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**Sub-State Nations and the Constitutional
State:
Embedding Normative Principles within
a Plurinational Constitution**



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Introduction

The continued resilience of sub-state nationalism within plurinational states has been the focus of work by political philosophers, political scientists and sociologists for several decades. Somewhat surprisingly this important phenomenon has not attracted similar levels of attention from scholars of constitutional law who have in general failed to address adequately both the constitutional critique sub-state nationalists make of established patterns of constitutional power and the demands they raise for radical constitutional change and for new approaches to constitutional interpretation. In particular, constitutional scholars have largely neglected the work done by political philosophers which has highlighted the following problematic features of constitutional theory in multinational democracies: the failure to expose the myth of cultural neutrality within the liberal democratic state; the concomitant failure to recognise and critique cultural and societal dominance within plurinational constitutions; and the poverty of taking a narrow, positivist approach to constitutionalism in the context of a complex, multinational state where the constitutional contours of inter-societal coexistence have often been worked out beyond the formal limits of the constitutional text. I will address these failings in reference to both the constitutions of particular states and constitutionalism and constitutional theory more generally.

The chapter is in three parts: Part 1 will address how the dominant role of a majority nation within a plurinational state has been interrogated by political theorists. Part 2 will turn to how this dominance has been crystallised within the constitutions of democratic states and how this has largely been overlooked in constitutional theory. Finally in Part 3 I will explore the role courts have played in entrenching the dominant position of the majority national society in the constitution. This final section does not purport to be comprehensive in its coverage – to my knowledge, no one has carried out a systematic, comparative study of the role of courts in processes of nation-building or in managing plurinational diversity within states. This new area does seem to be an important focus for future research.

Part 1

Exposing Dominance: the Groundwork of Political Theory

The resilience of sub-state nationalism in developed states such as Canada, Spain and the United Kingdom has been the focus of attention of political philosophers and sociologists for several decades. The main reason for this is of course prevailing political conditions; statehood and its underpinning ideology, nationalism, have each found themselves facing intense scrutiny in an age of globalisation. But another important reason for the philosophical attention that nationalism continues to receive lies in the fact that liberal philosophers over the past two decades have found the relationship between the state and the nation to offer very fertile soil within which to cultivate wide-ranging and fundamental challenges to widely held assumptions about the nature of the democratic state and the nature of the demos within the state – assumptions which for centuries have underpinned, it now seems in many respects mistakenly, so much grand theorising about the nature of the polis and the relationships of identity and loyalty between citizens and their respective states. The new task for constitutional theory is to build on this. In this part I summarise what I see to be the key advances made by political theorists that are particularly relevant to constitutional theory, practice and reform.

Important advances have been made within contemporary political theory in terms of exploring the fit between established liberal theory and the sociological reality of the plurinational state, with our understanding of this relationship moving forward in several main directions. One area of progress has been in exposing empirical deficiencies in models of traditional liberalism which we might say had fallen into the epistemological trap of ‘double-monism’. These models constructed theories of justice within a ‘one size fits all’ vision of the nature of the liberal democratic state, without paying careful attention to the specific normative challenges that arise from polity to polity depending upon variegated social, political and indeed constitutional structures. The second monistic assumption is that within every

state there is but one demos. These two presuppositions together comprise what we might call the inherent 'stateism' of traditional liberalism. By this the demotic unity of the state is taken as a given and a relatively uncomplicated theoretical plane is established upon which to deliberate about the democratic polity as a generalisable and indeed universalisable concept. These stateist assumptions came to be characteristic of a constitutional ideology, with states presenting their constitutions as neutral on cultural and societal matters when in fact they reflected, and served to entrench, cultural particularisms. And so we see liberalism and constitutionalism working together. The latter was the tool of state-building, but the stateist assumptions which linked nation and state were also accepted, seemingly without question, by those who took upon themselves the task of theorising about the nature of political justice in these states. In other words, the purported normality of stateist universalism became the *idée fixe* of both liberal theory and liberal constitutional praxis. What was overlooked was how each state became the tool for the consolidation of the particularisms of the specific national culture of the dominant national society, and how – a point to which I will return in Parts 2 and 3 – the constitution of these states played a key role in the consolidation of this dominance.

The state-centred model of liberalism, therefore, either ignored the significance of the nation entirely or implicitly elided the idea of the nation and the state, whereby it was assumed that for the purpose of normative political theory there was to the state one nation and to the nation one state. In the past fifteen years or so, however, a new tradition of theory, which has loosely been described as Liberalism II, but which seems to embrace theorists who go beyond liberalism into more radical critiques,¹ has highlighted how misconceived this elision has been. It has been shown that a monolithic vision of the nation and the state existing universally with such perfect unitary harmony served among other empirical errors to overlook the importance of sub-state group identities for many people – identities which could be

¹ C. Taylor, 'The Politics of Recognition' in A. Gutmann (Ed.) (1992) *Multiculturalism and the Politics of Recognition* (Princeton: Princeton UP): pp.25-73; J. Tully (1995) *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: CUP).

national without also being statal in form. The monistic or unitary stateist account is insufficiently sophisticated in empirical terms by failing to account for the sociological reality that multinational states exist alongside, and must in important respects be distinguished from, uninational states. These states are characterised by more than one public space and these different spaces are the consequence of multiple processes of nation-building, processes which remain on-going. So to summarise, the first achievement of this new theoretical school has been the exposure of the foundations of so much liberal theorising as empirically flawed or at least as insufficiently comprehensive.

A second and concomitant development has been to demonstrate how this unitary account of nation and state has also led to the building of a normative framework based upon a universal assumption of single-demos states that overlooks the different and often diverging aspirations of, and justice issues affecting, a plurality of national societies within the one state. The empirical weakness of the traditional account when applied without qualification to all states regardless of societal composition, led to the construction of universal theories of justice which seemed to accept the mistaken premise of state neutrality on matters of cultural and national identity.² These failings of the normative as well as the empirical framework of liberalism's approach to nationalism have also been subjected to forensic deconstruction by the new tradition of democratic theory. This has been done with most devastating effect in the work of Will Kymlicka which has explained that in all cases the state, including the liberal democratic state, has acted to consolidate in institutional terms the dominant influence of a particular national identity.³ The

² F. Requejo, 'European Citizenship in Plurinational States: Some Limits of Traditional Democratic Theories: Rawls and Habermas' in U. Preuss & F. Requejo (Eds.) (1998) *European Citizenship, Multiculturalism and the State* (Baden-Baden: Nomos): pp.29-49.

³ Will Kymlicka has claimed that 'this idea of ethnocultural neutrality is simply a myth': W. Kymlicka, 'Western Political Theory and Ethnic Relations in Eastern Europe' in W. Kymlicka & M Opalski (Eds.) (2002) *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: OUP): pp.13-105 at p.16. See also W. Kymlicka (1995) *Multicultural Citizenship* (Oxford: OUP); M. Moore (2001) *Ethics of Nationalism* (Oxford: OUP): p.130; F. Requejo, 'Democratic Legitimacy and

result of this has been that in states with more than one national society, minority nations that have been disadvantaged by the neglect of their specific aspirations for recognition and by the denial of constitutional space within which their discrete national societies might flourish, have traditionally been able to find little succour from liberal theories of justice either to explain their exclusion or to offer principles upon which it might be remedied.

Flowing from advances made in critiquing both the empirical and normative foundations of traditional liberal theories of the state, a third advance made by the new approach to nationalism has been positive rather than negative. In other words not a reaction to existing approaches but a proactive argument that nationalism should be taken seriously by democratic theory, thereby dispelling myths that nationalism is somehow inherently incompatible with liberalism or democracy. The resilience and ubiquity of national identities today (including the presence of a plurality of national societies within certain states) and an appreciation of the lack of state neutrality which has prejudiced sub-state nations in their search for recognition, have together led theorists to explain that not only are nationalism and liberalism not incompatible, but that in fact a coherent model of liberalism must be able to accommodate the political and constitutional aspirations of state and sub-state national societies if it is to remain loyal to fundamental democratic principles such as freedom and equality. What is required is the recognition of national identities and the constitutional accommodation of them so that the values of liberty and equality might be made more real for those individuals who can only meaningfully possess these freedoms in the context of their own flourishing national society.

National Pluralism in F. Requejo (Ed.) (2001) *Democracy and National Pluralism* (London: Routledge): pp.157-177.

Part 2

Constitutionalism and the Plurinational State

A. Building on Political Theory

The advances made by political theory, and in particular this last mentioned challenge, clearly have important implications for constitutional theory and practice. In this part I will explore how the dominant position of the majority national group has been crystallised, not only by the process of theoretical legitimation afforded it by traditional liberalism, but also by the constitutional theory and practice of constitutionalism in democratic states.

Dominant nations have consolidated their power in the constitution through both the substantive provisions of the constitution and control of constitutional process. In many ways this is simply an indirect consequence of size; as the largest national group, dominant nations have invariably been able to establish constitutions according to their own terms and in subsequent processes of constitutional change which operate upon a majority or super-majority basis it is easier for majority nations to update the constitution according to their societal aspirations and much more difficult for minority nations to do so. Given that this is, as I say, largely the indirect consequence of size I prefer in general to use the word dominance rather than domination, since the latter implies an active, self-conscious attempt to suppress minorities.

Notably, within constitutional theory there has traditionally been no recognition of this position of dominance within plurinational states or of the ways in which the constitution has acted to maintain it. One question which I feel needs further exploration is the respective influence which the constitutional theory of modern republican state-building and the more general political theory of liberal democracy have had upon one another in this respect. For example, are uni-demotic assumptions of liberalism in some measure a consequence of the ideology of republican

constitutionalism⁴ which served to justify the construction of single nations within states, or on the other hand should we instead look at this connection from a different perspective, whereby republican constitutionalism itself derives the legitimacy it claims for nation-building from wider assumptions within liberal theory concerning the inherent individualisation of the demos and the universal application of constitutional models? The degree to which each has influenced the other over time would of course be a major research project in itself and a difficult one. What seems clear however is that, regardless of which can be said to have played the leading role, both liberal democratic thought and republican constitutionalism have operated together and in some sense symbiotically, each in their own way helping to normalise the idea of democratic systems and their constitutional apparatus as both unidemotic in structure and as neutral on matters of culture.

In some respects constitutions can indeed work to remove issues of culture from the public sphere, for example in the separation of church and state but this should not belie the fact that in general the constitutions of states have not been neutral on issues of culture. In fact even the separation of church and state can serve to privilege a dominant religion in a range of ways. The main point though is that, as a number of commentators such as Kymlicka have pointed out, a state cannot be neutral on more general issues of societal particularity with language the most obvious example. In terms of constitutional design there are numerous ways in which states deny their plurinational nature or at least fail properly to accommodate it. Elsewhere I have discussed at length the main ways in which sub-state national societies have been disadvantaged by the constitutional systems of their respective states.⁵ I will not repeat this account here except to say that this lack of accommodation is manifested in four main ways: in the failure of the constitution to recognise the nature of the state as plurinational; in the denial of effective representation in the central decision-making process of the state; in the lack of control minority sub-state national societies have over the

⁴ J.R. Resina, 'Post-national Spain? Post-Spanish Spain?' (2007) *Nations and Nationalism* 8: pp.377-396.

⁵ S. Tierney (2004) *Constitutional Law and National Pluralism* (Oxford: OUP).

constitutional amendment process; and in the lack of autonomy which they have enjoyed.

B. Towards a Methodology of Constitutionalism for the Plurinational State

The task for constitutionalists interested in the justice issues that remain unresolved from this situation or who seek to respond to the ever more radical demands for constitutional change presented by sub-state nationalists, is to begin to consider how the constitutions of these states might better accommodate their plurinational nature. It seems that this task requires no less than a rethinking of traditional methods of constitutionalism as much as of the substantive provisions of existing constitutions. As I have previously addressed the substantive issues at stake, I will in this section instead begin to outline aspects of the methodology of constitutionalism – and in particular normative constitutional theory – that are most pertinent in a plurinational state context. Constitutional theory speaks specifically to the on-going dynamics of constitutional activity and these are generally about constitutional process within stable constitutional structures rather than dramatic constitutional change and major engineering projects to be undertaken *ab initio*. The constitutional theorist, therefore, engages with constitutionalism as it exists in practice, and insofar as normative prescriptions can feed into this engagement they should be able to do so at the interstices of extant constitutional projects and on-going constitutional processes. I will outline four specific areas where constitutional prescriptions might be useful.

Constitutional Interpretation

Prescriptions in the area of plurinational constitutions focus most often upon proposing changes to constitutional text, thereby overlooking the possible scope for incremental, and at times dramatic, changes that can be achieved by alternative approaches to constitutional interpretation. The latter may well be the preferred strategy employed by sub-state national societies who

feel that the original meaning or intention behind the constitution has been undermined by subsequent practice. (Another practical factor behind the search for reinterpretation in preference to textual amendment may be the difficulty in securing such formal constitutional amendment). Therefore, it is useful to draw a distinction between two types of constitutional critique offered by sub-state nationalists dissatisfied with current constitutional arrangements – one amendatory and the other interpretational. In the former case, the sub-state national society will accept that the dominant societal story of the constitution represents, in objective terms, an accurate interpretation of its meaning. This critique is focused not upon the meaning of the constitution as it stands, but upon its fairness or its adequacy to meet the needs of a plurinational polity, and it will manifest itself in calls for the constitution to be amended in order better to reflect the state's plurinational nature. The interpretational critique on the other hand does not accept the dominant interpretation of the constitution as it stands. This critique contends that the dominant narrative represents only one possible reading of the constitution, whereas the constitution is in fact capable of bearing one or more alternative meanings. It argues that such an alternative approach would in fact provide a more accurate account of the constitution's true meaning, reflecting, for example, a more appropriate rendition of the historical origins and development of the constitution, and thereby a truer story of the constitutional position of the sub-state national society(ies) within the state. The interpretational critique begins to hint at the need for an alternative constitutional methodology that will go beyond the narrow positivism that is so characteristic of much contemporary constitutionalism. This positivist approach attempts to understand the nature of constitutional power by a narrow treatment of the institutions of states whilst overlooking their underpinning social relations.⁶ That this model is not an adequate one with which to understand the workings of the plurinational constitution in particular is suggested by the fact that radically different visions of the meaning and purpose of the constitution can exist across the state and that constitutions can be interpreted in a range of ways

⁶ Ibid: Ch.5.

in line with these different visions.⁷ I will return to this point below.

Flowing from this point, a second issue specific to a constitutionalist approach to plurinationalism is to recognise which agencies (including judges) are in a position to influence constitutional behaviour, and to focus upon how they might alter the meaning or application of important constitutional provisions. This can represent an appeal that judges should seek out a return to the original tenor of the constitution in terms of ‘original intent’ approaches to jurisprudence,⁸ or it can be a call for new interpretation in light of prevailing conditions – ‘living tree/living instrument’ type approaches. In respect of the latter, judges might be influenced by on-going changes to the text of the constitution (developments in devolution; federalism etc.); changing attitudes, e.g. a rise of nationalist sentiment within the state; a changing international environment e.g. developments in the law of minority rights or self-determination; and even by changing intellectual insights, as constitutional actors interact with developing work in the academy.

A third priority is to recognise that constitutional process can be as important as the substantive terms of the constitution. In particular the amendment process has been a focus of attention by sub-state nationalists – the attempts by Quebec, for example at Meech Lake, to gain constitutional guarantees for a determinative role in the process of amending the Canadian constitution is of course an important example of this.

A fourth area of constitutionalism which is important as a source of constitutional prescriptions in the plurinational context is the relationship between formal and less formal constitutional processes. I would submit that, despite its neglect by constitutional theorists, this can be a highly significant issue particularly where the sub-state national societies think that implicit recognition of

⁷ S. Tierney, ‘*We the Peoples: Balancing Constituent Power and Constitutionalism in Plurinational States*’ in M. Loughlin & N. Walker (2007) ***The Paradox of Constitutionalism: Constituent Power and Constitutional Form*** (Oxford: OUP): Ch.12.

⁸ Such a process was arguably undertaken by the Supreme Court of Canada in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

the plurinational nature of the state was in place either at the time of the formation of the constitution and/or at other points in its gradual development. This recognition might have manifested itself in terms of constitutional conventions or in even more informal constitutional practices not directly articulated in the text of the constitution. It is in this sense that a move away from a narrow positivist approach to constitutionalism becomes particularly important. What is needed is a perspective that is alive to the informal processes of the constitution and that will take fully into account the composition of the state in sociological as well as institutional terms. On the first point David Feldman has observed in reference to constitutional texts: “the text only provides a focus for discussion, and a way of legitimizing conclusions by presenting them as the outcome of an interpretation of an authoritative text. The text itself provides a way of formulating and approaching the questions, but (even in a purportedly codified constitution) does not always provide the answers: these tend to lurk in the gaps between the terms of the text, or between form and reality.”⁹

It is of course widely argued that in Canada until 1982 a ‘conventional’, ‘informal’ or ‘procedural’ constitutional model prevailed wherein Quebec’s status was not fully articulated in the text of the constitution. This allowed Quebec the opportunity to seek constitutional accommodation within a more loosely constituted federation by means of the unwritten conventions and practices which underpinned it.¹⁰ Although some are sceptical of how far Quebec in fact managed to achieve acceptable constitutional accommodation *de facto* under this regime, what is evident is that the Constitution Act 1982, by defining the rights and duties of the provinces more tightly, particularly over the issue of constitutional amendment, resulted in the entrenchment of the principle of provincial equality. In Quebec, this was widely

⁹ D. Feldman, ‘None, One or Several? Perspectives on the UK’s Constitution(s)’ (2005) *Cambridge Law Journal*: pp.329-51 at p.348. See also, D. Feldman, ‘Courts, Constitutions, and Commentators – Interpreting the Invisible’ (1993–94) *Holdsworth Law Review* 16: p.37.

¹⁰ J. Ajzenstat, ‘Decline of Procedural Liberalism: the Slippery Slope to Secession’ in J. Carens (Ed.) (1995) *Is Quebec Nationalism Just?* (Montreal: McGill UP): pp.120-136; D.M. Thomas (1997) *Whistling Past the Graveyard: Constitutional Abeyances, Quebec and the Future of Canada* (Toronto: OUP).

seen as a measure which served to marginalise the province, undermining its perceived conventional status as the territorial embodiment of one of Canada's two founding peoples.¹¹ The patriation process, once completed, allowed a narrow legal positivism to be called upon both to assert that Quebec was now bound by a constitution with which it was deeply unhappy and which had been put in place by a process that had effectively excluded Quebec. A recent work by Eugénie Brouillet highlights how constitutionalism is impoverished by such a narrow positivism that does not take proper account of the political and sociological context within which a constitution evolves.¹² This is an argument that the tenor of the constitution as it developed in the nineteenth century was already geared towards a form of multinationalism, but that the informal avenues that facilitated this were undermined by patriation.¹³

Another example of the importance of the unwritten constitution is to be found in constitutional conventions and practices that have developed with devolution in the UK. The model of constitutional reform in Britain was of course highly inchoate and as such there is a considerable amount of untidiness particularly in terms of the division of powers at inter-parliamentary and inter-governmental levels. Therefore, particularly in the areas of overlapping or concurrent responsibility, informal or quasi-formal arrangements have been reached.¹⁴ Another example is the way in which, within the Scotland Act, the UK Parliament has sought to retain its power to legislate even on matters devolved to

¹¹ See Peter Oliver on the idea of 'double compact' as the theory of federalism which was strongly established within the Quebec political mind-set before patriation: P. Oliver, 'Canada, Quebec and Constitutional Amendment' (1999) *University of Toronto Law Journal* 49: pp.519-610.

¹² E. Brouillet (2005) *La négation de la nation. L'identité culturelle québécoise et le fédéralisme canadien* (Sillery: Les Éditions du Septentrion). See also, M. Chevrier, 'Federalism in Canada: A World of Competing Definitions and Views' in S. Tierney (Ed.) (2007) *Multiculturalism and the Canadian Constitution* (Vancouver: UBC Press); A-G. Gagnon & J. Erk, 'Legitimacy, Effectiveness and Canadian Federalism; On the Benefits of Ambiguity' in H. Bakvis & G. Skogstad (Eds.) (2001) *Canadian Federalism: Performance, Effectiveness and Legitimacy* (Toronto: OUP): pp.317-330.

¹³ Brouillet (2005); Ajzenstat (1995); Thomas (1997); Oliver (1999).

¹⁴ Memorandums of Understanding, and Supplementary Agreements known as 'concordats'.

Scotland. Despite this formal position, a convention has developed whereby the UK Parliament will not legislate on devolved matters without the consent of the Scottish Parliament.¹⁵ This convention does not by traditional, positivist interpretations have the force of law, but it does form a very important understanding on the part of the Scottish Parliament that there are fixed limits on the competence of the UK Parliament. As Feldman comments in reference to these unwritten arrangements more broadly: “One cannot understand the constitutional relationships between central and devolved authorities without taking account of these arrangements. These aspects of the constitution exist in the gaps left in the law, and reflect a Scottish view of the relationships as much as an English one.”¹⁶ In this sense Feldman voices the idea, referred to above, that while only one constitution exists there can be different visions of its purpose and meaning.¹⁷ This is often well understood within a state by important constitutional actors even when not expressly articulated in the text of the constitution. As such there can be a sense of a breach of the constitution when these informal understandings are broken. In the UK one example of this is the process of constitutional centralisation which took place in the UK in the 1980s and which led Scottish nationalists to argue that the tenor of the union settlement dating back to 1707 was being broken.¹⁸

As a final word on this point, it is of course open to constitutional actors, for example courts, to move away from a narrow positivist

¹⁵ This is the ‘Sewel convention’, named after the government minister who proposed it in parliamentary debate on the Scotland Bill. *Hansard*, 21st July 1998 (H.L.) Vol. 592: Col.791.

¹⁶ Feldman (2005): p.348.

¹⁷ See also N. MacCormick, ‘*Is there a Constitutional Path to Scottish Independence?*’ (2000) *Parliamentary Affairs* 53: pp.721-736 at p.727.

¹⁸ *Scotland’s Claim, Scotland’s Right* (Edinburgh: Scottish Constitutional Convention, 1995): para.19; J. Mitchell, ‘*From National Identity to Nationalism, 1945-99*’ in T. Dickinson & M. Lynch (Eds.) (2000) *The Challenge to Westminster: Sovereignty, Devolution and Independence* (East Linton, Scotland: Tuckwell Press): pp.154-164 at p.161; M. Keating, ‘*Managing the Multinational State: Constitutional Settlement in the United Kingdom*’ in T. C. Salmon & M. Keating (Eds.) (2001) *The Dynamics of Decentralisation: Canadian Federalism and British Devolution* (Montreal/London: McGill/Queens UP): pp.21-45 at pp.26-7.

approach and to adopt a more expansive view of the constitution which will take into account its societal composition and which will seek a more subtle appreciation of the understandings and agreements between national societies within the state, which although perhaps unwritten, are central to how the constitution is viewed by important stakeholders within the state. A number of commentators view the *Quebec Secession Reference* in this context; I will return to this question below.

Part 3

The Role of the Courts

In Part 1 I discussed how the ideology of constitutionalism has helped crystallise or consolidate the dominant nation's position. In this Part, I will ask what role courts have played through constitutional interpretation, and wider adjudication, in entrenching the privileged position of the majority national society. I will suggest that this has been done through a variety of steps taken by the state's top courts both in elevating their own constitutional position and in developing creative approaches to jurisprudence. I will address the following issues: how courts have assumed the role of ultimate arbiters of the constitution and of relations between centre and sub-units in federal systems; their adoption of a positivist approach which has served to undermine the normative force of informal norms; by courts articulating and pursuing a centralising *telos* in the task of adjudication; and by the identification of values within the constitution, typically human rights values, which the courts believe should be applied in a universally uniform way across the state. I will address each of these in turn.

- i. The pre-eminent position top courts enjoy within contemporary constitutional systems finds its origins in the development of American constitutionalism. Two cases from early US constitutional history show how the Supreme Court assumed for itself the role of ultimate arbiter of the constitution and in doing so began to play a significant role in consolidating the constitution as the unifying device of a single demotic state. These have

become precedents for constitutional adjudication generally and for constitutionalism in federal states in particular.

- a. A major step in modern constitutional jurisprudence has been the emergence of the top court as the ultimate arbiter of the written constitution. The landmark case here is of course *Marbury v Madison*¹⁹ which begins the process whereby the Supreme Court asserts *kompetenz-kompetenz* to speak with a determinative voice in articulating the balance of constitutional power among the institutions of the central government of the state. In due course it would use this power to declare acts of the Congress unconstitutional. Of course such a role for a top court is now almost universally accepted within constitutional systems today, but it is worth remembering how this power was assumed by the Supreme Court for itself in the absence of clear constitutional authority, and secondly, just how pivotal this makes the role of the highest courts within constitutional systems. Of course courts can and do apply a self-denying ordinance to their work, seeking to restrain the extent to which they branch into 'political' parts of the constitution, but even so, the courts themselves have assumed the power to set the very limits of what is appropriate for them to adjudicate upon. In the context of the discussion above as to the informal constitution which exists alongside the formal, written text, this puts the court in a strong position to articulate the central purposes of the constitution, and to set a particular *telos* for its development.
- b. A related development in judicial expansionism occurred in the subsequent case of *McCulloch v Maryland*.²⁰ This case did not involve so much the respective powers of the central organs of the state, but rather the balance of constitutional power

¹⁹ *Marbury v Madison* (1803) 5 U.S. 137.

²⁰ *McCulloch v Maryland* (1819) 17 U.S. 316.

between the central government and federal sub-units within the federal system. In terms of the background negotiations and the text of the federal settlement established in 1787, there was an uneasy stand off between the 'sovereign' powers of the states and the 'sovereign' powers of the centre. In *McCulloch*, the Supreme Court established for the USA that the Constitution of the US, in addition to granting the federal Congress express powers, also accorded it with implied powers in order to implement the former. This was a crucial step in consolidating the legitimacy, and in time the expansion, of the powers of the federal government *vis-à-vis* the states. It also established that state action could not impede the federal government in the proper exercise of its constitutional authority. Again such a power on the part of top courts in federal systems is taken for granted today but we should not I think overlook how this was once again a very radical step in self-empowerment by the Supreme Court. The Court, as it had done in *Marbury*, assumed implicitly the jurisdiction to determine definitively the limits of constitutional powers. But *McCulloch*, from the perspective of federal theory, is more significant. In *Marbury* the Court was elevating its role among other branches of the central government. But in *McCulloch* the Court wades into the central power-struggle of the federal system and assumes to itself the authority to demarcate the respective constitutional powers of the central government and the states. This was at the time (and indeed until the Civil War continued to be) a deeply unsettled relationship. Throughout the early decades of the nineteenth century the federal government and the states were in a condition of tension precisely on this issue of competing claims to sovereign power within the constitution.²¹ But in

²¹ As Requejo puts it, American federalism "is fundamentally a unational model that avoids the basic question, unanswered in democratic theory, about who the people are, and who decides who they are." F. Requejo (2005) *Multinational Federalism and Value Pluralism* (London: Routledge): p.61.

McCulloch the Supreme Court implicitly makes a claim on behalf of the central organs of government by elevating its own position as one of those central organs: the central government by definition has a superior role within the constitution if an agency of that central government has taken to itself the authority to articulate determinatively the respective powers of centre and states.

Behind this shift in *McCulloch* seems to be a further implicit declaration on the part of the Supreme Court: namely that it is acting in the name of one united political people. Ultimate sovereignty in terms of constituent power which the states had called upon severally to establish the USA had been surrendered. Insofar as constituent power remained a legitimate force, its constitutional identity had shifted from the individual demotic power of each of the states to become the undifferentiated sovereignty of one American demos.²² Furthermore, its potency was now emasculated by being transferred to and encapsulated by the sovereignty of the constitution. By this double shift, the sovereignty of the free revolutionary peoples of the several states had been transformed into the constrained sovereignty of one, unified constitutional people and that sovereignty was now to be expressed only through the manner and form permitted by the constitution as policed by the Supreme Court. The Civil War challenged both of these ideas. Many Southern nationalists asserted that they accepted the supremacy of the constitution but they contended that this supremacy *within the constitution* rested with the several states. This was based upon the implicit assumption that the authority of the constitution was founded upon the constituent power of each of the states and this had not been replaced; secondly they contended that the last word on how this power related to that of the central government could not be determined by an agency of that central government,

²² S.M. Griffin, 'Constituent Power and Constitutional Change in American Constitutionalism' in Loughlin & Walker (2007): Ch.3.

namely the Supreme Court. However, defeat in the Civil War ended this contention as a serious constitutional argument and the unidemotic conception of one constitutional people was fully entrenched in the constitutional ideology and national consciousness of the USA, as was the idea that the Supreme Court was the authoritative arbiter of the constitution of that united, sovereign people.²³ This principle has set an important precedent for the constitutional design of federal states since then.

- ii. I have observed that informal or semi-formal conventions and practices are a highly significant element of constitutionalism within plurinational states, particularly where sub-state national societies think that implicit recognition of the plurinational nature of the state was in place either at the time of the formation of the constitution and/or in its gradual development. It is clear that courts can act to strengthen or weaken the status of such unwritten norms. The Canadian experience of the past twenty-five years suggests just how pivotal the role of the courts can be. I have discussed above how a narrow positivism at the time of patriation of the Canadian constitution raised strong resentment in Quebec. It is important to recall that the Supreme Court played a significant role in legitimising this process in the *Patriation Reference*²⁴ and the *Veto Reference*.²⁵ As Michael Mandel puts it: “though [former Prime Minister] Trudeau passed the first constitutional amendment against Quebec’s will, it was the Supreme Court of Canada that said it was constitutionally acceptable to do so.”²⁶

²³ *Texas v White* (1869) 74 U.S. 700.

²⁴ *Patriation Reference: Re Resolution to Amend the Constitution* [1981] S.C.R. 753 at 905.

²⁵ *Re Objection by Quebec to Resolution to Amend the Constitution* [1982] 2 S.C.R. 793.

²⁶ M. Mandel, ‘A Solomonic Judgment?’ (1999) *Canada Watch* 7: pp.1-2. Peter Russell is also critical of the *Veto Reference*: “it was a political response to a political challenge dressed up in judicial clothing.” P.H. Russell, (1993) *Constitutional Odyssey: Can Canadians be a Sovereign People?* (2nd Ed.) (Toronto: Toronto UP): p.129. For other critiques see: K. McRoberts, (1997) *Misconceiving Canada: The Struggle for National Unity* (Toronto: OUP):

However, it is also important to note the considerable change in approach adopted by the Supreme Court in the *Secession Reference*. Here we see a move away from a narrow legalism with the Supreme Court recognising the way in which constitutionalism and politics operate together: “In our constitutional tradition, legality and legitimacy are linked...our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values.”²⁷ I have argued elsewhere that although the Supreme Court makes no explicit statement that Quebec has a special constitutional status, it seems that the societal uniqueness of Quebec is important to the courts opinion in this case. For example, the Court uses the keyword ‘distinct’ which was of course so central to many of Quebec’s attempts since the 1960s to have the plurinational character of Canada constitutionally recognised.²⁸ Others take the view that the *Secession Reference* represents a shift in approach since the early 1980s and even an attempt to undo some of the damage done to Quebec/Canada relations at that time. For example, Jean Le Clair argues: “Backtracking from the dubious reasoning it expressed in the Quebec Veto Reference, the court recognized the need to take into account Quebec’s specificity in Confederation. In other words, in the eyes of the court, the federal principle is not an ethereal concept universally applicable in all federations; it is historically contextualized.”²⁹ According

p.163; P. Hogg (1997) *Constitutional Law of Canada* (4th Ed.) (Toronto: Carswell): p.24; Oliver (1999): p.544, fn.106.

²⁷ *Reference re Secession of Quebec*: para.33.

²⁸ S. Tierney, ‘The Constitutional Accommodation of National Minorities in the UK and Canada: Judicial Approaches to Diversity’ in A-G. Gagnon, M. Guibernau & F. Rocher (Eds.) (2003) *Conditions of Diversity in Multinational Democracies* (Canada: Institute for Research on Public Policy): pp.169-206.

²⁹ J. Leclair, ‘A Ruling in Search of a Nation’ (1999) *Canada Watch* 7: pp.1-2. Peter Oliver has also argued that the *Secession Reference* can in a sense be seen as an attempt by the Supreme Court to correct its decision in the *Veto Reference*. Oliver (1999): p. 546, fn.115. See also M. Walters, ‘Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and

to this argument the Court's recourse to unwritten as well as to written principles may have been in part due not only to regret over the role it had played at patriation, but also to a newfound maturity which recognised that managing a constitution for a country as diverse and complex as Canada required a more sophisticated constitutional apparatus than narrow positivism could provide.

iii. Judicial approaches to centralisation/decentralisation

The pivotal role that courts play in articulating the tenor or purpose of a constitution gives them considerable responsibility within decentralised constitutional systems in terms of maintaining or altering the equilibrium that exists between centre and subunits. This has been a feature of American jurisprudence with swings from time to time by the Supreme Court from a more centralising to a more decentralising agenda and *vice versa*.³⁰ Another example is the Court of Justice of the European Communities which has for long been criticised for having a centralising agenda by those who think it has expanded the power of European institutions in an illegitimate way.³¹ The Canadian experience of courts is interesting in terms of how the British Judicial Committee of the Privy Council and the later Supreme Court of Canada acted, or at least are perceived to have acted, in very different ways in terms of centralisation and decentralisation. For many, the influence of the Judicial Committee of the Privy Council maintained a strong federalist spirit within the constitution; and notably in Quebec this is often contrasted with the jurisprudence of the post-war Supreme Court which is thought to have pursued, or at least facilitated, a Canadian nation-

its Lessons for the United Kingdom (1999) *Modern Law Review* 62: pp.371-396 at p.375 and p.378.

³⁰ The commerce clause is one device employed in a centralising way.

³¹ K.J. Alter (2001) *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: OUP).

building project, the patriation process being the classic example.³²

iv. Stateism and human rights

The centralising mentality of a top court can be seen as a manifestation of ‘stateism’, and perhaps nowhere is the impetus towards a homogenised set of state-wide standards more apparent than in the area of human rights law. Stateism seeks to ensure the establishment of universal standards either based upon individual equality within a particular polis – welfare rights are the most obvious example – or based upon a sense that standards should be universal across humanity – an implicit assumption of a universalist liberal ethics. In particular, the latter principle seems to translate crudely into attitudes concerning civil liberties within states. This universalist assumption can lead to an opposition to group rights within a state. It can also create a predisposition against varying civil liberties standards including variation in the interpretation and implementation of these standards within states, even when these states are plurinational, composed of a collection of national societies with different cultures and societal priorities and even when this difference has been recognised in heavily devolved institutional arrangements.

Although presented as a universalist ethic, this notion of universalism can in fact be used to disguise a state-centred agenda of homogenisation. The supposedly universal standard that is set is in fact a standard emerging from the particularism of a specific national society. As Requejo put it: “it uses a universalist language to refer to a particular group, the citizens of a state, which takes for granted a uniform identity of citizenship created from the premises of an implicit stateist nationalism. The result is a form of nationalism that dubs as particularist and ‘against

³² J. Leclair, ‘*The Supreme Court of Canada’s Understanding of Federalism: Efficiency at the expense of Diversity*’ in J-F. Gaudreault-Desbiens & F. Gélinas (Eds.) *The States and Moods of Federalism : Governance, Identity and Methodology* (Cowansville : Yvon Blais) : pp.383-414.

the common interest' any attempts to regulate the rights of a national group whenever these fail to coincide with the particularist interests of the hegemonic group that the state defines as 'national.'" ³³ The result of stateism dressed as a universalist approach to human rights inevitably causes tension with federalist³⁴ and devolved³⁵ systems of government. Indeed, in the Canadian situation Chevrier argues that among Anglophone scholars there is a narrative that foresees a state-wide set of civil liberties standards in time replacing or at least substantially undermining federalism itself.³⁶

Concluding Remarks

In this chapter I have attempted to show that considerable work is needed by constitutional scholars to analyse both how the constitution has been used as a central device in the consolidation of host state dominance in plurinational states, and how courts have played a central part in this process. Other underworked research areas involve determining principles of constitutionalism fit for plurinational states today and mechanisms of adjudication appropriate for their implementation. It is also the case that the focus of work on plurinational states has centred upon the usual suspects in the Western world of Canada, the UK, Spain and Belgium. But this is changing as scholars begin to address the plurinational reality of many states across the globe,³⁷ and consider how constitutional structures might be amended better to

³³ Requejo (2005): pp.263-4.

³⁴ A.C. Cairns, (1992) *Charter versus Federalism* (Montreal/London: McGill-Queen's UP).

³⁵ C.M.G. Himsworth, 'Rights Versus Devolution' in T. Campbell, K. Ewing & A. Tomkins (Eds.) (2001) *Sceptical Essays on Human Rights* (Oxford: OUP).

³⁶ "Following the 1982 Constitution Act, it has become commonplace to foretell a...displacement, where the Charter of Rights would impose its unifying logic in Canadian society": Chevrier (2007), above. But for a different perspective see J. Hiebert, 'The Charter and Federalism: Revisiting the Nation-Building Thesis' in D. Brown & J. Hiebert (Eds.) (1994) *Canada: The State of the Federation, 1994* (Kingston: Institute for Intergovernmental Affairs): p.153 at p.156.

³⁷ Kymlicka & Opalski (2002); W. Kymlicka & Baogang He (Eds.) (2005) *Multiculturalism in Asia* (Oxford: OUP).

accommodate this reality.³⁸ In many ways this is the new challenge for scholars of plurinational constitutionalism, but more importantly it is a challenge for states, for political actors and for citizens, to reflect upon the demotic make up of their own polity and to shape their constitutions to meet the needs of the plurality of different groups which come together to shape the reality of the state constitution.

³⁸ S. Choudhry (Ed.) (2008) *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford: OUP).