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Children of Two Logics: A Way into Canadian Constitutional Culture

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Children of two logics: A way into Canadian constitutional culture

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Through an analysis of the Canadian case, this article explores the tension between the universal and the particular in modern constitutional imagination, arguing that the points of friction between these two "logics" of constitutionalism are invaluable entry points into understanding the defining features of various constitutional cultures. The article argues that to understand Canadian constitutional culture, both at the structural level and also in the finer strokes surrounding given issues, one must appreciate that Canadians are the children of two constitutional logics: that of the local, the particular, and harmonious relations between diverse communities achieved through political compromise, and that of the universal, the metaphysical, and of a faith in the reason of legal principle. Examining issues of religious and cultural difference, judicial review, and indigenous rights, the article uses Canadian constitutionalism to illustrate that the points at which the march of the logic of universal reason meets resistance in the particular are key junctures for understanding a country's constitutional culture.

1. Introduction

Canada was not founded on a vision of universal truth or of fundamental human rights. There was no moment of rupture from the rule of law that inaugurated a project of ideal state creation, no constitutional moment of popular coalescence around metaphysical ideals that would underwrite the country's life. France and the United States, constitutional traditions that have dominated so much of constitutional theory, can hold out such statements of universal truth as the imaginary foundation of their republics. The French Revolution, and the republic that it yielded, had beating at its heart the Declaration of the Rights of Man and Citizen, articulating natural rights of a universal nature that would be the imaginative core of a new constitutional culture. The US Declaration of Independence began not with a statement about the form

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of government sought, or a catalogue of injustices, but with an ontological claim: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." It is this statement of universal truth that animated the revolution and informed the constitutional tradition to which it would give birth.

Not so in Canada. Canada came about through slow evolution: the Treaty of Paris, local treaties between indigenous peoples and colonial representatives, a Royal Proclamation, followed by acts of Imperial Parliament, inching towards experiments in responsible government and, ultimately, Confederation and its first Constitution in 1867. To the student of Canadian history, the development of the Canadian Constitution is a source of inexhaustible interest. Yet it is a story of relationships, of political compromises, of conventions and meetings navigating local interests in an effort at a reasonably workable and effective system of government. "A reasonably workable and effective system of government" . . . a far cry from the Bill of Rights and the French Declaration. Rich though the details of this early phase in Canadian constitutional history may be, it is not the stuff of novels or movies; it captures the interest of the local historian, not the imagination of the world.

Yet it would be quite wrong to say that Canada's constitutional origins, and the Constitution that was crafted in 1867, lacked inspiring vision or noble object. The ring of its ambition simply did not carry in the same way as the French or the model of revolutionary state formation to the south. The ambition was expressed in what would fairly be called a mundane set of provisions establishing branches of government, dividing powers, providing for schools, and tenure for judges. There was no Bill of Rights or formalized statement of political ideals. Of course Canada would receive its modern declaration of rights, the Charter of Rights and Freedoms,[1] in 1982, with its guarantees of rights and fundamental freedoms bringing Canada into the global family of polities organized around abstract universals. With the Charter, there would be no lack of high-sounding language and aspirational statements. But what could be said of the Canadian constitutional project pre-Charter, before this desiderata of rights and freedoms that echoed the core of international law, developing European constitutionalism, and the heart of the great constitutional projects of modernity?

Well before the addition of the Charter to the Canadian constitutional landscape, the great Canadian constitutional scholar F. R. Scott could say the following of the project of constitutionalism in Canada:

> [A] constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual and of cultural groups to one another and to the state. If human rights and harmonious relations between cultures are forms of the beautiful, then the state is a work of art that is never finished. Law thus takes its place, in its theory and practice, among man's highest and most creative activities.[2]

[1] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.

[2] Frank R. Scott, Essays on The Constitution: Aspects of Canadian Law and Politics at ix (1977).

There is much in Scott's statement. Constitutionalism is about harmonious relations between cultures, not just the relationship of state and citizen. It is about the relationship of groups to one another, not solely or even primarily about the individual. Prior to the Charter, the aspiration, nobility, and beauty of the Canadian constitutional project lay in the particular. The heart of the Canadian constitutional project was the logic of compromise, relativism, and local interest, negotiated into workable configurations that bound communities together. The vision lay in the nobility in making government work *in this place* given local conditions and the specific interests of given communities. Canadian constitutionalism was an exercise in the logic of the particular; it was consummately political.

Today, the Charter of Rights and Freedoms sits at the forefront of Canadian constitutional imagination. The British North America Act (now the Constitution Act 1867),[3] with its political arrangements and expressions of contingent history, remains crucial to the life of the country but the culture of Canadian constitutionalism has shifted. The Charter's protections of universal human rights and freedoms based in a modern metaphysics of state and citizen has migrated to the center of public consciousness about what Canadian constitutionalism entails. This is the Canadian constitution that resonates with the Bill of Rights, with the achievements of revolution, with the universal declarations that now set the path for the profoundly anti-political project of European constitutionalism.[4] It is a constitutionalism in which the all-purpose reason of proportionality balancing is the lodestar of good governance just as it is across the Western world.[5] And, as such, it is a constitutionalism that allows for—perhaps demands—comparison with and sampling from other similar constitutional orders. If all are expressions of a reasonable response to a set of universal claims about the human, the migration of constitutional ideas seems inexorable.[6] This constitutionalism is an exercise in the logic of the universal; it is concept-governed and the ideal of modern legality.

One cannot appreciate Canadian constitutionalism without recognizing that this second, powerful logic has never eclipsed the first. To understand Canadian constitutional culture, at both a structural level and also in the finer strokes surrounding given issues, one must appreciate that Canadians are children of two constitutional logics—that of the local, the particular, and of harmonious relations between diverse communities

[3] Constitution Act 1867 (UK), 30 & 31 Vict, c. 3, reprinted in RSC 1985, App. II, No. 5.

[4] For a discussion of European constitutionalism in terms that resonate with this piece, *see* Ulrich Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 Eur. L.J. 14 (2003).

[5] For a sense of the dominance of proportionality theory in modern constitutionalism, *see, e.g.*, Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans., 2002); Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 Ratio Juris 131 (2003); David M. Beatty, The Ultimate Rule of Law (2004); Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. Toronto L.J. 369 (2007). For a critical discussion of the descriptive sufficiency of such theories *see* Benjamin L. Berger, *The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination*, 61(4) U. Toronto L.J. 579 (2011). *See also* Grégoire Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 Can. J.L. & Jurisprudence 179 (2010).

[6] *See, e.g.*, Sujit Choudhry, The Migration of Constitutional Ideas (2007).

through political compromise; and that of the metaphysical, the universal, and of a faith in the reason of legal principle. These logics are not pure forms of some sort but, rather, imaginative formations about the nature of government, community, and authority that pull on one another at all points. It would be wrong to imagine that doctrines of federalism and separation of powers are bereft of universal ideals or that a bill of rights is detached from the politics of the particular. At a deep level, federalism gives expression to ideals of democracy, of self-determination, and (as the Scott quotation makes plain) inter-cultural justice. And, like most bills of rights, the Canadian Charter was the product of local, historical debate and compromise and remains a site for these more political battles.[7] Yet each has a dominant inflection—an orientation—that maps onto the two logics that I have identified. Contemporary Canadian constitutional culture is revealed in the story of navigating between these two logics at certain key points, tacking back and forth between the two, frequently confronting the tensions arising from fidelity to two visions of what constitutions are really *for*, and finding a way to live with the resulting paradoxes. This is the central claim of this piece: that tracking the abiding relationship between these two logics of constitutionalism is crucial to understanding the nature of Canadian constitutional culture.

In this article I will look at three areas of modern Canadian constitutional life in which one finds the play of these two constitutional logics. I will look to cultural and religious difference; judicial review; and issues of indigenous rights, title, and government as points at which one finds the imprint of these competing logics, and where it becomes clear that it is precisely at such points that one gets a line of sight into Canadian constitutional culture. When we find that the particular resists annexation by the logic of the universal we have our hands on something important. At such points the particular is expressing something essential about constitutional identity, about what defines this community as one that asks for affection rather than assent. Here, the obdurate force of "what is reasonable" pauses at the threshold of a claim about "who we are."

My purpose is to illuminate something generally unnoted but essential in the culture of Canadian constitutionalism and so my focus is on the Canadian case. Nevertheless, I would venture that, although Canadian constitutional life might serve as a particularly potent instance of this dynamic, what I am exposing is a general predicament of modern constitutionalism and what I am suggesting is of broader methodological import in the study of constitutional cultures. Even in those polities in which the universal and philosophical drove the state from its inception, that older—ancient—sense of a constitution as a political device fitted to working out local problems among particular interests in a given place is never too far absent. Modern constitutions are beholden to two ideals: first, that if well enough crafted, they should

[7] On the political debates and interests that led to the term "God" finding its way into the preamble to the Constitution Act 1982, *see, e.g.*, George Egerton, *Trudeau, God, and the Canadian Constitution: Religion, Human Rights, and Government Authority in the Making of the 1982 Constitution*, *in* Rethinking Church, State, and Modernity: Canada Between Europe and America 90 (David Lyon & Marguerite Van Die eds., 2000).

be largely transportable to any other polity as an expression of universal truths of the just relation between state and citizen; and, second, that constitutions are stabilized political solutions to the exigencies of the particular, responsive and faithful to local truths and contingent realities. The insistent trend of modern constitutionalism is towards the universal. Yet the points at which the march of the logic of universal reason meets resistance in the particular are key junctures for understanding a country's constitutional culture. They are points at which the political, which sits at the heart of every constitution, no matter how modern and committed to universal reason, shines through. It is here that one finds the matters that define a polity as a polity, rather than a geographically defined administrative unit giving better or worse articulation to principles of reasonable government. At these points—where what seems reasonable finds a limit in who we are—we have a conduit into constitutional culture.

2. The claims of diversity

The realities of state formation in Canada were such that Confederation would require the coming together of two smaller maritime colonies, Nova Scotia and New Brunswick, along with two large populations—an English Protestant population in what would become Ontario, and a large French Catholic population in Quebec. Constitutional scholars and historians frequently refer to confederation as a "compact" or the constitutional "compromise" between French and English Canada. Canadian constitutional history prior to Confederation in 1867 was inaugurated by the Treaty of Paris (1763), resolving hostilities between the British, French, and Spanish Crowns and ceding French interests in North America to the British. Constitutional development at this early stage involved a series of subsequent acts of the Imperial Parliament (such as the Quebec Act, 1774) attempting to manage the on-the-ground realities of creating a country out of these "two solitudes." Given the practical need to secure the acceptance, if not garner the loyalty, of the large French population in British North America in the wake of the American Revolution and the fact of an emerging and ambitious republic to the south, these early constitutional documents involved concessions, compromises, and guarantees aimed at the protection and satisfaction of French Catholic rights. The British had won the war against the French but working out the local complexities of governance was a much more complicated task.

The British North America Act, now the Constitution Act 1867, bears the imprint of this local history. Among the most important provisions in this vein is § 93, which guaranteed government-funded (French) Catholic schooling in English Canada and (English) Protestant schooling within French Canada. Section 93 is not much studied in contemporary Canadian first year constitutional law courses but this fact belies its historical significance. Section 93 was among the most important provisions leading to Confederation. In the 1980s and 1990s, the Supreme Court of Canada would look back at § 93 and characterize it as "part of a solemn pact resulting from the bargaining which made Confederation possible."[8] The Court explained that

[8] Reference Re Bill 30 [1987] 1 S.C.R. 1148 at 1173.

> The protection of minority religious rights was a major preoccupation during the negotiations leading to Confederation because of the perceived danger of leaving the religious minorities in both Canada East and Canada West at the mercy of overwhelming majorities.[9]

The importance of this provision to the creation of the country could not be overemphasized: "Without this 'solemn pact,' this 'cardinal term' of Union, there would have been no Confederation."[10] Far from an institutional separation between church and state, the assurance of state support for religious education was an essential ingredient of Canadian constitutional life.

After the introduction of the Charter this arrangement would be subject to serious—and eminently reasonable—constitutional scrutiny. When, in the mid-1980s, the Ontario government sought to enact legislation that would provide for full funding of Roman Catholic separate high schools in Ontario, consistent with its obligations under § 93, non-Catholic families objected that similar support was not extended to other separate denominational schools. The Charter now prohibited discrimination on the basis of religion in § 15(1) and barred state endorsement of religion by virtue of "freedom of religion" in § 2(a).[11] The Charter seemed to expressly preclude precisely the kind of special arrangement found in § 93 of the Constitution Act 1867. There was a deep awkwardness around affirming special privileges for Roman Catholics in Ontario and the recently enacted constitutional commitment to the equal treatment of religions. The Supreme Court held, however, that § 93, "which represented a fundamental part of the Confederation compromise"[12] was simply immune from Charter scrutiny.

The principle that the Charter cannot be used to attack another part of the constitution was confirmed and amplified in the second challenge to these religious education arrangements, the case of *Adler*.[13] Here the Charter claim was slightly different. A group of Jewish parents and a group of non-Catholic Christian parents sought the expansion of the funding regime—equal funding of their schools, the litigants argued, would protect their religious freedom in the same manner as Roman Catholic education protected Catholicism in the Province of Ontario. The majority of the Supreme Court admitted that § 93 of the Constitution Act 1867, served "to entrench constitutionally a special status for such classes of persons, granting them rights which are denied to others."[14] Yet when attention shifted to whether this offended the guarantee of freedom of religion, the Court again answered with an emphatic "no." Justice Iacobucci's reasoning is telling: "As a child born of historical exigency, § 93 does not represent a guarantee of fundamental freedoms"[15] but, rather, was "the product of an historical compromise which was a crucial step along the road leading to

[9] *Id.* at 1173.
[10] Adler v. Ontario [1996] 3 S.C.R. 609, ¶ 29.
[11] R. v. Big M. Drug Mart [1985] 1 S.C.R. 295.
[12] *Id.* at 1197–1198.
[13] Adler, 3 S.C.R. 609.
[14] *Id.*, ¶ 25.
[15] *Id.*, ¶ 30.

Confederation."[16] This status immunized it from the Charter; the principles of freedom of religion and the equal treatment of religions simply did not apply.

One sees, here, a constitutional system caught between two competing logics. Canada would not have existed but for this historical compromise—a key function of the Constitution Act 1867. Section 93 was a manifestation of constitutionalism as a response to local exigency, historical particularity, and the political interests of communities. This is the historical heartland of Canadian constitutionalism. Yet those who challenged this arrangement were correct; this historical compact could not be squared neatly with a principled, abstract commitment to religious freedom and equality. The point is wonderfully underscored by another case brought in the same year as *Adler*, but this time to the UN Human Rights Committee.[17] Mr Arieh Hollis Waldman, the father of two Jewish children enrolled in a private day school in Ontario, argued that Ontario's policy of funding separate Roman Catholic Schools violated religious freedom and equality guarantees found in the International Covenant on Civil and Political Rights. The tribunal took account of the reasoning in the *Bill C-30* case and the *Adler* decision, noting the special constitutional status of Roman Catholic education reflected in § 93 of the Constitution Act 1867. The Committee reasoned as follows:

> In the instant case, the distinction was made in 1867 to protect the Roman Catholics in Ontario. The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish Community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation.[18]

The Human Rights Committee of the United Nations found Canada in violation of article 26 of the International Covenant on Civil and Political Rights. "[T]he fact that a distinction is enshrined in the Constitution," the Committee explained, "does not render it reasonable and objective."[19] Of course it doesn't.

It is no answer to the demand for equal treatment by Jews to explain that they are not Catholic or Protestant, which is what the Supreme Court of Canada's answer boils down to. Many claims of historical privilege have given way to the rights-based logic of equal treatment, including instances in which novel constitutional interpretation was required to make it so. Indeed, the case that gave Canada its central constitutional metaphor—the constitution as "living tree"—is one such example, a case in which the force of equality dictated an interpretation of the constitution that would make women and men equally eligible to serve in the Senate.[20] So the key question is why *this* particular survives when others succumb to the logic of the universal? The answer

[16] *Id.*, ¶ 29.

[17] Waldman v. Canada, HCROR, 76th Sess, Annex, Communication No. 694/1996 (1996).

[18] *Id.*, ¶ 10.4.

[19] *Id.*

[20] Robert J. Sharpe & Patricia I. McMahon, The Persons Case: The Origins and Legacy of the Fight for Legal Personhood (2007).

is about constituting narratives and constitutional identity. The Catholic schooling question participates in one of the grand narratives of Canadian self-understanding. The story of Canada as built on two foundational cultures, the English and the French, has been basic to Canadian self-understanding and the question of Catholic and Protestant schooling, particularly Catholic schooling in Ontario, is a kind of synecdoche for this larger narrative. The UN Human Rights Committee is not bound to this story in any way, owes this narrative no fidelity or care. Yet when these cases were decided, the same could not be said for the Supreme Court of Canada, whose role in part is to reflect the constitutional identity of the country. No matter how potent the logic of the universal, this was one event horizon past which reason alone could not see. This particular survived the force of the universal because it stood for something fundamental about the identity of Canadian political community. It may not always be so. As multiculturalism and cultural diversity deepens, political identity may shift and the borders around this particular might weaken; in fact, today we see the privilege afforded to Catholic schooling in Ontario subject to renewed debate. But a change in the answer to this constitutional question will signal a change in the basic narratives of the constitutional culture, not a sudden realization of the wisdom of the universal. While Canadian constitutional life aspires to the modern logic of constitutions as expressions of legal reason and objective proportionality, Canadian constitutionalism is also bound to the particulars that make it the distinctive political arrangement that it is.

Paul Kahn has written that the ethical challenge of multiculturalism is precisely the difficulty of holding together our commitments to the universal and the particular.[21] He explains that, when met with deep difference, we worry that a hands-off relativism will lead us into moral cowardice whereas the assertion of universal standards draws us into a kind of colonialism. This ethical tension is also woven right into the constitutional fabric in Canada. The multicultural constitutional history of the country, as well as Canada's official state policy of multiculturalism, speaks to a political reality that is no less a part of Canadian constitutional culture than the language of universal human rights found in the Charter. And so when met with the prospect of Islamic arbitration in Canada,[22] the debate reflects the demand for universal standards that will ensure gender equality but we are also cognizant of the need to recognize, as we have in other contexts, the importance of having room for legal pluralism and the demands of diversity. Hearing certain pleas for the active integration of immigrants and minorities into Quebec culture,[23] we heed the call of two logics of constitutionalism—the need to protect and respect a distinct French geo-political identity that lies at

[21] Paul W. Kahn, Putting Liberalism in its Place 1–8 (2005).

[22] Natasha Bakht, *Were Muslim Barbarians Really Knocking at the Gates of Ontario?: The Religious Arbitration Controversy—Another Perspective*, 40th Anniv. Ed. Ottawa L. Rev. 67 (2006); Anver Emon, *Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation*, 87 Can. Bar Rev. 391 (2009); Sherene Razak, *The "Sharia Law Debate" in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture*, 15 Feminist Legal Stud. 3 (2007).

[23] *See, e.g.*, Gérard Bouchard & Charles Taylor, Building the Future, A Time for Reconciliation: Report (Commission de consultation sur les pratiques d'accomodement reliées aux différences culturelles 2008).

the bedrock of our constitutional politics and the universal principle of freedom of religion that makes coerced integration anathema. The unrelenting direction of modern constitutionalism is towards the logic of universalism, of reason-based standards that bind all equally. Yet this is one key point at which Canadian constitutionalism gives space to the force of the particular, stalling this march of the universal. This is the deeper significance of the association of Canada with a unique concern with multiculturalism and explains the overwhelming theoretical concern of Canadian constitutional thought with issues of multiculturalism and cultural difference. In identifying this point of resistance to universalism, one finds an insistent claim about "who we are" and, with this, an important dimension of Canadian constitutional culture.

3. Judicial review

The claim of this article has been that to understand contemporary Canadian constitutional culture, one has to grasp that Canadians are children of two distinct constitutional logics, the logic of the particular and that of the universal. When one finds points at which the local and particular are impervious to the logic of the universal, we have our hands on something crucial to constitutional identity and culture. Debates regarding judicial review are another expression of this—an example of a prominent aspect of modern Canadian constitutional life that one cannot really understand absent an appreciation of the play of these logics.

The introduction of the Charter in 1982 inaugurated a debate on the legitimacy of judicial review, one that can fairly be said to have consumed Canadian constitutional theory and adjudication since that time. Of course, theoretical debates inquiring into the legitimacy of judicial review are in no way unique to Canada, serving as they have as a mainstay of constitutional theory in many jurisdictions. But the Canadian instantiation of these debates has certain unique contours and an intriguing history. After the introduction of the Charter, critics quickly emerged from the left, arguing that Courts lacked the legitimacy and competence to decide serious social policy questions.[24] These voices were matched and paralleled by commentators on the right who complained of "judicial activism" and the lack of judicial accountability.[25] Over time, the response to these critiques from those supporting the Charter took shape in a dialogic theory of judicial review, arguing that the judiciary's role was simply as one partner in a conversation about the meaning and application of the Charter, effectively defending judicial review by diminishing the sense of its finality. Debates over "dialogue theory" came not only to preoccupy (to the point of exhaustion, many would say) constitutional theory[26] but were eventually seized upon by the Supreme

[24] *See, e.g.*, Andrew J. Petter, *The Politics of the Charter*, 8 Sup. Ct. L. Rev. 473 (1986); Allan C. Hutchinson & Andrew Petter, *Private Rights-Public Wrongs: The Liberal Lie of the Charter*, 38 U. Toronto L.J. 278 (1988).

[25] *See, e.g.*, F. L. Morton & Rainer Knopff, The Charter revolution and the Court Party (2000).

[26] *See, e.g.*, Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or perhaps the Charter of Rights isn't such a bad thing after all)*, 35 Osgoode Hall LJ 75 (1997); Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue (2001).

Court of Canada itself as an account of the legitimacy of its role.[27] Constitutionalism in Canada since 1982 has been shot through with contestation regarding the role and legitimacy of judicial review in the constitutional order.

One way of reading this fact of Canadian constitutionalism is simply as a democratic worry of the kind hashed about in the United States since the early nineteenth century,[28] delayed in its Canadian appearance owing to the late introduction of a constitutional bill of rights. On this reading, the story is essentially one about the democratic accountability of the judiciary. This is certainly part of the story in Canada and I do not suggest that this is a misreading. My argument, however, is that there is much more at play in this debate in Canada and that at its core is a tension between fundamental ways of imagining the role and function of a constitution, a tension made palpable and pronounced by the particularities of Canadian constitutional history and reflective of important dimensions of constitutional culture.

The dominant experience over constitutional history in Canada has been of a constitution as compact and political compromise. This is what I have called the consummately political constitution. From confederation in 1867 until 1982 the role of the courts in constitutional matters was one of sustaining the political. When they spoke in a constitutional idiom, the voice of the courts was not interpreting the governing truths of a constitutional text but, rather, using the constitution as a device in arbitrating as between political powers within the state. The courts were curating the political compact of confederation in a manner that left substantive matters to legislative will. When it spoke on constitutional matters, the Supreme Court of Canada was normally attempting to strike a balance as between provincial and federal legislative bodies, interpreting and applying the political bargain struck among provinces in the formation of the country. Substantive matters were left to political institutions with the courts umpiring the contest when the two sides wrestled over jurisdiction.[29]

The animating principle in this era of constitutionalism in Canada was that of the classic British constitution: parliamentary supremacy. The ethos of parliamentary supremacy elevates political will and interest. If a legislative act can be imagined, parliamentary supremacy in the Canadian federation begins with the proposition that one level of government or the other has the power to enact it.[30] There was a role for the courts in constitutional matters—an important one—but it was a role in "arbitrating will." The courts were tasked with maintaining a workable, balanced political compact within which interest and political preference remained supreme. One can

[27] See Vriend v. Alberta [1998] 1 S.C.R. 493, ¶¶ 137–140; R v. Mills [1999] 3 S.C.R. 668, ¶¶ 20, 57; Sauvé v. Canada (Chief Electoral Officer) [2002] 3 S.C.R. 519.

[28] The literature on this topic is, of course, enormous. *See, e.g.*, Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986); Paul W. Kahn, The Reign of Law: *Marbury v. Madison* and the Construction of America (1997).

[29] Of course, prior to the Charter, tools and concepts from the constitutional law governing federalism – including the declaration of legislative acts as *ultra vires* – were sometimes used to address issues that we would now characterize as raising substantive rights-based concerns. See, e.g., Switzman v. Elbling, [1957] S.C.R. 285.

[30] Of course the outer limits of the principle of parliamentary supremacy have never been sharply defined or directly tested.

see clearly the way in which this historic role for the courts matches the logic of the particular, as I have described it. On this logic, the Constitution is first and foremost about practical solutions to local problems of governance among multiple political communities. Judicial review was not a new issue with the Charter; courts suspended and declared invalid legislation for over a century before the Charter was instituted and yet Canadian constitutional theory did not bother much with the democratic legitimacy of judicial review. We were comfortable with judicial review because it was about curating the political, which, consistent with the logic of a consummately political constitution, remained responsible for substantive policy matters. For the first 115 years of Canadian constitutional history this is the principal role that courts played in Canadian constitutionalism.

One still finds this mode of constitutionalism, with its political and particular core, in modern federalism decisions. Yet perhaps the best expression of this constitutional logic from within the Supreme Court's own jurisprudence is found in the *Reference re Secession of Quebec*.[31] The question of whether Quebec could secede unilaterally from Canada was referred to the Supreme Court of Canada. This is the Ur-case of the courts curating the constitutional compact, tending to the local particulars of Canadian state history. The Court approached this question by articulating the foundational principles that animate the Canadian constitutional order (it named federalism, democracy, constitutionalism and the rule of law, and respect for minorities), setting the terrain on which political action would have to take place. The Court looked to Canadian history to catalogue the political conventions that form part of Canadian constitutionalism and ultimately held that political recognition and negotiation would be constitutionally required should a clear majority of Quebecers express the will to secede from Canada. In summarizing its role, the Court offered a passage that is perfectly emblematic of the first logic of constitutionalism—the logic of the particular, the local, and the political:

> The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution," not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.[32]

This is the Court acting in execution of consummately constitutional duties but there is nothing universal, nothing based in general claims of right or reason, and everything contingent, local, and particular about its role. To be sure, in its decision

[31] Reference re Secession of Quebec [1998] 2 S.C.R. 217.

[32] *Id*., ¶153.

the Court also reflected the Canadian constitutional commitment to broader norms, such as the protection of minorities. Again, these logics are not pure forms but, rather, pull on one another at all points. But the heart of the decision is deference to will rather than the assertion of universal claims of reason or right. It is the Court guiding procedurally while deferring substantively to the exigencies and force of political will. This is a judicial role consonant with one, venerable, logic of constitutionalism.

It is trite to observe that the Constitution Act 1982, and the Charter in particular, radically altered the role of the courts. More telling is the shift in constitutional logic that this change in role reflected. Rather than curating or sustaining the political, the Court's voice in constitutional matters would now involve limiting or containing the political. In its new role enforcing rights, the judiciary would now speak substantive truth in response to interest and will. The universals of rights and categorical claims of just state-citizen relations could and would now hollow out a space in the antecedent sphere of parliamentary (read political) supremacy into which no expression of will, no manifestation of political interest, could encroach. This is a familiar logic to US constitutional theory, that of courts as guardians of substantive limits on the political—the high priests of constitutionalism; but it was a fundamental shift in constitutional life in Canada.

With this shift, the ultimate word on substantive matters of policy would be spoken by courts in the idiom of rights and proportional limitations on rights. Means–ends proportionality is none other than the deployment of reason as a limit on political will.[33] Canadian courts were thus placed in the position of oracles of reason-based universals and, in this way, became part of a global conversation of constitutional courts. The universalist nature of rights discourse implies a convergence in method and reason, one that we have seen coalescing among contemporary supreme courts around the world. Met with an issue that turns on fundamental political or social rights, the tools, reasoning, and considerations ought not to differ much whether spoken by the Canadian, South African, or Israeli Supreme Courts or, for that matter, by the European Court of Justice or the UN Committee on Human Rights. Positions might differ but the language would be highly recognizable, maybe even portable. The introduction of the Charter was a rebalancing between political will as the expression of particular interest, and reason as the universal logic of rights; the new role for the courts reflected this shift in constitutional logics.

There is no shortage of Charter cases that displays the judicial role incumbent on this second logic of constitutionalism. A sterling example is the Court's unanimous decision in *United States v. Burns and Rafay*.[34] The question before the Court was whether it was constitutionally permissible to extradite two accused to Washington State to face three counts of aggravated first degree murder, where the potential penalties included capital punishment. The practice of capital punishment was abolished in Canada by act of Parliament in 1976, after years of political debate. The question in

[33] I discuss this idea more fully in Berger, *supra* note 5. *See* Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 Mich. L. Rev. 2677 (2003).

[34] United States v. Burns and Rafay [2001] 1 S.C.R. 283.

Burns and Rafay was, essentially, whether the Charter prohibited the Canadian government from exposing a citizen to capital punishment at all. The Court concluded that it would offend § 7's guarantee of life, liberty and security of the person and offend the principles of fundamental justice to extradite without assurances that the death penalty would not be sought. In deciding this politically pregnant question, filled with issues of executive power and international relations, at every turn the Court's reasoning sounds in the register of constitutionalism as an expression of universal rights as limits on the political and on executive power. In its reasoning the Court invokes the International Covenant on Civil and Political Rights, various protocols under that covenant, the Convention on the Rights of the Child, various UN releases and reports, and European protocols, conventions, and court rulings as persuasive authority on the rights-offending nature of capital punishment. There is no sense of deference to the political process as the matter is cast entirely as one of fundamental and universal rights, albeit anchored in a Canadian context. Consistent with the underlying logic of rights-based constitutionalism, with some local color and legislative specifics extracted, the decision could have as easily been issued by the German Constitutional Court as by the Canadian Supreme Court. Now a Charter issue, the Court has the constitutional role and authority to conclusively settle a substantive question that was, prior to 1982, a matter determined exclusively by political will.

Contrasting the *Secession Reference* with *Burns and Rafay* draws into sharp focus my point that the nature of judicial review displays the extent to which Canadians are children of two constitutional logics. Read in this way, the pitched debate regarding judicial review is, amongst other things, an expression of the felt tension between a new sense of constitutionalism and an older way of thinking about the nature and function of constitutions. Indeed, the charge of judicial activism—a potent cry in Canada leveled equally by critical scholars on the left and conservatives on the right—can be heard as anxiety that the first constitutional logic is being eclipsed by the second. At core, we see in the Canadian practices of and debates about judicial review a contest of constitutional logics—one of managing political arrangements and finding working solutions among interests and another about declaring universal truth as found in rights and reason. Canadian constitutional life can't let go of a tradition in which judicial review fundamentally served the political, nor can it now turn its back on a newer role in which the courts honor the constitution by trumping interest with rights, will with reason, and the particular with the universal. This tension beats at the heart of constitutional life in Canada; but why is this tension so central?

Of course, debates about the legitimacy of judicial review are found in constitutional systems around the world. Judicial review raises basic democratic questions, such as the legitimacy of an unelected judiciary and, at a deeper and more interesting level, the problem of a community governing itself over time.[35] Yet despite the substantial influence of US and international theory in Canadian debates on the legitimacy of judicial review, it is a mistake to reduce the anxiety about this issue in Canada to a shared concern with these structural issues. Scholars who draw easy

[35] See Paul W. Kahn, Legitimacy and History: Self-government in American Constitutional Theory (1992).

equivalencies between the US and Canadian debates miss something important about Canadian constitutional culture. When we ask why this appearance of concern about the political and the particular continues to have such purchase in Canada despite the existence of an entrenched bill of rights, why the universal has not eclipsed the older logic of constitutionalism, the answer comes back to key narratives about Canadian constitutional identity. The British tradition, in which parliamentary supremacy is the particular expression of the priority of political will, is a deep part of constitutional self-understanding in Canada. It must be recalled that Canada is an anti-revolutionary constitutional culture, in some ways no less shaped by the American Revolution than its neighbor to the south. The preponderance of English inhabitants of what would become Canada were loyalists committed to the continuance of the British tradition in North America. The defeat of the Americans in the War of 1812 was the defence of political autonomy under this way of life, this form of governance. There is, thus, a deep way in which the claim about a kind of "Americanization" that comes with judicial review interacts with the narratives that help to shape Canadian political and constitutional identity.

But there is another narrative layer that helps to explain the distinctive purchase of the logic of the particular and, hence, the depth of anxiety around questions of judicial review. Over time, the British parliamentary tradition took on a particular inflection in Canada, becoming associated with the rise of social welfare. For much of Canadian history the most symbolically prized advances in social justice in Canada came through the legislatures, not the courts. *Brown v. Board of Education* was decided in 1954. The first iteration of national, universal healthcare was introduced by act of Parliament in 1957,[36] building on earlier provincial legislative innovations. What is often overlooked in discussions of the Canadian instantiation of the debate about judicial review is the way in which the parliamentary tradition has been imaginatively tethered to Canadian self-understanding as a social democracy committed to some version of a welfare state. This link between contests about judicial review and the social democratic identity of the country explains some of the deeper elements of the public controversy—the trauma—that occurred when the Supreme Court used the Charter of Rights and Freedoms to invalidate a key aspect of the public health care scheme in Quebec.[37] This decision was not just an occasion for concern about the democratic nature of judicial review, but a site of overt conflict between two logics of constitutionalism, and a point at which the logic of the particular touched upon a key dimension of "who we are."

Limits on judicial review are limits that the particular imposes on the logic of the universal. Structurally, these limits are points at which constitutional culture privileges will over reason. In Canada, debates over these limits are also entwined with stories that shape constitutional identity and point to important dimensions of constitutional culture. This is yet another place where one finds that identifying points of

[36] Hospital Insurance and Diagnostic Services Act, SC 1957, c 28.

[37] Chaoulli v. Quebec (Attorney General) [2005] 1 S.C.R. 791. *See* Kent Roach et al., Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada (2005).

tension between the two logics of constitutionalism is a way into Canadian constitutional culture.

4. Aboriginal justice

There is no shortage of historical injustices perpetrated by the state in Canadian history. From the Chinese head tax[38] to the internment of Japanese in World War II, the denial of asylum to Jews fleeing Europe in the shadow of the Shoah, or the history of eugenics and forced sterilization of the mentally handicapped, Canadian governments have, like other nations, visited significant suffering on its peoples over the life of the country. These injustices mar Canadian history and have been responded to through political settlement, official inquiry, apology, and sometimes reparation. Shameful and harrowing as they have been, these dark acts of the state have not generally been read in Canadian political life as undermining the authority of the state or engaging questions of fundamental constitutional moment.

The history of the treatment of the Aboriginal peoples of Canada—also a story of historical injustice and the exercise of raw economic, physical, and political power over a minority population—sounds in a different register altogether. The presence and immediacy of this issue is palpable to a visitor to Canada, who is reminded in a variety of ways of the underlying and durable claim to sovereignty made by the Aboriginal peoples of Canada. One cannot appreciate modern Canadian constitutional life without a grasp of the unique role played by issues of Aboriginal justice including, most prominently, constitutional claims of Aboriginal rights and title over land. The constitutional debate surrounding these issues of Aboriginal rights and title cannot be understood without seeing the way in which they are shaped by the tension that I have been describing in this piece—the tension arising from the fact that Canadians have now inherited two distinct, and sometimes competing, but both still salient, constitutional logics.

Issues of Aboriginal justice are dealt with in Canada through doctrines and devices that overtly seek to reopen the era of compacts and compromises that constituted the community. Alongside the English and French, Aboriginal peoples played a crucial role in the creation of the country yet they were unrecognized in the Constitution Act 1867 (other than as a subject matter of Federal jurisdiction).[39] Modern advocacy and jurisprudence on Aboriginal justice issues has thus been built either on recovering the originary compromise and political promises made in the Royal Proclamation of 1763, in which the Crown vouchsafed lands and rights to the Indigenous peoples of Canada,[40] or, where they existed, the treaties—the literal compacts—reached between the Crown

[38] Mack and others v. Attorney General of Canada (2002), 217 D.L.R. (4th) 583, ¶ 10 (Ont. C.A.), in which the Court held that the Charter could not apply retroactively to a "discrete act which took place before the Charter came into effect."

[39] The Constitution Act 1867, § 91(24) assigns the subject "Indians, and Lands reserved for the Indians" to legislative authority the Parliament of Canada.

[40] Hamar Foster & Benjamin L. Berger, *From Humble Prayers to Legal Demands: The Cowichan Petition of 1909 and the British Columbia Indian Land Question*, *in* History's Living Legacy: Essays on Colonial Legal Culture in Canada, Australia and New Zealand 243 (Hamar Foster et al. eds., 2008).

and First Nations in the early formation of Canada. Treaty litigation activates the older logic of constitutionalism, seeking to honor arrangements precisely designed to establish harmonious relations amongst peoples and political arrangements responsive to life *for these people, in this place*. That these treaties and proclamations have not been honored historically does not forfeit them their constitutional status.

Patriation of the Constitution in 1982 virtually codified this assignation of Aboriginal justice issues to the realm of politics and will, rather than universal reason. Sections 1 to 34 of the Constitution Act 1982 comprise the Charter of Rights and Freedoms. The next section, § 35, is part of this same Constitution Act but falls outside Canada's constitutional bill of rights. It states, simply, that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The Supreme Court of Canada has recently described "the grand purpose of § 35 of the *Constitution Act, 1982*" as facilitating "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[41] Furthermore, in a textual echo of the principle discussed earlier in this piece that one part of the Constitution cannot be used to attack another—a principle that recognizes the existence and continued salience of two constitutional logics—§ 25(1) of the Charter itself explicitly states as follows:

> 25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

This section is saying that the new universalist logic of constitutionalism cannot be used to limit or restrain the effort to repair and redeem the old.

Consistent with the ascription of Aboriginal justice to the logic of this first constitutionalism, and connecting back to the prior section on judicial review, the dominant theme in the Court's management of § 35 and treaty rights—its mode of judicial review—is consistently (perhaps to a fault) the assertion of political and relational obligations such as the duty to consult, the "honour of the Crown," and the political duties incumbent on the project of redeeming the gaps and broken promises in Canada's originary compact.[42] The Court is clear that § 35's promise "is realized and sovereignty claims reconciled through the process of honourable negotiation."[43] In

[41] Beckman v. Little Salmon/Carmacks First Nation [2010] 3 S.C.R. 103, ¶ 10. *See* R. v. Gladstone [1996] 2 S.C.R. 723, ¶ 73, in which the Court describes the purpose of § 35(1) as being "to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory." *See also* Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) [2005] 3 S.C.R. 388, ¶ 1: "The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests, and ambitions."

[42] *See, esp.*, Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511, ¶ 25; R. v. Sparrow [1990] 1 S.C.R. 1075.

[43] Haida, 3 S.C.R. 511, ¶ 25.

Delgamuukw v. British Columbia, the watershed case on Aboriginal rights and title in Canada, Chief Justice Lamer famously concluded his judgment with a paragraph that well reflects the assignation of these issues to constitutionalism of managing political communities:

> this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in Sparrow, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place." Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, . . . at para. 31, to be a basic purpose of s. 35(1)—"the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." Let us face it, we are all here to stay.

The courts retain the authority to declare Aboriginal rights and title but they are slow to do so, preferring to push the issue back into the domain of interest and the negotiation between sovereign wills. The courts thus assume their role within the older constitutional logic—to sustain and curate the domain of the political.

One could well imagine that the Charter of Rights and Freedoms would have something to say about the inequalities, poverty, health crises, systemic marginalization, and historical injustice that characterizes the predicament of many Canadian Aboriginal communities. Such issues might be addressed through the equality guarantee found in § 15(1) of the Charter or the protection of life, liberty, and security of the person found in § 7. The protection of customs, rituals, and sacred relationships could perhaps be addressed by the guarantee of freedom of religion and conscience[44] with traditional community structure and governance dealt with through associational rights. To do so would seem not only logical and direct but also a vindication and strong affirmation of the general social and political values of the Canadian community. Indeed, this is the way in which most contemporary claims of discrimination, state-inflicted injustice, and inequality are analyzed in modern Canadian constitutionalism. So, again, we are met with the question as to why *this* issue remains durably assigned to the logic of the particular in Canada, why *this* particular is not consumed by the advancing logic of the universal.

To be sure, certain Aboriginal justice claims, such as those to title over land, do not seem particularly well suited to the Charter. But that's an incomplete answer. The interesting point is that the many claims that do seem suited to Charter resolution are seldom addressed in this manner. In the few cases in which substantive equality as guaranteed by § 15(1) is invoked to address the systemic exclusion and need for unique treatment of Aboriginal communities, or freedom of religion is invoked to protect historical practice and sacred places, the results are often unsatisfying and the experience is strangely awkward for Canadian law.

[44] *See* John Borrows, Canada's Indigenous Constitution 239 (2010).

The problem is that Aboriginal justice is simply not understood, at base, as a question of the rights and protections to which we are all entitled as a matter of human dignity. Within the Canadian constitutional imagination there is something intuitively inappropriate about addressing Aboriginal justice with rights enjoyed by all because the failure at the heart of Aboriginal justice claims was not and is not a failure of the universal and common; it is, rather a failure of our political constitution (in all senses of the word) and this must be spoken to with the older logic of constitutionalism as community formation, compact, will, and compromise. The justice issues that arise from the historical treatment of the Indigenous peoples of Canada are issues that touch upon the identity of the nation, stitched into the narratives of the country.

It is tempting to argue that efforts to address Aboriginal justice issues flow from the internalization of a new story about Canadian identity, one in which the country was founded by multiple nations and legal traditions, including not only the two dominant European traditions but also the cultures of those who inhabited the land before "discovery."[45] More likely, I suspect, is that Canadian constitutional identity has internalized a story about its intrinsically colonial nature and the violence and victimization at the heart of its political formation. On either account, though, the issue of Aboriginal justice persists as a matter for the particular, ill-fitted to the logic of the universal, because it is somehow fundamental to narratives that shape the identity of the Canadian constitutional state. The Canadian understanding of the historical injustice suffered by Aboriginal peoples is not as a failure of regard for what we are all and everywhere owed as human beings but, rather, an injustice that cannot be abstracted from this place or from who we are. To address such matters in the idiom of universal rights is a Canadian constitutional category error. The treatment of Aboriginal justice issues is thus another expression of the palpable way in which Canadians remain children of two constitutional logics, another instance of the line of insight into constitutional culture that we gain by looking at those points at which the logic of the particular resists the claims of universality and reason alone.

5. Conclusion—Understanding constitutional cultures

This article has been concerned with exposing something of the architecture of Canadian constitutional culture, displaying a structural tension within the idea of constitutionalism in Canada. What has been revealed is not an incompatibility, nor a problem or inconsistency that calls for resolution. It is, instead, a complexity in the imaginative inheritance that forms part of contemporary Canadian culture. Exposed, it shines a light on the distinctive aspects of Canadian constitutional life. Canadians live as the children of two constitutional logics. One is the political constitution, that which attends to the particular, the local, and concerns itself with sovereignty and will. The other is the constitution of liberal political culture, the expression of general principles of good governance, claims based in universal right, and the privileging of

[45] John Ralston Saul, A Fair Country: Telling Truths About Canada (2008).

reason. Seeking to understand any significant dimension of Canadian constitutional life, one must contend, I have argued, with the reality of negotiating these two constitutional logics. This is true of the management and encounter with diversity or the issue of multiculturalism; the status and nature of judicial review; or the purchase and prominence of Aboriginal justice issues. But the reach of this insight is greater, inflecting not only domestic issues such as the modern treatment of Canada's symbolically precious health care system, but also arguably showing its face in broader comparative registers, such as Canada's legal and political relationship to international law and its complicated place situated between constitutional trends in Europe and the US tradition.

The tension between these two ideas of what a constitution *does*—this tension between a constitutional logic of the particular and one of the universal—may be not just the predicament of contemporary Canadian constitutionalism but, sometimes *sotto voce*, of modern constitutionalism at large. The constitution appears as both republican and liberal in French and US constitutional culture, though the expression of this tension would require separate study, its own constitutional ethnography.[46] The same could be said with respect to a very different historical unfolding in UK constitutionalism, which in recent years has been as concerned with the project of European bureaucratic constitutionalism as with devolution in Scotland and Northern Ireland. It is perhaps when we are faced with questions of constitutional *creation* that this contest of logics becomes clearest. We know that a new constitution in Iraq must respond to the political realities and fraught histories of Sunni, Shiia, and Kurdish communities, and, further, that Islamic law must figure meaningfully into this new constitution, but we intuit, quite rightly, that universal norms, and the way of thinking about government that such norms reflect, will have little to contribute on this point. Yet this new constitution must also be the expression of universal human rights and liberal democratic principles. The resulting constitution is complex, awkward, and fraught with tensions. These are tensions that one sees in all new constitutions, from Afghanistan and the manic constitution making in Thailand,[47] to Egypt's past and future constitutions.

The Canadian experience, with its long constitutional history only latterly injected with a strong rights-protecting dimension, expresses this confluence of constitutional logics particularly well. But wrestling with the universal and the particular as equally precious but awkwardly combined expressions of what constitutionalism is about may be a modern conundrum of liberal constitutionalism at a time when national histories still matter deeply and the idea of national sovereignty is not yet obsolete. These tensions are the predicament of modern constitutionalism. Expressed differently in different contexts, perhaps today we are all children of two constitutional logics. If this is so, then the study of comparative constitutional cultures should be keenly

[46] *See* Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 Law & Soc'y Rev. 389 (2004).

[47] Andrew J. Harding & Peter Leyland, *The Colour of Thailand's (Un)Constitutional Reforms: Red, Yellow, or Orange?*, *in* Legitimacy, Legal Development & Change: Law & Modernization Reconsidered 85 (David Linnan ed., 2012).

interested in those points in the constitutional life of a country at which the claims of the particular persist in spite of the logic of the universal—those issues that occupy such a key place in the constitutional imagination of the community that they cannot be recast in or reduced to universalist terms, cannot be made subject to the claims of reason alone. These points of particularity are windows onto constituting narratives. They are orienting points for a constitutional culture precisely because they are other than that which we could all share as common participants in a universalist logic of reasonable government. Perhaps this link between the particular and constitutional culture that I have drawn out in this article is natural enough—identity always turns on the particular. And for the political, as in the personal, it is the particular—not the universal—that defines community, inspires affection, and fosters belonging.