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THE ROLE OF APEX COURTS IN FEDERAL SYSTEMS: BEYOND THE LAW/POLITICS DICHOTOMY

There is much disagreement about the central judiciary's role in federalism. Whereas some scholars view a central judicial umpire as a defining feature of federalism, others find courts acting as arbiters of federalism to be unnecessary, ineffective, or even marginally harmful[1].

INTRODUCTION

What role do apex courts play in federal systems? What should that role be? And, most importantly, should there even be a role for courts in federal systems? For decades, these questions have given rise to heated debates, which will arguably never end. Indeed, whenever an apex court issues a ruling in a federalism-related dispute, consequences ensue. These consequences can be legislative, with one level of government being allowed or prevented to go ahead with a particular public policy. They can also be financial, as judicially-arbitrated federalism-related disputes are often about the allocation of funds between governments. And since appropriate funding is critical in the implementation of most public policies, such rulings end up having social consequences. Last, but not least, they can also be political: court rulings may pacify or intensify disputes. As well, they may foster or impede unity within federations, particularly multinational ones, for even formally neutral or technical rulings may take on a symbolic dimension often disproportionate to their actual importance as precedents. Saying here that a consequence is symbolic does not amount to saying that it does not exist. For symbols do matter, and public perceptions of them matter even more. In other words, the ruling of an apex court in a federalism-related dispute is susceptible of having a tangible impact on the polity, and the fact that most citizens cannot directly feel it because of the technical nature, and thus relative unintelligibility, of such a ruling, does not change that conclusion.

In a way, it is precisely because of that impact that it is worth re-examining judicial interventions in federalism-related disputes, and, more specifically, whether apex courts should even play a role in them. I will first map out the main arguments raised against the judicial review of such disputes (I), after which I will turn to those defending the judicial branch's (somewhat) positive contribution to the evolution of federations (II). It shall

[1] D. HALBERSTRAM, « Comparative Federalism and the Role of the Judiciary », in *The Oxford Handbook of Law and Politics*, Oxford, Oxford University Press, 2008, p. 142, 143.

be observed here that both positive and negative assessments of the judiciary's role in a federation take on a normative and an empirical dimension. I will then briefly offer my own defense of that contribution, while stressing the need to end the zero-sum approach to the law and politics relation that seems to inspire many of these assessments (III).

Before going further, however, it is worth observing that the focus of this paper will be, as has already become clear, on « apex courts ». An apex court designates the highest judicial decision-maker within a federation, which has jurisdiction to decisively decide federalism-related cases, and whose rulings are not subject to any form of further review[2]. The jurisdictional scope of such apex courts is thus irrelevant: what counts for the purpose of this paper is that they resolve in the last resort federalism-related disputes. And while it is true that lower courts may often decide such cases, it is apex courts that end up setting the main parameters governing the interpretation of federal divisions of powers. What could potentially be of significance, however, is the mode of designation of their judges, as it may certainly influence federal actors' perception of these courts' political legitimacy. While important, examining that particular variable is beyond the scope of this paper. A further strength of the label « apex courts » is its generic and encompassing nature. It easily covers courts that exercise either *a priori* or *ex post facto* judicial review, or courts that decide constitutional cases only, as well as those that have a much broader jurisdiction. For example, under that definition, the Supreme Court of Canada, Germany's *Bundesverfassungsgericht*, or Spain's *Tribunal supremo* (even if Spain is not a federation strictly speaking) would qualify as apex courts. On the contrary, it is arguable that the competing notion of « supreme court » is too heavily connoted with the highest courts in the judicial pyramid of some major common law federations, including the United States of America and Canada to name but a few.

I. THE FOES

Two distinct lines of argument can be, and have been, raised against judicial interventions in the functioning of federations.

The first is empirical. Examining how apex courts decide federalism-related disputes, it holds that such courts tend to be biased against federated entities, making them more often than not a centralizing tool. In a way, their very role is to foster unity, if necessary at the expense of diversity. They can thus participate in the implementation of a system under which the federal government ends up controlling in many important respects the federated entities. Particularly when their judges are federally-appointed, « federal high court acts as an alternative method by which federally appointed persons can, through use of majority decision-making, become a de facto uni-

[2] M. TUSHNET, « Judicial Accountability in a Comparative Perspective », in N. BAMFORTH & P. LEYLAND (dir.), *Accountability in a Contemporary Constitution*, Oxford, Oxford University Press, 2013, p. 57, 58.

tary constituent assembly (or a *gouvernement des juges*) that challenges the very foundation of the federal principle[3] ». This observation points out to the nation-building role that apex courts may play in a federation[4]. But this role is not unproblematic, as, arguably, methodological nationalism is not intrinsically more legitimate when it favors the federation as a whole instead of federated entities[5]. In some federations, the locus of the nation is far from clear and therefore remains a debated issue. So, whenever one who adheres to a federated entity-centered methodological nationalism seeks to assess the apex court's impact on the evolution of federalism, the evaluation risks being negative.

An unstated assumption of such analyses often lies in the Manichean presupposition that centralization is intrinsically bad and that decentralization is ontologically positive. In other words, their lack of axiological neutrality when evaluating the case law emanating from apex courts, and therefore their flirt with normative theorizing, reveal their limits. It is one thing to observe a fact, *i.e.* the presence of recurring decisional patterns, and quite another to provide an interpretation of that fact informed by a particular theory or ideology. As Robert Howse once observed, abstractly valuing decentralization over centralization, or vice versa, is highly problematic[6]. Indeed, that exercise simply cannot be done in the abstract, and the criteria upon which it is founded must be publicised and justified. Such criteria risk being strongly influenced by the particular standpoint adopted by those performing the evaluation exercise[7].

These considerations draw our attention to the normative arguments that are often raised by critiques of judicial interventions in the functioning of federations. Such arguments may stem from various theoretical or ideological perspectives, and can also be influenced by the actual circumstances in which the judicial review of federalism-related disputes takes place in a given federation. The particular nature of the standpoint from which that practice is assessed may further taint the analysis, as it may end up raising the intensity of the critique so levelled. For example, someone who evaluates it from a staunch nationalist perspective extolling the virtues of the distinct

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[3] A. BZDERA, « Comparative Analysis of Federal High Courts: a Political Theory of Judicial Review », *Canadian Journal of Political Science*, 26, 3, 1993, p. 28.

[4] One could for example argue that the very broad interpretation given to the U.S. Constitution's commerce clause has to some extent fostered the development of an American nationality that transcends state identities. Admittedly, it may also have contributed to the radicalization of such identities through the hardening of the discourse of state rights.

[5] On methological nationalism, see U. BECK, « Toward a New Critical Theory with a Cosmopolitan Intent », *Constellations*, 10, 2003, p. 453; A. WIMMER & N. GLICK SHILLER, « Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences », *Global Networks*, 4, 2, 2002, p. 301.

[6] R. HOWSE, « Federalism, Democracy, and Regulatory Reform: A Skeptical View of the Case for Decentralization », in K. KNOP *e. a.* (dir.), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*, Vancouver, UBC Press, 1995, p. 273.

[7] R. SIMEON, « Criteria for Choice in Federal Systems », *Queen's Law Journal*, 8, 1983, p. 131.

identity that predominates in a federated entity may be more likely to view unfavorably and to more intensely criticize the nation-building agenda which he or she may decipher in the rulings of the federation's apex court.

Beyond the contextual influence of specific variables, however, some normative arguments come up more often than others in the critique levelled against judicial mingling into the working of federations, which can alternatively be characterized as useless, exaggerated or even illegitimate.

A very influential argument lies in the adherence, implicit or explicit, to the idea of the primacy of the political over the juridical. Albert Venn Dicey was one of the pioneers in raising that type of critique. Taking stock of the fact that federalism is somewhat synonym with legalism[8], he nevertheless deplored that judges in federations inevitably exceed their role of guardians of the constitution to become « master[s] of the constitution[9] ». He thus concluded that federalism « substitute[s] litigation for legislation[10] ». According to Baier, Dicey « saw in federalism too much of a reliance upon law to settle political and social problems[11] ».

Dicey wrote at a time the state's reach and structure were still minimal, and political processes arguably simpler. While it cannot be ignored, the law/politics dichotomy on which he relied must currently be grasped in light of evolutions in the practices of intergovernmental relations. I will return to that later, but suffice it to say for the moment that while important, the impact of a court ruling on the division of powers within a federation may not be as significant and as determinative as it was when Dicey was writing, precisely because of the increased complexity of state action, including the modes of organization of intergovernmental interaction, which has transformed cooperative federalism into a fact even when it is not recognized as a foundational norm. Reflecting upon the role of apex courts in federations therefore requires integrating that variable, which points to the need to be skeptical about single-standpoint analyses.

Yet, such analyses have flourished after Dicey, and still continue to do so. One of his contemporaries, James Thayer, essentially concurred with Dicey, while emphasizing the concept of legislative sovereignty and the inappropriateness of judicial second-guessing of legislative policy choices, which was in line with his rational basis review doctrine[12]. It would be a serious mistake to underestimate the deep influence of Thayer's rationality requirement on how the intellectual opposition to the judicial review of feder-

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[8] AV. DICEY, *Introduction to the Study of the Law of Constitution*, 10th ed., London, Macmillan & Co., 1960, p. 178.

[9] *Ibid.*, p. 175.

[10] *Ibid.*, p. 179.

[11] G. BAIER, *Courts and Federalism. Judicial Doctrine in the United States, Australia and Canada*, Vancouver, UBC Press, 2006, p. 9.

[12] J. THAYER, « The Origin and Scope of the American Doctrine of Constitutional Law », *Harvard Law Review*, 7, 1893, p. 129.

alism-related disputes unfolds, particularly in the literature emanating from the United States.

In a very different intellectual tradition and true to his philosophy revolving around the notion of political conflicts involving friends and foes[13], Carl Schmitt argued that courts that would decide, relying on their discretionary power and absent stable, general and predetermined norms applicable to the case, existential conflicts in a federation, would overstep their judicial role. Moreover, should such courts consider themselves above the parties to the federal compact, they would in fact become sovereign (while it is supposed to be the federation that is sovereign), and would thus have to be characterized as a full-fledged political force. Furthermore, Schmitt observed that a « mixed » decision-making body, with equal representation from the federal government and the federated entities, could hardly decide anything unless some « representatives » of these parties disrespect the wishes of their principals[14]. What is not clear in Schmitt's vision is what he understands by « existential conflict ». In the pages following his musings on who should decide such conflicts, he goes on to examine Calhoun's theory of sovereign state rights, in which the federal government is essentially a delegate of the federated entities, as well as the case of secession. In light of such examples, we may surmise that conflicts arising out of reasonable disputes about the interpretation of constitutional provisions governing the division of powers, *i.e.* stable, general and predetermined norms as Schmitt understands them, could not be characterized as « existential », in which case courts arbitrating such conflicts would not be usurping another branch's powers. If this reading is correct, apex courts would only be incompetent to the extent that they are called upon to deal with existential issues rather narrowly defined. It arguably follows from this, for example, that the Supreme Court of Canada, when asked to rule on Quebec's potential secession, should have accepted the argument of the amicus representing the interests of the Quebec government to the effect that this question was a purely political one, and should have declined jurisdiction as a result[15].

In recent decades, nowhere the principled opposition to the judicial review of federalism-related disputes has been more vocal than in the United States. Three main narratives have been invoked.

The first one rests on a belief – I use this word on purpose – that the political safeguards enshrined in the federation's structures and processes adequately protect the states against federal encroachments[16]. The decentralizing role played by political parties provides such a safeguard according to

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[13] C. SCHMITT, *La notion de politique/Théorie du partisan*, Paris, Flammarion/Champs, 1992, p. 63-66.

[14] *Id.*, *Théorie de la constitution*, Paris, PUF, 1993, p. 518-519.

[15] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

[16] H. WECHSLER, « The Political Safeguards of Federalism: the Role of the States in the Composition and Selection of the National Government », *Columbia Law Review*, 54, 1954, p. 543.

Larry Kramer[17]. Interestingly, this emphasis on political processes led Jesse Choper to argue that « [t]he federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates « states' rights » should be treated as nonjusticiable, final resolution being relegated to the political branches-*i.e.*, Congress and the President[18] ». As Yoo correctly points out, Choper's non-justiciability thesis notably relied on the assumption that the United States Supreme Court was the less democratic organ of federal governance[19].

This sheds light on the second main contemporary narrative iterated by foes of the judicial review of federalism-related disputes, *i.e.* democracy. In this narrative, the undemocratic nature of judicial review is contrasted with more democratic, and arguably more inclusive, fora. For example, Mark Tushnet has defended the idea that the important role played by courts of law in upholding constitutional rights has somehow led citizens to believe that only courts can determine what is constitutional or unconstitutional. In a way, the primacy of courts of law in interpreting these rights since the advent of constitutionalism in the United States would have had the perverse effect of inducing citizens to abdicate their responsibility in defending such rights in non-judicial fora or in civil society at large. A kind of path dependency and passiveness would have ensued. Tushnet instead calls for the emergence of a form of « populist constitutionalism », which would have citizens engaging in the interpretation and implementation of the constitution in various non-judicial fora, this being applicable to federalism as well[20]. This view clearly echoes, while somewhat radicalizing it, the political process theory defended by Weschsler and others before. Underpinning this argument is a critique of the aristocratic nature of constitutional review, which somehow expels the concrete *demos* from the constitutional equation. This is undeniably a legitimate concern. Yet, the relation of federalism to democracy remains ambiguous and most complex to grasp. I will return to this in section III of this paper.

The third narrative is a different iteration of the democracy-based one[21], but it adds a further layer to the argument, *i.e.* courts' incapacity « to per-

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[17] L. KRAMER, « Putting the Politics Back into the Political Safeguards of Federalism », *Columbia L. Rev*., 100, 2000, p. 215.

[18] J.H. CHOPER, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, Chicago, University of Chicago Press, 1980, p. 175.

[19] J.C. YOO, « The Judicial Safeguards of Federalism », *S. Cal. L. Rev.*, 70, 1996-1997, p. 1311, 1319.

[20] M. TUSHNET, *Taking the Constitution Away from the Courts*, Princeton, Princeton University Press, 1999.

[21] P. C. WEILER, « The Supreme Court of Canada and Canadian Federalism », *Osgoode Hall L.J.*, 11, 1970, p. 225, 240.

form the function of constitutional innovation and adjustment[22] ». It is exemplified by Paul Weiler's functionalist critique of the Supreme Court of Canada's case law on federalism-related disputes, in which he complained that both the legitimacy and the quality of judicial policy-making in such disputes were dubious, and argued that the type of political relationship underpinning a federal system does not require to be arbitrated by an external third-party, even when it apparently sours. Moreover, absent meaningful, *i.e.* not unduly indeterminate, legal guidelines allowing for the determination of a case, courts should not, as a matter of principle, interfere in federative disputes, which he deems to be essentially political[23]. The best way, according to him, to manage such conflicts is continuous negotiation and political compromise[24]. A corollary argument, advanced by Patrick Monahan, is that federative disputes, because of their inherently political nature, are irreducible to their legal dimension; accordingly, legal doctrines simply cannot pretend to be able to resolve such disputes[25]. More precisely, since federations represent a transaction formalised at a specific moment in the history of a political community, it is misguided to evaluate their evolution in light of what is perceived to be inherent to federalism. This brings Monahan to argue that federalism-related disputes must be resolved through political processes. Interestingly, he believes that the federal government offers a locus where the federal qualities of a society are articulated and protected[26]. Adhering to this belief presupposes equating the federation as a whole with the nation envisaged as a quasi-single *demos*. Again, the ghost of methodological nationalism shakes his chains.

As can be seen, many of the arguments against the judicial arbitration of federative disputes and their justiciability boil down to the law/politics dichotomy. We will see that this dichotomy plays a much less important role in the arguments supporting, to some extent at least, such a judicial role.

II. THE FRIENDS

Some scholars have approached the role of the judiciary in federations from a more positive angle. Here again, lines of argument tend to be either predominantly empirical or normative.

On the empirical side, Cheryl Saunders observes in a study on the functioning of federal institutions in eleven federations that courts are systematically vested with the power to review federalism-related disputes, with the exception of Switzerland. Thus, factually, the practice of having courts de-

[22] *Ibid.*, p. 250.

[23] *Ibid.*

[24] *Ibid.*, p. 243.

[25] P. MONAHAN, « At Doctrine's Twilight: The Structure of Canadian Federalism », *U. of T. L.J.*, 34, 1984, p. 47, 48.

[26] *Ibid.*, 96.

limiting the constitutional powers of each level of government is widespread, which makes theoretical attempts at delegitimizing this practice rather moot, as stimulating or sound as they may be from a theoretical standpoint. Yet, Saunders correctly observes that the mode of appointment of apex court judges may have an impact on the perception of the legitimacy of their rulings:

> Whichever approach is adopted, the court with final authority to interpret the constitution is an important actor in the federation. Responsibility for it usually lies with the national government, but the constituent units are often involved in some way, reflecting the role of the court in umpiring the boundaries of constitutional power between the two spheres, however its effectiveness may be[27].

For his part, Koen Lenaerts, basing his conclusion on a comparative study of Canada, Switzerland, Spain, Belgium, the European Union, and the United States, argues that « ..it is the proper function of the federal constitution, umpired by the federal judiciary, to strike the appropriate balance of powers between the federation and its component entities[28] ». He deems this « balancing » role to be a core judicial one, first iterated and explored in the United States: « The normal enforcement mechanism of the constitutional balance is of a judicial nature and in case of conflict between validly enacted federal and component-entity laws, the former prevail over the latter[29] ». Gerald Baier concurs. According to him,

> [The] task most commonly associated with a high court in a federation is the supervision and interpretation of federal arrangements. Courts complete this task in two ways, either by directly altering the division of powers through the simple resolution of jurisdictional disputes or by altering, in that process, the vocabulary and habits of federalism[30].

He sees as perfectly normal and legitimate what he characterizes as a judicial alteration of the « vocabulary of federalism » a task that is inevitable because while

> [f]ederalism and the law are meant to introduce certainty, […] constitutional language is often intentionally imprecise or quickly becomes outdated. Provisions are vague enough that contending societal forces and battling governments certainly cannot agree on equally acceptable definitions of key terms or provisions. This is the paradox of federal legalism that judicial review attempts to overcome[31].

Ironically, when someone like Patrick Monahan envisaged the indeterminacy of constitutional norms as a ground for expelling courts from the ar-

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[27] C. SAUNDERS, « Legislative, Executive, and Judicial Institutions: A Synthesis », in K. LE ROY & C. SAUNDERS (dir.), *Legislative, Executive and Judicial Governance in Federal Countries*, Vol. 3, Montreal & Kingston, Forum of Federations/IACFS, McGill-Queen's University Press, 2006, p. 344, 368.

[28] K. LENAERTS, « Constitutionalism and the Many Faces of Federalism », *Am. J. of Comp. Law*, 38, 1990, p. 205.

[29] *Ibid*., p. 263.

[30] G. BAIER, *Courts and Federalism…*, *op. cit*., p. 11.

[31] *Ibid.*, p. 11-12.

bitration of federalism-related disputes, Baier opines that their role is justified by that very indeterminacy. He further adds that courts not only allow for the evolution of federal arrangements, but for the perpetuation of federalism itself[32]. This particular stance goes directly against that of Weiler, who believed that judicial « adjustments » were either impossible or, at best, inefficient.

Edmond Orban also emphasizes the role of apex courts in federations as one of arbitration between the various levels of government. This arbitration role contributes to what he calls a process of « federalization-integration » which points to the need for some form of balance. However, he notes that this role may lead to very different outcomes depending on the federation involved, and its particular political, economic and social infrastructure. To the process of federalization-integration may thus be substituted one of centralization, unification, or even assimilation[33].

Other scholars prefer examining the role of apex courts in federations from a more normative standpoint.

This question may first be approached from the perspective of legal theory. Hans Kelsen, Carl Schmitt's intellectual nemesis, did not directly address it in the chapter dealing with federations in his *General Theory of the Law and the State*[34]. However, the emphasis that he places in his *Pure Theory of Law* on the judiciary's role to interpret the constitution – which stands at the apex of a country's normative pyramid – and the fact that federal divisions of powers are by definition constitutionally enshrined, arguably compel us to conclude that the judiciary can validly play that role in a federation. Kelsen indeed contends that absent constitutional provisions expressly allocating a non-judicial organ the power to decide disputes arising out of the constitution, the organs responsible for the application of the law, *i.e.* courts, must be presumed to also be vested with the power to determine the constitutional validity of the laws they are being asked to apply[35]. From this perspective, there would be no reason to exempt constitutional provisions dealing with federalism from this general review power.

The question of the role of apex courts in federations may further be examined from the standpoint of federalism itself, be it from an abstract perspective or a more historically-situated one. For instance, John Yoo relies on an originalist approach to argue that judicial review in a federation serves the main purpose of preventing abuses by the two orders of government. In the context of the United States, he argues that

> [t]he Framers created judicial review in order to prevent any of the branches or levels of government from exceeding the written limitations

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[32] *Ibid.*, p. 12.

[33] E. ORBAN (dir.), *Fédéralisme et Cours suprêmes*, Brussels & Montréal, Bruylant & Presses de l'Université de Montréal, 1991, p. 24-25.

[34] H. KELSEN, *Théorie générale du droit et de l'État* suivi de *La doctrine du droit naturel et le positivisme juridique*, Paris & Brussels, LGDJ & Bruylant, 1997.

[35] *Id.*, *Théorie pure du droit*, Paris & Brussels, LGDJ. & Bruylant, 1999, p. 268.

> on their powers. The federal courts would prevent the states from frustrating the legitimate exercise of national power, and, on the flip side of the coin, they would block the national government from infringing upon the independent sovereignty of the states[36].

Under this view, the safeguards put in place through the action of the judiciary would apply symmetrically. However, others have defended an asymmetrical application of that form of judicial review. Such is the case with no other than Oliver Wendell Holmes, who justified this asymmetry by the need to preserve the unity of the federation: « I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States[37] ». This view reveals the influence of methodological nationalism, the nation here being the global *demos* deemed to be represented by the federal government. Under this view, the main role of the judicial review of federalism-related disputes is not so much to maintain a balance between the federal and federated governments, but to advance the interests of a larger entity – « We, the People » – that transcends, perhaps at the risk of obscuring, smaller ones. In the process, federalism itself may end up taking the back stage, or becoming a remote second thought.

Methodological nationalism, be it centripetal or centrifugal, thus poses a threat to federalism, which further draws attention to the limits of zero-sum approaches to the law/politics dichotomy when reflecting on the role of apex courts within federations. For both in vertical and horizontal federal regimes, experience shows that

> political safeguards of federalism are insufficient, that concerns about judicial bias are overstated and that the particular limitations on the judiciary's ability to implement the principles of substantive subsidiarity, instrumental subsidiarity, and integration should inform judicial doctrine more systematically than they currently do[38].

III. BEYOND THE LAW/POLITICS DIVIDE

Alexis de Tocqueville observed long ago that federalism, as a political system, is complicated[39]. That complexity arguably makes it irreducible to unduly simple dichotomies, one being the law/politics dichotomy when it is applied to grasping the role of apex courts in federations. Thus, while proposals for limiting, if not eliminating outright, the judicial review of federalism-related disputes often stem from legitimate concerns, they stumble on a series of hurdles.

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[36] J.C. YOO, « The Judicial Safeguards of Federalism », *op. cit.*, p. 1404.

[37] O. WENDELL HOLMES, *Collected Legal Papers*, New York, Peter Smith, 1952, p. 295-296.

[38] D. HALBERSTAM, Comparative Federalism and the Role of the Judiciary », *op. cit.*, p. 144.

[39] A. DE TOCQUEVILLE, *De la démocratie en Amérique*, Paris, Gallimard, 1961, p. 253.

The first problem has to do with the actual unfolding of the law/politics interplay in most federations. It is indeed a *fact* that while court decisions may impact, and sometimes substantially, on the functioning of federations, they mostly tend to fill gaps or to dissipate constitutional ambiguities. They may occasionally provoke some political realignment, but realpolitik generally takes over and governmental actors carry on doing what they constantly do, *i.e.* negotiating agreements the legal status of which may vary depending on the agreements in question and on the legal tradition in which the constitutional law of the federation is anchored[40]. It is worthwhile noting that these variations between legal traditions, with civil law federations tending to juridify intergovernmental agreements and common law jurisdictions tending to leave them in the political realm[41], highlight the intrinsic ambiguity of what is considered political or legal.

In some federations, such as Canada or the United States, where multilateral formal constitutional amendments are difficult to come to life, if not de facto impossible, this dynamic of peri-constitutionalism is widespread, and expresses itself in the interstices of the constitutional text, as construed by these countries' Supreme Courts. As such, the relationship that is at the basis of any federation is irreducible to its formal expression in the constitutional text, which, in turn, is often imprecise or indeterminate. Although apex court rulings certainly instill an element of rigidity in an otherwise rather fluid political process, they do not alone eliminate that fluidity, nor should they. Even when « dual federalism » reigns supreme in courts, cooperative federalism often prevails everywhere else[42]. And this hardly says anything about how court rulings are actually implemented by the parties… Thus, and perhaps counter-intuitively, the evaluation of the role played by apex courts in the functioning and evolution of federations should never solely be done through the pathological prism of these courts' case law, a prism that is all the more prevalent in common law federations. I use here the expression « pathological prism » to emphasize the fact that courts of law tend to intervene only when disputes cannot be settled in other loci, jumping in the fray when the functioning of the federation is faced with a clear pathology. In my view, assessing the impact they have in a federation must also be made in light of the non-pathological moments of that federa-

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[40] See, *inter alia*, these works by J. POIRIER, « Les ententes intergouvernementales dans les régimes fédéraux : aux confins du droit et du non-droit », in J.-F. GAUDREAULT-DESBIENS & F. GÉLINAS (dir.), *Le fédéralisme dans tous ses états : Gouvernance, identité et méthodologie/The States and Moods of Federalism: Governance, Identity and Methodology*, Montreal & Brussels, Éditions Yvon Blais & Bruylant, 2005, p. 441; « Intergovernmental Agreements in Canada: at the Cross-roads Between Law and Politics » in P.J. MEEKISON, H. TELFORD & H. LAZAR (dir.), *Reconsidering the Institutions of Canadian Federalism. Canada: the State of the Federation 2002*, Montreal & Kingston, McGill-Queen's University Press, 2004, p. 425.

[41] See J. POIRIER, « Les ententes intergouvernementales dans les régimes fédéraux… », *op. cit.*

[42] See R.A. SHAPIRO, *Polyphonic Federalism. Towards the Protection of Fundamental Rights*, Chicago, University of Chicago Press, 2009, p. 111.

tion, *i.e.* of what concretely goes on in the federation's daily life. Superficial perceptions can then be relativized.

The second problem raised by attempts at expelling courts from the resolution of federalism-related disputes lies in the shaky normative assumptions upon which the justifications invoked sometimes rely.

In 1973, Paul Weiler had concluded his brilliant essay on « The Supreme Court of Canada and Canadian Federalism » by quoting a law article evaluating the impact of court rulings on labour relations[43]. The quotation was as follows:

> The federal allocation of legislative authority is an integral part of our system of self-government. When it works well, it does not need the sanction of constitutional law. It is only when the system breaks down that the Court's aid is invoked. But the Supreme Court cannot, by occasional sporadic decisions, restore the parties' continuing relationship and its intervention in such cases may seriously affect the on-going system of self-government. When their autonomous system breaks down, might not the parties better be left to the usual methods for adjustment of political disputes, rather than to court actions on the constitution? I suggest that the law stay out – but, mind you, not the lawyers[44].

The reference to this citation is interesting in two respects, first, as it emphasizes the crucial importance of the notions of self-government and democracy in court-skeptics' scholarly work; second, as it highlights the role of bargaining in political processes – and perhaps ironically the limits of bargaining in some contexts.

Federalism's relation to self-government and democracy is fraught with tension. This can be explained both by the intrinsically fluid signification of the concept of democracy, on one hand, and by the challenges posed by federalism to monolithic conceptions of democracy, on the other. One must initially observe that there are several theories of democracy. Some are substantive, while others are procedural. I will just identify a few basic elements of what, I think, is essential to the democratic idea in order to highlight the tension between democracy and federalism, which in turn points to the limits of democracy-based critiques of the judicial review of federalism-related disputes.

First, democracy implies the idea of self-government. But in a federation, shouldn't that idea of « self-government » be conceived of bearing in mind the constitutional recognition of at least two levels of legal orders overlapping with two levels of distinct and legitimate political communities? A further, and vexing, question is who the « self » is in the expression « self-government? » Does it refer to the « selves » of federated entities *qua* federated states? Does it refer instead to the citizens forming a *demos*? If so, which *demos*, and how many? It may be that for a majority of American cit-

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[43] P. C. WEILER, « The Supreme Court of Canada and Canadian Federalism », *op. cit.*, p. 250-252.

[44] H. SHULMAN, « Reason, Contract, and Law in Labour Relations », *Harv. L.R.*, 68, 1955, p. 999, 1024.

izens, the prevailing *demos* is that constituted by the broader federal polity; for instance, in spite of its resilience in the post-Civil War era, the discourse of state rights in the United States has had to be adapted to evolutions in the conception(s) of Americanness, and to the fact that if deep regional diversity once overlapped with deep legal diversity, the situation may have changed due to the influence of various political or legal events. As a counter-example, the well-known Canadian case reveals a situation where perceptions of the *demos* vary significantly across the federation. The position of Quebec, which in spite of its provincial status sees itself as a nation within the federation does not need further explanation. It shall suffice to say that most Quebecers tend to see themselves as Canadians through being Quebecers, a phenomenon that Charles Taylor characterizes as « deep diversity »:

> Many of the people who rallied around the Charter and multiculturalism to reject the distinct society [as the constitutional « qualifier » of Quebec society] are proud of their acceptance of diversity – and in some respects rightly so. What is enshrined here is what one might call first-level diversity. There are great differences in culture and outlook and background in a population that nevertheless shares the same idea of what it means to belong to Canada. Their patriotism or manner of belonging is uniform, whatever their other differences, and this is felt to be a necessity if the country is to hold together. This is far from accommodating all Canadians, and for most French Canadians, the way of being a Canadian (for those who still want to be) is by their belonging to a constituent element of Canada, *la nation québécoise*, or *canadienne-française*. Something analogous holds for [A]boriginal communities in this country; their way of being Canadian is not accommodated by first-level diversity[45].

Thus, the understanding of the idea of self-government in a federation must be open to the possibility of acknowledging instances of deep diversity, which means that this idea must be recognized as potentially polycentric.

Secondly, democracy requires that one expression or another of the rule of law must be implemented, which means, at the very least, that everyone is equal before the law, which is not without difficulty in a federation, as the citizens of some federated entities may get better social services, or pay less taxes, than citizens of other federated entities. How do we conceive of equality in a federal setting: as intergovernmental or as interpersonal? In addition to pointing to considerations pertaining to substantive equality envisaged in a federal context, this raises the question of potentially competing definitions of a federation.

Thirdly, democracy cannot be reduced to majority rule. But if it is, then federalism risks being perceived as undermining democracy, in the sense that it is likely to frustrate majority rule as a result of the division of the 'national' polity into smaller segments the existence of which is constitutionally entrenched. This may be the case in the abstract, but, precisely, a federal

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[45] C. TAYLOR, « Shared and Divergent Values », in *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism*, Montreal & Kingston, McGill-Queen's University Press, 1993, p. 182.

polity is not any abstract polity: it is a polity that, for diverse reasons, has been politically designed and legally constituted as federal, which by definition implies some degree of political fragmentation. Federalism does not imply a monolithic polity, but presupposes instead a plural one. At the very least, the contours of the *demos* are not without ambiguities, and it could be said that there are scales of *demoi*. Thus, assuming that the judicial review of federalism-related disputes is problematic because it frustrates the will of the majority at a pan-federal level might significantly obscure the otherwise legitimate interests of the federated *demoi*, some possibly more sensitive than others. On these questions, I refer my readers to my remarks above on Quebec.

Fourthly, democracy has increasingly been understood as consubstantial to the constitutional recognition and enforcement of some basic fundamental rights and liberties, such as the freedoms of expression and association, but it must be acknowledged that this protection is historically contingent. As the emphasis placed on parliamentary sovereignty in the British constitutional tradition reveals, it has long been believed that « English liberties » could adequately be protected by Parliament. The legicentrism extant in many European civil law jurisdictions enshrined the same type of assumption. However, even in the latter jurisdictions, constitutionalism is increasingly spreading, with the substantial structural and cultural changes it brings to a society. Federations have not been spared by this phenomenon, and the citizen-centrism that has sprung up as a result of this dynamics may have impacted on perceptions of federalism. For example, in Canada, the phenomenon of « Charter-Canadians » is well-documented, and has certainly contributed to reducing the political importance of federalism in some segments of the population[46]. Yet, it is has not erased its institutional and legal salience. Moreover, although it could be, and has been, argued that social, cultural and economic rights are as important as civil and political ones, their materialization, which is already significantly more complicated given the positive obligations they impose upon the state, is made even more difficult in a federation because of the presence of at least two levels of governments that may adopt divergent socioeconomic policies. While some have argued in the past that, for that very reason, federalism is problematic from the standpoint of distributive justice, no universal rule can be drawn in that respect.

Fifthly, federalism is said to foster public participation in democracy[47]. The idea is that because of their alleged proximity to citizens, the governments of the federated units provide them with an enhanced opportunity to involve themselves in the functional process of self-government. Yet this representation somehow echoes an era where perceptions of time and space

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[46] J.-F. GAUDREAULT-DESBIENS, « Memories », *Supreme Court Law Review*, 2nd Series, 19, 2003, p. 219.

[47] See K.-D. SCHNAPHAUFF, « El Sistema Federal de la Republica Federal de Alemania », in P.J. MEEKISON (dir.), *Las relaciones intergubernamentales en los paises federales. Una serie de ensayos sobre la práctica de la gobernanza federal*, Ottawa, Foro de Federaciones, 2003, p. 41.

were different, and, most importantly, where information technologies were not as effective in alleviating physical distance as they are today.

It is quite clear, in light of the above, that the relationship between federalism and democracy leads to contingent outcomes at best. Moreover, and this is crucially important, acknowledging the potentially ambiguous and plural nature of the federal *demos* should induce caution. Consequently, grounding an argument against the judicial review of federalism-related disputes on democracy is perilous.

A corollary argument is based on a representation of the proper role of courts vis-à-vis legislatures, which should be one of deference. This argument knows several variations, however. For some, the deference should be symmetrical and absolute; for others, it should be relative and asymmetrical. For example, in the American context, Shapiro suggests distinguishing between situations in which a court is asked to decide a case in an area where Congress has clearly spoken on a matter under its jurisdiction and has thus excluded the states from this regulatory area, and situations where Congress has not so clearly spoken. In the former case, courts should abstain from actively intervening in a dispute with a state, but not in the latter. Shapiro makes this argument while elaborating a theory of « polyphonic » federalism which, relying on a functional approach, denies the possibility of identifying core « local » and « national » issues, and holds that courts, when competent to hear a case, should presume that concurrent powers can be validly exercised[48]. But the type of review envisaged here is radically univocal and asymmetrical, being essentially confined to the review of « alleged state infringements on national prerogative[49] ». As interesting as it may be, this view does not merely call for judicial deference towards legislative decisions, but also for judicial deference towards one particular level of legislative decision-maker, *i.e.* the federal Congress with its particular institutional design. Of course, Shapiro does not pretend to propose a universally applicable theory of federalism. Yet, although its roots in the American experience are clearly acknowledged, his approach arguably enshrines a set of normative assumptions about the predominant *demos* and the suitability of a monological, functionalist analytical framework that is rather common in its country of origins, but that may not apply so easily outside of it. Shouldn't the evaluation, from a generic rather than country-specific angle, of the contribution of courts to federalism be made bearing in mind the multiplicity of standpoints that may influence the perception of the legitimacy and efficiency of judicial interventions in federalism-related disputes? In that sense, the foes/friends dichotomy that I purposely, and to some extent ironically, used in this paper can be misleading, at least whenever these foes and friends anchor their reflections in the context of a particular federation.

It is probably already clear to my readers that I consider that courts play an essential role in monitoring the evolutions of federations so as to ensure that a country's federal dynamics is not left to the whim of one single order

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[48] R.A. SHAPIRO, *Polyphonic Federalism…*, *op. cit.*, p. 111-113.

[49] *Ibid.*, p. 112.

of government, whatever it is, and thus that federalism itself is irremediably altered, or becomes merely cosmetic. It must be equally clear, however, that I do not idealize the role of courts, and that I acknowledge at the outset its limits – I shall return to the problem of idealism in conclusion. That being said, acknowledging limits is not the same thing as denying courts any useful role, nor does it say anything about the type of norms they can refer to when monitoring the behaviour of federal actors.

In this respect, it is important to stress that because the content of any federal bargain is bound to remain, to some extent, incomplete or indeterminate[50], which allows for its evolution, tools of flexibility must be elaborated for the efficient conduct of the administrative relations between federal actors – the famed « political processes ». Courts must not unduly hinder the working of such processes, but must be vigilant so as to prevent the obliteration of core federal values in these processes[51]. In this respect, I share Daniel Halberstram's view that

> [t]he promise and limitations of judicial review suggest that the judiciary can help protect and complete federalism. But it must do so with the understanding that the primary determinants of the federal balance lie in politics, and in bargaining over the appropriate jurisdictional scope for government action. Accordingly, the judiciary should control fair play and cohesion among the levels and units of government by enforcing non-discrimination rules and basic rules of free movement. It should also preserve the organizational integrity of the various levels and units of governments. And courts should impose burdens of justification on the central government to help ensure the salience and transparency of what is ultimately a political determination[52].

I further concur when he highlights the deleterious consequences of the predominance of functionalism when courts tackle federalism issues, which more often than not ends up undermining core concerns relating to the latter[53]. In view of addressing these problems, I have begun elaborating since 2002 a deontic-axiomatic theory of federalism which argues, against dominant scholarly views, that federalism should not be envisaged as being systematically subservient to external values, and therefore be reduced to a mere instrumental role. It accordingly defends the thesis, again against dominant views, that identifying core values as inherent to federalism is possible and that such values can be operationalized as foundational legal principles in the adjudication of federalism-related disputes, in a context-sensitive manner[54]. Indeed, while court interventions in such disputes inevitably mo-

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[50] G. BAIER, *Courts and Federalism…*, *op. cit*., p. 11.

[51] D. HALBERSTRAM, « Comparative Federalism and the Role of the Judiciary », *op. cit.*, p. 143.

[52] *Ibid*., p. 156.

[53] *Ibid.*

[54] See, in English, J.-F. GAUDREAULT-DESBIENS, « The Irreducible Federal Necessity of Jurisdictional Autonomy, and the Irreducibility of Federalism to Jurisdictional Autonomy », in S. CHOUDHRY, J-F. GAUDREAULT-DESBIENS & L. SOSSIN (dir.), *Dilemmas of Solidarity. Redistribution in the Canadian Federation*, Toronto, University of Toronto Press, 2006, p.

bilize the explicit sources of normativity – constitutional texts, precedents, etc. –, they can also be informed by core principles against which formal law-based outcomes are assessed, and the reasons underpinning them, tested. Through the process of balancing which is inextricably linked to the weighing of competing principles, some negative aspects of categorical approaches can be alleviated, and federal actors as well as relevant decision-makers – courts included – are asked to justify their arguments not vis-à-vis values that may be legitimately held but that are external to federalism, but vis-à-vis values that federalism generically seeks to foster. I refer my readers to these papers for further detail.

What needs to be stressed here is that principles, when used by courts, do not systematically predetermine outcomes. It is in light of the facts of the case, the particular intellectual tradition in which federalism is understood in a given federation, and well as the political and historical context of that federation that principles are individuated and weighted against each other. Thus, if that approach may be characterized as « conservative » in that it not only values outcomes that reflect an intersubjectively legitimate conception of federalism, but seeks to maintain federalism by taking it seriously, it does not amount to freezing federalism in time, nor does it wish to extirpate flexibility from it. Actually, provided they remain within some federalism-relevant bounds, political actors are encouraged to experiment and to optimize their constitutional potential. Under that view, courts should not refrain from intervening in federalism-related disputes when asked, but should nevertheless be aware of the importance of referring to the core obligational content of federalism when calibrating their decisions, and deciding their modes of intervention. In light of this, it becomes difficult to identify a silver lining which would indicate when a court should intervene, and when it should not. In all likelihood, courts can intervene, when needed, in the ordinary working of the federation – in its « daily life » in a way – , in times where adjustments are needed (assuming that they must not unduly hinder political processes and that they should encourage rather than discourage cooperative behaviours), or when political practices or attitudes threaten the balance of powers within the federation or impose substantial negative externalities on some federal actors. Of course, contextual variables such as the federation's particular institutional design, the apex court's jurisdiction, or the structure of constitutional review – *a priori* or *a posteriori*, abstract of concrete – must be taken into consideration. But these variables will primarily affect how courts will intervene, and not whether they should intervene.

Courts can, and should, also intervene when federations face, or could face, a « constitutional moment, *i.e.* where the interests of the community and the rights of its members are the subject of a significant deliberation[55] ».

185; J.-F. GAUDREAULT-DESBIENS, « The Canadian Federal Experiment, or Legalism without Federalism? Toward a Legal Theory of Federalism », in M. CALVO-GARCIA & W. FELSTINER (dir.), Federalismo/Federalism, Madrid, Dyckinson, 2004, p. 81; J.-F. GAUDREAULT-DESBIENS, « Towards a Deontic-Axiomatic Theory of Federal Adjudication » (forthcoming).

[55] See B. ACKERMAN, *We the People: Foundations*, Cambridge, MA, The Belknap Press of Harvard University Press, 1991.

For example, a federation confronted with a secessionist threat would arguably face such a moment, and a judicial intervention to clarify the rights and interests of all relevant stakeholders might be warranted. This is precisely what the Supreme Court of Canada did in 1998, when, after accepting to provide an advisory opinion on the question, it rejected the idea that secession could be characterized as either purely political or purely legal.

Granted, a judicial intervention on such an existential question is markedly different from one the effect of which will be felt on the interpretation of the division of powers. However, while this question may be seen as trivial in some federations, it may be seen as crucial in others, such as sociologically multinational ones, hence the importance of recognizing constitutional moments where a court must intervene, and, most importantly, to understand that what a constitutional moment is can be addressed from various standpoints.

This judicial role further seeks to maintain a federal culture, which points to the pedagogical role of adjudication, notably through a resort to principles giving meaning to the so-called federal principle, this with a view to checking the influence of concerns that, while important (such as economic ones), may reasonably be characterized as external to federalism proper[56].

One question that then arises is that of the impact of formal or formalized norms on the citizens' engagement vis-à-vis a regime-value, like federalism (or democracy), and the respect for the principles underpinning that regime-value. Some have surmised that it is rather informal norms which end up positing the expected behaviour of political actors and the relation that citizens have with these actors and their behaviour[57]. Does it mean that the formal affirmation of norms, particularly by apex courts, is useless? Some, like Barry Weingast[58], have hinted that self-enforcing, federalism-related constraints are possible, in that the most powerful political actors will abstain from violating them if they believe that a majority of the population would oppose their behaviour and would sanction it through usual political channels. This presupposes that these constraints are consensual, and that the citizenry has attained a level of coherence allowing them to mobilize against that behaviour, so as to make the potential sanction plausible[59].

Such a vision, which reflects a bias favorable to a hands-off approach regarding the intervention of courts in federalism-related disputes, prima fa-

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[56] J.-F. GAUDREAULT-DESBIENS, « Pour une théorie déontique-axiomatique de la décision en contexte fédéral, ou quelques jalons pour une philosophie politico-juridique du fédéralisme », *Jus Politicum*, 16, p. 135-177 (http://juspoliticum.com/article/Pour-une-theorie-deontique-axiomatique-de-la-decision-en-contexte-federal-ou-quelques-jalons-pour-une-philosophie-politico-juridique-du-federalisme-1090.html).

[57] K.E. DAVIS & M.J. TREBILCOCK, « The Relationship Between Law and Development: Optimists versus Skeptics », *American J. of Comp. L.*, 56-4, 2008.

[58] B. WEINGAST, « The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development », *J. of Law, Economics and Organization*, 11-1, 1995.

[59] *Ibid.*, p. 10.

cie raises two problems. Wouldn't political actors judging that no strong consensus can be identified, or that citizens do not care about federalism, or are just too divided to mobilize against them, be tempted to see in that an incentive to ignore federalism-related concerns? Conversely, assuming that a consensus can emerge, would it be sufficiently intersubjective in the sense that it would emanate from several segments of society, whose interests in the federation can be different but could still overlap through a form of « convergence of interests?[60] ». Absent such consensus, wouldn't there be an incitement to marginalize some segments of the population which could be superimposed on particular federated units? Of course, such a dynamic could have a disproportionately deleterious effect in multinational federations. The desired consensus should thus emanate from multiple segments of the society.

That being said, even someone who, like Weingast, is *a priori* skeptical towards the influence of formal norms on political actors' behaviour, acknowledges that such norms are indeed susceptible of playing a significant structural role in processes leading to the production of consensuses, even when they are not formally enforced. As he notes, « an appropriate chosen set of public rules embodied in a constitution can serve as a coordination device because it provides each citizen with a similar way of judging and reacting to state action[61] ». In other words, formal norms or norms formalized with the imprimatur of a legal producer (which could include, for example, constitutional conventions deemed of political nature in spite of being judicially recognized in the Westminster model)[62], could partake in the constitution of a horizon of common reasons where courts could draw when evaluating the action of federal actors. The law is thus able to feed politics.

Two central ideas come out of this.

On the one hand, leaving political actors without enforceable, normative parameters for managing their relations in a federal context, risks opening the door to the obscuring of core federative values, as a result of which the momentous interests of a dominant group could prevail, perhaps for a long time. Such an outcome is likely to undermine trust in the federation, which points to apex courts' trust-building function. From that perspective, the question is not so much whether apex courts should play a role in federations, but rather how we should look at what they do when they do intervene in federations.

On the other hand, even if the formal recognition, be it in the constitution or in the case law, of normative principles deemed to be inherent to federalism, will never be a panacea, it could still contribute, without entirely

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[60] On the convergence of interests' theory, see D. BELL, « *Brown* v. *Board of Education* and the Interest-Convergence Dilemma », *Harvard Law Review*, 93, 1980, p. 518.

[61] B. WEINGAST, « The Economic Role of Political Institutions... », *op. cit.*, p. 15.

[62] *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

determining it of course, to mold the culture of political actors and citizens. Sometimes symbolic effectiveness is as valuable as concrete effectiveness.

CONCLUSION

Philosopher Gaston Bachelard elaborated in the early twentieth century the notion of « epistemological obstacle » which designates obstacles to the progress of thought. One of the obstacles he identified is idealism, which makes of ideas « the fundamental explanatory principle of the world [63]». Ideas then become the « foundation of reality » which may have the effect of obscuring the otherwise uncontested existence of obvious social or natural phenomena[64]. When this happens, « ideal realities[65] »prevail over material ones, something that is likely to lead to highly problematic situations. If there is a conclusion to be drawn from the above, it probably lies in the need to reject Manichean representations when reflecting on the judiciary's role in the arbitration of federalism-related disputes. Political and judicial processes are highly complementary in the life of a federation… Neither should be idealized, but none should be despised either.

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[63] G. BACHELARD, *La formation de l'esprit scientifique. Contribution à une psychanalyse de la connaissance objective*, 12th ed., Paris, Vrin, 1983, p. 49.

[64] *Ibid*., p. 49-50.

[65] On the concept of « ideal reality » see M. GODELIER, *L'idéel et le matériel. Pensée, économies, sociétés*, Paris, Fayard, 1984, p. 198.