United States essentially follows the distribution of legislative jurisdiction. A dual court system is not, however, a necessary feature of federalism. In Canada, for example, provincially-constituted courts staffed by provincially-appointed judges administer reams of federal law as well as provincial law, and provincially-constituted courts staffed by federally-appointed judges administer reams of federal and provincial law indiscriminately. Sometimes provincially-constituted courts with federally-appointed judges are conscripted to administer federal law—as in bankruptcy. Sometimes, as in the case of the Federal Court, federal courts with federally-appointed judges administer only federal law, and sometimes federal courts with federally-appointed judges administer all types of law (as in the case of the Supreme Court of Canada).

If judicial institutions may be federalized along principles different from the legislative power, would a similar logic apply to executive and administrative institutions? Historically, this was the pattern of the legislative union, but administrative duality pursued in Canada East and Canada West between 1841 and 1867. Vestiges remain today. It is clear that where an administrative or executive agency is established by statute, the power to create that agency must be vested in the relevant legislative assembly. But the mandate and activity of the agency need not always be limited in this way. A Law Commission or a Civil Code Revision Office, or a Social Science and Humanities Research Council may examine or fund research into any area of law.

Does the same reasoning apply when the agency is established by prerogative? For example, would a royal commission established under the prerogative of the Lieutenant-Governor be necessarily limited to examining questions that fall within provincial jurisdiction? Again, the answer depends of the governance function actually being performed: authority to collect information, conduct research, make recommendations, and distribute benefits is less constrained than authority to impose burdens, enact formal rules, and decide disputes. In this connection, it bears notice that one of the central executive powers in a Parliamentary democracy—the assent to legislation—has always been federated on a different principle than either legislative or judicial powers: the powers of reservation and disallowance are a sovereign executive jurisdiction that vest ultimate authority in provincial matters in the federal executive and in federal matters in the Queen.

It is not just the formal institutions of executive governance that display multiple federal dimensions. So do the everyday institutions, instruments and activities of the modern administrative state. Governments typically manage property, personnel, information, and money using instruments as diverse as legislation, prerogative, taxation, subsidy, contract, ownership, and so on. Consider first the most visible of the governance institutions—the regulatory

agency. What principle of federalism governs the powers of executive agencies that have been delegated powers to both make law and to apply law? As far as I know, it has never been decided that jurisdiction to adjudicate must strictly track sections 91 and 92. Indeed, the idea of interdelegation to a jointly-constituted regulatory agency is evidence of how administrative boards and commissions can become sites of federalism with a tailor-made jurisdiction. Exactly what jurisdiction is the subject of interdelegation, and what structure of interdelegation is chosen, is as varied as the agencies themselves.

The further aspect of administrative federalism relates to the panoply of other instruments of regulatory governance: notably, owning, taxing, contracting, borrowing, and subsidising. Suppose a provincial government were to purchase real estate in another province. To what extent would doctrines of intergovernmental immunity be applicable, and if so, is this the same as the intergovernmental immunity that may apply to federal parks or other works or undertakings in provinces? In Canada, the primary locus of dispute about the boundaries of executive federalism of this sort has been in relation to the spending (and more recently, taxing power). But the scope for deploying alternative governing instruments is much broader. Historically, governments often pursued their regulatory agenda through Crown corporations (the ownership function). Increasingly, they are doing so through public-private partnerships and procurement (contract). In few federations are the spending, taxing, owning, and contracting functions of government limited strictly to purposes within the realm of their legislative competence.

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These reflections suggest that a richer understanding of normativity and of instruments of governance—that is, a much richer understanding of the multiple sites of federalism—will generate a more pluralistic conception of the fault-lines of federalism. Over the past century, courts and scholars have developed sophisticated doctrines for assessing the scope of the legislative jurisdiction attributed by sections 91 and 92. But there is nothing even as remotely subtle as this jurisprudence in relation to other governmental functions. It is now the time to theorize prerogative, executive, administrative, judicial, quasi-judicial, and delegated legislative powers along jurisdictional fault-lines appropriate to each. It is also time to develop interpretive doctrines for borrowing, taxing, spending, contracting, owning, and administering that are equally as subtle as those invoked to mediate conflicts of legislative jurisdiction.

D. PLURAL MODES: TERRITORIAL, PERSONAL, AND PSYCHOLOGICAL FEDERALISM

In the Introduction to this paper, federalism was presented as much more than a political doctrine about the manner of dividing sovereignty and

allocating the functions of government on a territorial basis. When all its formal and informal, institutional and non-institutional, quotidian and exceptional variants are considered, a highly variegated picture emerges. Most importantly, the state is revealed, despite its claims for itself, not to be the most salient normative institution for most people. Indeed, it is only possible to talk of federalism in the state once people have already embarked on the project of deciding who they are in relation to others and to the institutions and associations within which these relationships are pursued. These non-state federal reflexes set the scope of the personal and collective agency (sometimes called sovereignty) that political institutions are then meant to facilitate and promote.

There are at least three distinct types of what might be called "relational" non-state federalism. Think first of the panoply of voluntary associations and other institutions of civil society that human beings typically join and engage with as part of their sense of self. Most are themselves federated institutions: religious institutions, bridge clubs, farmers organizations, boy scouts, cancer societies, poverty relief associations, environmental groups, guilds and clubs, and a myriad of others. Notwithstanding the professional reflex of jurists to "de-legalise" these organisations as mere social institutions or voluntary associations, they substantially mediate the central issues of everyday life in Canada—transcendent belief, language, heritage, and aspiration. Moreover, in most cases, they do so with only a tenuous regard for distributive decisions taken in the political domain. In other words, the forms of relational non-state federalism are as multiple and variegated as the forms of political federalism.

At a second level, there is the vast range of institutions that are called in aid of economic activity: business enterprises, trade unions, universities, and hospitals. So, for example, in most corporate structures, and in everyday forms of corporate reorganization, shareholders of different categories have different rights. Their shares (their title of belonging) are not always identical, and will always confer a number of different prerogatives and obligations. Again, in any bankruptcy workout, it is necessary for the trustee to divide and organize creditors into discrete categories, depending on the nature of their claims. The authority of these creditors to accept or reject a proposition and to bind others to decisions taken is determined by the particular status as creditor (that is, the type of claim they are asserting).

Finally, and a bit closer to home, the modern university is a remarkably differentiated structure—within its units, across its disciplines, and extramurally. As a law professor I find my citizenship as a member of the Faculty of Law, of McGill University, of the Canadian Association of University Teachers, of the Canadian Association of Law Teachers, and of the Quebec Association of Law Teachers, not to mention the circles of interaction I share with other Canadian constitutional law teachers, with colleagues in other

departments, with collaborators in various interdisciplinary research teams, and in the countless informal groups that give direction and purpose to my everyday activities.

Let me conclude this subject by briefly noting a third kind of relational federalism suggested at the outset of this essay: the federalism of the family. I need not go over that ground here, other than to note, once more, that the manner of conceiving the federal principle within the family, and the specific manner in which tasks and responsibilities are distributed is both quite subtle, and not predetermined by the way these allocations are made in the realm of political federalism.

In all the examples of federalism so far considered—whether in the political institutions of the state, where citizens are invited to display loyalty to those who wield coercive or symbolic power as their delegates, or in myriad other circumstances where social institutions imply multiple layers of agency and affect—an implicit or explicit "other" has always been present. The idea of relational federalism calls forth a collective project involving aspirations as well as structures, processes, and institutions for their invention, identification, and accomplishment.

But undue emphasis on federalism as a collective project understates the pervasiveness of federalism as a personal project. The truest federalism is a psychological federalism that decomposes not political and anthropological affiliations, but legal subjects themselves. Critical theories of legal pluralism not only model the diverse motifs, ambitions, sites, and modes of federalism that compete for citizen engagement, but also acknowledge the law-generating capacity of the legal subjects. A legal subject is himself or herself a site of law; and once a site of law, a legal subject is necessarily a federation.

The point merits emphasis. Those who argue for notions of personal federalism—depending on perspective either pre-Westphalian (feudal) or post-Westphalian (in multi-ethnic states)—have only a truncated view of psychological federalism. While one might well imagine some notion of cosmopolitan citizenship, in which people affiliate without primary regard to geography (any country that has systems involving two or more public school boards—whether based on language, religion, or nationality—operative in the same territory knows the phenomenon) the federalism in issue remains a relational federalism. The criterion of distribution of agency and structure has changed from territory to commitment, but the notion of federalism remains external to the legal subject, who has no role other than as passive citizen.

Psychological federalism rests on a different premise. Rather than decompose institutional affiliation, it decomposes legal subjects. Might not the world-wide-web be the modern interpersonal instantiation of contemporary

psychological federalism—providing a link with traditional relational federalism? Psychological federalism strongly contests all forms of legal subjectivity that imply "nationalism"—even those that attempt to compose with multiple nationalisms. Both territorial and personal federalism rest on three questionable assumptions about individual identity. First, they only recognize certain identities. Second, they presume that some of the identities that they do acknowledge are more important than others: these "key" identities are said to define the identity of the state. Third, they tend to essentialize identity for the purposes of giving or denying legal recognition.

Psychological federalism accepts that identity is not unidimensional; identities are cumulative, intersecting, overlapping. Contemplate the bases upon which a person reflects, reacts, speaks, or presents himself or herself in public. That person might claim to be doing so "as" a white, or a heterosexual, or an anglophone, or a male, or a lapsed Protestant, or a 55 year-old, or someone who is legally-trained, or a bald person, or a resident of Montreal, and so on. How does one know whether another is speaking as some of these things (that is, as reflecting only one or the other of these particular identities)? As all these things at once? Or as none of these things?

In the end, identity is for each legal subject to discover and appropriate. There is no litmus test for identity—say as a francophone, as a mulatto, or as a woman—that can trump self-ascription. It is not for the state to say that Félix Leclerc is a white, male, francophone singer if he (she) understands himself (herself) to be a black, female, hispanophone painter. The state, just like other institutions within and through which a legal subject forges relationships, may view certain identity claims as less plausible than others, but the question of plausibility is always itself interactive and iterative. The conventional federal conception of identity—whether of national identities, subnational identities, or particular relational identities—peremptorily denies to legal subjects the possibility of negotiating the contours, contents, and cardinality of their multiple identities.

* * *

At bottom, arguments for federalism presume that social diversity is sufficiently important to merit structuring governance institutions. These institutions do more than manage collective life. They elaborate processes and regimes that both reflect and constitute the identity of legal subjects. Some identities are relational (that is, are formed in interaction with social groups); some are psychological (that is, are formed in interaction with one's understanding of how one conceives oneself). Relational federalism, whether territorial or personal, conceives the distribution of agency and sovereignty as external to the legal subject. Psychological federalism is a federalism internal to

the legal subject. Each legal subject is constantly remaking his or her relationships with others, and reallocating the scope of authority that these others are acknowledged to exercise in ascribing a particular identity to any pattern of interaction.

CONCLUSION: KALEIDOSCOPIC FEDERALISM

Throughout this paper I have argued for a conception of federalism that draws on contemporary understandings of law and legal normativity: most notably, legal pluralism. Many constitutional law scholars today lament the fixation of judicial and doctrinal interpretations of federalism that have been long abandoned in almost every other field of law: the early twentieth century Diceyan rule of law model of pure legalism.

Recall the foundational postulates of mainstream federalist theory. First, law is presented as a systematic assemblage of official rules of general conduct attributing various types of rights to discrete legal subjects. In this model, law is to be exclusively associated with the normative outputs of the state. This affirmation may be described as a postulate of "legal centralism." Second, there can only be a single legal order in any geographic territory. Federalism merely pluralizes the components of an otherwise unitary legal regime in that a supreme constitution authoritatively allocates law-making authority to different legislatures. This affirmation may be described as a postulate of "legal monism." Third, law results from the explicit activity of specified institutions such as legislatures, courts, and executive agencies. All the outputs of these institutions are law simply because of their origin; nothing can be law unless it emanates from them. This affirmation may be described as a postulate of "legal positivism."

In a legal pluralist framework, by contrast, law is presented and represents itself as radically non-centralist, non-monist, and non-positivist. Legal artefact, social milieu, and particular identity are seen as mutually constituting and constituted, as an unsystematic melee. Because each legal subject is constantly deciding the relative weight of rules, processes and values as amongst the several legal regimes that attract loyalty and commitment, the state's pretence to unify or rank these regimes is, both temporally and territorially, contingent.

The legal subject negotiates identity in every location of interaction—society, community, workplace, family, and the state—with the many (the hundreds, the thousands of) other legal subjects negotiating their identities there as well. Particular legal subjects are shaped by the knowledge and identities they inherit, create, and share with other legal subjects. So too with the different sites of law. They are constituted by the knowledge they possess, create, and share through particular legal subjects. By imagining law as a mode

of giving particular sense to particular ideas in particular places, legal pluralism shifts inquiry towards thinking of law as meaning, not machinery (as aspiration, not structure; as narrative, not norm).

In this construction of meaning, the metaphor of federalism is most appropriately a metaphor of *métissage*. For the legal subject himself or herself is the meeting ground of multiple legal subjectivities (citizenships), and the point of the encounter is the continuing dynamism and disorder that such an encounter presupposes. Those who see federalism as the static parallelism of two citizenships whose differences must be reconciled in the construction of a fictitiously coherent and stable whole, are trapped by a logic in which the uncertainty of encounter is either absent, past, predetermined, or already digested. A federalism of *métissage* is a federalism that highlights the mixing rather than the mix.

And so I come at last to the title of this paper: kaleidoscopic federalism. Kaleidoscopic federalism is a federalism that focuses more on the actual deployment of social and political power, than on abstract questions of who might, in theory, possess it.

Why kaleidoscopic? Because a kaleidoscope of continuously shifting shapes and colours, juxtapositions and patterns reminds us that processes, structures, and institutions in law are also in constant flux. Within each of several dimensions there will be dynamic distributions of agency and authority. We can no more know just how jurisdictional attributions will play out in advance, than we can know what jurisdictions will be in issue. We can no more know which relationships will be privileged, than we can know who will be privileged within these relationships.

Federalism is a metaphor for imagining the manner in which citizens conceive who they are and how they organise the relationships through which they pursue their purposes and ambitions in concert with others across the entire range of human interaction. Those who see federalism only as the structural consequence of a document called a constitution forget that federalism comprises both implicit and explicit texts and practices, as these are constantly churned by the pestle of everyday interaction in the mortar of social institutions. A kaleidoscopic federalism is fundamentally a federalism of aspiration or virtue: a federalism of equal respect, self-doubt, and trust that keeps contingent the interplay of agency and structure in the construction of self and other.

A quotation from a good friend and colleague provides an eloquent counterpoint to the view of federalism argued here. She says: "I abandoned federalism and became a separatist when I did research on the declaratory power. How can you have a federation where jurisdictional boundaries are in

flux, where one governmental agent can trespass on the territory and governing competence of the other, and where sovereignty is not clearly allocated?" Well, in my view, unless this is the case—unless you are prepared to tolerate shifting boundaries, different and multiple fault lines, and overlapping claims of authority, and to acknowledge that identity cannot be simply fractionated and parcelled out to different institutions in discrete packages—whatever else you have, you don't have federalism.

Postscript: Sources and References

The three central questions addressed in this paper are: (1) the history, foundations, structures, modes, and sites of federalism—with particular reference to Canada; (2) the design of institutions to accommodate linguistic, cultural, and social diversity; and (3) the construction of federal identity and the bearing of theories of legal pluralism on how these identities are mediated through law. Much of my own work over the past decade has focused on these themes, although I have not heretofore tried to draw them together in a single essay.

1. History, Foundations, Structures, Modes, and Sites of Federalism

Standard theories of federalism typically presume a fixed, monistic arrangement of normative institutions and normative forms. Territory becomes the sole differentiating criterion, and little attention is devoted to how these arrangements are actually churned by everyday interaction. More recently, some theorists have developed the concept of personal federalism as a way to negotiate cultural difference in the same territory. Both are forms of relational federalism.

I have discussed the history, images, and narratives of federalism in Canada in a series of texts that consider the place of Quebec, and Quebec legal institutions in the contemporary constitutional order. See "Harmonizing the Concepts and Vocabulary of Federal and Provincial Law: The Unique Situation of Quebec" in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism* (Ottawa: Department of Justice, Canada, 1997) at 29; "Encoding *Canadian* Civil Law" in J.E.C. BRIERLEY *et al.*, eds., *Mélanges Paul-André Crépeau* (Cowansville: Éditions Yvon Blais, 1997) at 579; "Three Centuries of Constitution-Making in Canada: Will There Be a Fourth?" (1996) 30 U.B.C.L. Rev. 211; "Meech Lake to the Contrary Notwithstanding: Part I" (1991) 29 Osgoode Hall L.J. 253 ; and "Meech Lake to the Contrary Notwithstanding: Part II" (1991) 29 Osgoode Hall L.J. 483.

The recent scholarship of three colleagues from Quebec, David Howes, Jean Leclair, and Jean-François Gaudreault-DesBiens is particularly insightful on these problems. See D. HOWES, "La constitution de Glenn Gould : le contrepoint et l'État canadien" in J.-G. BELLEY, ed., *Le droit soluble : con-*

tributions québécoises à l'étude de l'internormativité (Paris: L.G.D.J., 1996); "Pour une interprétation esthétique des constitutions canadienne et américaine" in J. LAMOUREUX, ed., *Droits, liberté, démocratie* (Montreal: ACFAS, 1991); "Picturing the Constitution" (1991) 21 American Review of Canadian Studies 383; J. LECLAIR, "The Supreme Court's Understanding of Federalism", in J.-F. GAUDREAULT-DESBIENS and F. GÉLINAS, eds., *The States and Moods of Federalism: Governance, Identity and Methodology*, (Montreal/Brussels: Yvon Blais/Bruylant, 2005); J. LECLAIR, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389; and J.-F. GAUDREAULT-DESBIENS, "The Canadian Federal Experiment, or Legalism without Federalism? Toward a Legal Theory of Federalism", in M. CALVO-GARCIA and W. FELSTINER, eds., *Federalismo/ Federalism*, (Madrid: Dyckinson, 2003), p. 79. I also owe much to Bruce RYDER'S essay, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L.J. 308; to S. LaSELVA, *The Moral Foundations of Canadian Federalism* (Montreal: McGill-Queen's University Press, 1996); and to J. WEBBER, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994).

On territorial federalism generally, see E. RUBIN, "On the Fundamentality and Irrelevance of Federalism" (1997) 13 Ga. St. U. L. Rev. 1009; A. HOWARD, "The Values of Federalism" (1993) 1 New Eur. Law Rev. 143; B. FRIEDMAN, "Valuing Federalism" (1997) 82 Minn. L. Rev. 317; M. BURGESS and A.-G. GAGNON, eds., *Comparative Federalism and Federation* (Toronto: University of Toronto Press, 1993), especially R. CHAPMAN, "Structure, Process and the Federal Factor: Complexity and Entanglement in Federations" at 69. The model of personal federalism is developed carefully in A. MESSARA, "Principe de territorialité et principe de personnalité en fédéralisme comparé. Théorie générale et conséquences en matière de décentralisation" in T. FLEINER-GERSTER and S. HUNTER, eds., *Fédéralisme et décentralisation* (Fribourg: Éditions Université de Fribourg, 1987) at 447.

2. Institutional Design to Accommodate Social Diversity

To date, questions of instrument choice and institutional design have been dominated by public choice theorists who assume that different processes of legal and social ordering are morally neutral and fungible. In discussions of federalism, this perspective is translated into the idea that federalism is fundamentally a choice about the location of rational structures of institutional decision-making, and the substantive content of canonical texts meant to attribute constitutional virtue (such as *Charters of Rights*). The alternative is to see instrument choice as a contingent interplay of agency and structure in the self-construction of citizens.

I have addressed these problems of institutional design from the perspective of social ordering processes in "The Swiss Army Knife of Governance" in P. ELRADIS, M.M. HILL and M. HAVLETT, eds., *Designing Government: From Instruments to Governance* (Montreal and Kingston, McGill-Queen's University Press, 2005) at 203; «The Governance of Human Agency» in Canada. Parliament. Senate. Special Committee on Illegal Drugs, *Canabis, our position for a Canadian public policy: Final Report / Senate of Canada, Special Committee on Illegal Drugs* (Ottawa, Ont.: Senate of Canada, 2002), online: Committee Research Papers <www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/research-papers-e.htm>; "The Integrity of Institutions: Role and Relationship in Constitutional Design" in R. MACDONALD, ed., *Setting Judicial Compensation: Multidisciplinary Perspectives* (Ottawa: Law Commission of Canada, 1999) at 7; "The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity" in K. KULCSAR and D. SZABO, eds., *Dual Images: Multiculturalism on Two Sides of the Atlantic* (Budapest: Royal Society of Canada—Hungarian Academy of the Sciences, 1996) at 52; "Recognizing and Legitimating Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada" in *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 232.

On different functions of governance and institutional means for regulating these functions, see J. POIRIER, "The Functions of Intergovernmental Agreements: Post-Devolution Concordats from a Comparative Perspective" (2001) P.L. 134; "Pouvoir normatif et protection sociale dans les fédérations multinationales" (2001) 16 C.J.L.S. 137; and "Federalism, Social Policy and Competing Visions of the Canadian Social Union" (2002) 18 C.J.L.S. 355; R.D. WOLFE, "See you in Washington?" (2003) 9:4 Choices 3; "Rendering Unto Caesar: How Legal Pluralism and Regime Theory Help in Understanding 'Multiple Centres of Power'" in G. SMITH and D. WOLFISH, *Who Is Afraid of the State? Canada in a World of Multiple Centres of Power* (Toronto: University of Toronto Press, 2001); A.-M. SLAUGHTER, "Governing in Global Networks" in M. Byers, ed., *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000). For a symbolic take on these questions, see J. WEBBER, "Constitutional Reticence" (2000) 25 A.J.L.P. 125; "Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform" (1999) 21 Sydney L. Rev. 260.

Issues of institutional design are closely linked to the questions of secession, federalism and subsidiarity as models of political accommodation of social diversity. See A. BUCHANAN, *Secession: The Morality of Political Divorce From Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991); T.M. FRANCK, "Postmodern Tribalism and the Right to Secession" in BROLMAN, LEFEBER and ZIECK, eds. *Peoples and Minorities in International Law* (Amsterdam: Nijhoff, 1993) at 11; D. EDWARDS, "Fearing

Federalism's Failure: Subsidiarity in the European Union" (1996) 44 Am. J. Comp. L. 537; G. BERMANN, "Taking Subsidiary Seriously" (1994) Colum. L. Rev. 332.

3. Identity and Legal Pluralism

Many commentators see federalism only in its instantiation through the political state. They do not consider the federal aspects of the family, the neighbourhood, or the workplace. The legal pluralist perspective argues that federalism within the state comprises both implicit and explicit texts and practices, as well as implicit and explicit texts and practices in multiple non-state social settings. A kaleidoscopic federalism, as argued in this paper, is distinct from both territorial and personal federalism. It is federalism of aspiration, of virtue, and of the recognition that every legal subject is a distinct site of federal governance.

I have argued for a pluralist understanding of law and identity in: "The Legal Mediation of Social Diversity", in A. GAGNON *et al.*, eds., *The Conditions of Diversity in Multinational Democracies* (Montreal: Institute for Research on Public Policy, 2003) at 85; "L'hypothèse du pluralisme dans les sociétés démocratiques avancées" (2002) 33 R.D.U.S. 133; "Normativité, pluralisme et sociétés démocratiques avancées: l'hypothèse du pluralisme pour penser le droit" in C. YOUNÈS and E. LEROY, eds., *Médiation et diversité culturelle : Pour quelle société ?* (Paris: Éditions Karthala, 2002) at 21; *Lessons of Everyday Law* (Montreal: McGill-Queen's Press for the School of Policy Studies, Queen's University and the Law Commission of Canada, 2002); "By Any Other Name..." in R. MACDONALD and B. BONNEVILLE, eds., *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada and B.C. Treaty Commission, 2001) at 73; "Regards sur les rapports juridiques informels entre langues et droit" (2000) 3 R.C.L.F. 137; "Legal Bilingualism" (1997) 42 McGill L.J. 119; "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Ariz. J. Int'l & Comp. L. 69; "What is a *Critical* Legal Pluralism?" (1997) 12 C.J.L.S. 25 (with M.-M. Kleinhans).

There are a number of excellent recent studies on the theory of identity and the relationship of legal structure to identity. See J. NEDELSKY, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91; N. KASIRER, "Le droit robinsonien" in N. KASIRER, ed., *La solitude en droit privé* (Montreal: Thémis, 2002); "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 J. Legal. Educ. 29; "Legal Education as *Métissage*" (2003) 78 Tul. L. Rev. 481 ; "Larger than Life" (1995) 10 C.J.L.S. 185; D. JUTRAS, "Énoncer l'indicible : le droit entre langues et traditions" (2000) R.I.D.C. 781; J.-F. GAUDREAULT-DESBIENS, "Spendeurs et misères de la juridicisation de l'identité" [unpublished]; J. LECLAIR, "Aboriginal Rights as Seen Through

the Prism of Federalism" [unpublished]; D. HOWES, "In the Balance: The Art of Norman Rockwell and Alex Colville as Discourses on the Constitutions of the United States and Canada" (1991) 29 Alta. L. Rev. 475; "'We Are the World' and its Counterparts: Popular Song as Constitutional Discourse" (1990) 3 International Journal of Politics, Culture and Society 315. See also the special issue (2000) XIII Can. J.L. & Jur.; C. TAYLOR, *Multiculturalism and "the Politics of Recognition"* (Princeton: Princeton University Press, 1993); D. ARCHIBUGI, "Principles of Cosmopolitan Democracy" in *Re-imagining Political Community* (London: Polity Press, 1997); W. KYMLICKA, *Multicultural Citizenship* (Oxford: Clarendon, 1995); R. JANDA and D. DOWNES, "Virtual Citizenship" (1998) C.J.L.S. 27.