Constitutional Unity and Complex Identification

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There is a tension in Professor Post's paper, I believe, between a recognition of the historical variability of the kind of uniformity underwriting democratic constitutionalism and the claim that the moral unity necessary for the legitimacy of modern states depends on a baseline of individualism. Hence all departures from a baseline of individual rights stands in need of special justification. Post writes: 'Group rights designed to protect distinct identities fly in the face not merely of the individualism characteristic of democracy, but also the individualism that Durkheim hypothesises *must* lie at the foundation of social solidarity in any modern diverse society'.[1] The problem of constitutional unity with regard to 'special rights' therefore, as Post sets it up, is that if citizens do not share the common status as individuals, what binds them to a single constitution? A singular mode of political identification is thus a prerequisite, it seems, as a basis for genuine constitutional unity. I think the paper demonstrates very nicely the difficulties and tensions created by 'special rights' against a baseline of individual rights. But it hasn't shown—at least for me—why this mode of identification is the best or only source of constitutional unity in deeply diverse states.

I take it that *all* regimes or schedules of rights are subject to strategic behaviour, whether minimalist (as 'negative' or economic constitutionalism is said to be), or 'political' (as republican or 'post-liberal' constitutionalism is said to be).[2] The first involves thinking of constitutions as mainly about limiting the damage governments and citizens can do to each other, and the second as providing the framework for the political (that is, democratic) determination and interpretation of the relevant set of values and institutions of that society. But deciding what to leave *out* of constitutional schedules is subject to the same kind of contestation that occurs at other levels, and determining the conditions under which procedures are genuinely democratic or fair will involve invoking principled constraints on the nature of the political. A right to freedom of cultural expression, for example, can be interpreted negatively as a right of non-interference (that is to exercise standard rights of freedom of expression, association or speech), or as entailing more positive rights to assistance and self-determination. Neither way of putting it, it seems to me, is any more or less protected against strategic behaviour and thus any more or less likely to create constitutional dissonance. Professor Post shows very

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1 Robert Post, 185 this volume.

2 Duncan Ivison, 'The Hobbesian logic of negative constitutionalism', (1999) 47 *Political Studies* 83-99.

well the tensions generated by the latter, more expansive, way of interpreting such a right, but the consequences of the former can be equally destabilising (and unjust). Abolishing forms of local autonomy or rescinding funding for minority language schools may not, strictly speaking, violate individual rights to freedom of expression or association, but they can also have devastating effects for national minorities (as Post seems to accept).

One could argue that the state should not subsidise the cultural preferences of its citizens on the grounds both of constitutional unity and justice, and equally, that it should respect the choices of its citizens and not interfere in the associational life of the groups they choose to form (except to preserve the conditions necessary for exit).[3] It is not clear whether or not Post is committed to such an argument. But it would seem to follow from his concern with the granting of rights to group rights-holders (cell 3 of Table 1) and his careful discussion of the problem of 'internal minorities'. However this argument raises some difficult questions with regard to constitutional unity (and indeed justice). Why should citizens who did not choose to be members of minority cultures—such as indigenous peoples—suffer from the disadvantages such membership can bring in a liberal democratic state such as Australia or Canada; namely, the possible eradication of their culture? Even accepting that not all forms of assimilation amount to oppression, to argue that the state should remain neutral about the moral costs of assimilation—neither promoting them nor trying to prevent them—is, at the very least, to suggest a controversial basis for constitutional unity (especially in a state with indigenous populations).

Why is the 'dynamic' effect of special rights *necessarily* (as Post argues) 'inconsistent with the social solidarity required for constitutional unity' unless the basis for that social solidarity is, in fact, as individualistic as Post claims? There are obviously reasonably stable liberal-democratic states that have departed from a baseline of individual rights when accommodating ethno-cultural groups in the process of nation-building (including, arguably, the United States).[4] Is the point that the closer these arrangements are to promoting the recognition of citizens as individuals rather than members of groups the more likely they are to promote genuine constitutional unity? I do not see why this follows, especially in multi-national contexts where means have to be found to incorporate the presence of two or more peoples into that constitutional unity. Surely constitutional disunity is more likely if the recognition of citizens as individuals entails denying those to those in minority cultures basic language rights, or the capacity to preserve aspects of their cultural structure. Not every cultural practice deserves protection or warrants the granting of group rights. But determining, on democratic grounds, which practices might justifiably entail such measures means taking seriously the way citizens value their cultural attachments, especially if liberalism aspires to

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3 See Chandran Kukathas, 'Liberalism, Multiculturalism and Oppression' in Andrew Vincent (ed), *Political Theory: tradition and diversity* (Cambridge: Cambridge University Press, 1997) 132-53.

4 See Will Kymlicka, 'American Multiculturalism and the "Nations Within"', in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000).

remain neutral with regard to citizens' ends.

Remember the initial characterisation of the nature of constitutional unity (adopted from Korsgaard and Pitkin). Pitkin argues that how we are able to constitute ourselves as a political community is tied to how we are already constituted by our distinctive history, by our 'fundamental ethos or temperament'. Thus a constitution can succeed in establishing durable and stable institutions only if it draws upon the foundation of this 'fundamental ethos'. I agree. But it is not clear to me that such a fundamental ethos is going to be (or need be) as individualistic as Post presumes (or at least in the way I think he presumes).

Democracy is the rule of 'the people' and constitutional unity depends on 'the people' identifying with the acts and/or procedures of the state. But what are the relevant *boundaries* of this unit of collective agency and how are they justified? It is striking how often this question is consistently avoided in democratic theory, albeit with a few notable exceptions. What level or unit should be used to evaluate democratic functioning? What if there are two or more 'peoples' in a state each, for argument's sake, with a plausible right to self-rule? To say that such claims to self-rule create constitutional dissonance is true, but to presume it can only be overcome by treating people as individuals without regard to their cultural or national attachments is not only to presume the relevant unit for democratic functioning, but also its 'fundamental ethos or temperament'—often precisely what is at issue for groups like indigenous peoples and other 'stateless nations'. What hope then for the constitutional unity of multinational states? This is a difficult case, but arguably amongst the most pressing to consider today.

Of course one option is simply to deny that such minorities have rights to self-rule and subject them to national norms and rules. But that hardly contributes to the sense of their authorship of the acts and/or procedures of the state necessary for the stability and functioning of a democratic state. These acts and/or procedures instead become simply an alien imposition. Striking the appropriate balance between enabling citizens to feel 'at home' amongst the basic institutions and practices of society and yet also ensuring these institutions are just means finding, or more accurately *creating*, inter-cultural common ground upon which these institutions and practices can be mutually justified.

In fact, I think the sources of constitutional unity in a democratic state, especially a multinational state, are much thinner and more complex than Post suggests, precisely because the question of who 'we' are when we refer to the unit of agency of the democratic state is dynamic and often ambiguous. Particular conceptions of the good offer too narrow a base for allegiance in these circumstances and first principles of justice too broad. Citizens share, if anything, a certain way of arguing about particular sets of values and principles.[5] And precisely for this reason, at times, they can tire of the argument and see no good reason for continuing to co-exist in the same state. In many instances I think this means constitutional unity will be much closer to a *modus vivendi* than Post (or Rawls, for

5 See, eg, Jeremy Webber, *Reimagining Canada* (Montreal: McGill-Queens University Press, 1994).

that matter) would like, although I believe more can be said in favour of such arrangements than Post allows.[6]

In Canada, for example, some citizens may identify their political allegiance to the acts and procedures of the state in light of the rights they are guaranteed as individuals under the Charter of Rights and Freedoms. But others, such as Aboriginal citizens, may identify with their nation which federated itself to Canada through a treaty and whose 'inherent right to self-government' is thereby recognised (constitutionally or otherwise). To say that as liberal democracies, Canada or Australia would still be concerned to ensure that the practices of ethno-cultural groups and other associations are compatible with liberal democratic values is not the same thing as saying individual rights provide *the* basis for constitutional unity. That unity may depend more on the various distinct peoples of a multinational state being able to trust the fairness of decision-making arrangements that affect their interests.[7] And although protection for basic individual rights is undoubtedly a necessary feature of the basis of this trust, it is by no means a sufficient condition.

In fact, precisely because rights are interpreted by courts and applied by particular agencies and institutions, the grounds of constitutional unity will also rest—at least in multinational contexts—on measures that often depart from a strict interpretation of the basic liberties. These may include, for example, attaching certain interpretive rules to particular agreements or policies struck between cultural groups and the state to encourage ongoing dialogue and the resolution of disputes; or allowing for different forums of judicial review (for example, at the regional or international level); or acknowledging different levels of political jurisdiction, both territorial and non-territorial. As Joseph Carens has argued, 'People are supposed to experience the realisation of the principles of justice through various concrete institutions, but they may actually experience a lot of the institution and very little of the principle'.[8] That seems especially true in the case of the Aboriginal peoples of North America and Australasia. These arrangements are, of course, potentially controversial both within and outside the cultural communities they address. But then so are the alternatives.

Complex identification requires recognising citizens' interests in being treated as an individual but also as members of a range of diverse intra- and international associations, some connected to matters of cultural and political identity and others less so. Post points out very effectively the dynamic and strategic effects

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6 See John Ferejohn's paper in this issue and Duncan Ivison, 'Modus vivendi Citizenship' in Catriona Mckinnon, Iain Hampsher-Monk (eds), *The Demands of Citizenship* (London: Continuum, 2000).

7 By invoking the language of 'trust' and cooperation' I am suggesting that an acceptable account of *modus vivendi* arrangements will not be one based exclusively on mutual advantage. For further discussion Ivison, 'Modus Vivendi Citizenship'; cf the discussion by Rawls of the slippage between comprehensive and partially comprehensive doctrines and his political conception of justice in *Political Liberalism* (New York: Columbia University Press, 1993) 158-64.

8 Joseph Carens, 'Citizenship and Aboriginal Self-Government'; paper prepared for the Royal Commission on Aboriginal Peoples (1995).

of these different allegiances and the tensions they generate. But the ground for constitutional unity will have to be found *amongst* and *between* these different allegiances, rather than hoping to transcend them by appeal to a singular mode of political identification based on individual rights.