

Devolutions of Sovereignty and National Ethos

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In 'Democratic Constitutionalism and Cultural Heterogeneity' Robert Post invites us to consider optimal formulae for constitutional accommodations of diverse cultures within one state. The topic is particularly contemporary. First because the Conference was held against the backdrop of momentum building in preparation for Australia's 1999 referendum on constitutional change. But second and more importantly, because the value, or indeed the imperative, of accommodating cultural heterogeneity within a constitution has emerged as a topic of considerable importance in the final decades of the 20th century. The constitutions which are most immediately brought to mind by Post's paper—those of the United States, Australia, and Canada—were written at a time when cultural heterogeneity would have had a different meaning than it does today, had anyone bothered to put the two words together and turn their mind to them. At present, however, the importance of cultural heterogeneity to constitutional recasting is evident in multicultural Australia, multi-'national' Canada, and the increasingly less-melted pot that is the United States. Constitutions emerging in this era, such as those in Bosnia-Herzegovina and South Africa to name but two, must make cultural heterogeneity their centrepiece or be doomed to almost instantaneous failure.

I set out here to make two comments on Post's paper which are linked together by their relationship with the place of cultural heterogeneity in national design and how we assess this when confronted with an opportunity for constitutional change. Initially, I examine Post's third possibility for protecting cultural heterogeneity: devolution of sovereignty. I agree with him that this is an important part of any discussion of constitutional arrangements respecting diverse cultures and I extend his analysis of the topic in a way that I believe sharpens the analytic potential of his trichotomy. I then turn to what Post's broader analysis of constitution as national ethos can tell us about the role of non-justiciable constitutional preambles. In conclusion I join these two comments to the topic which dominated much of our panel's discussion at the conference itself: whether a democratic constitution must be more than a baseline agreement about a way to live together.

Post's argument develops against the backdrop of an assumption of a democratic state that wishes to promote the greatest degree of cultural diversity that is compatible with its own democratic constitutionalism.¹ I too depart from this

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¹ Robert Post, 187 [9] this volume.

assumption as I seek to develop links between Post's work and the present Australian constitutional moment. While I am not convinced that Australia as a nation, or as a state, seeks to promote the greatest possible cultural diversity, I am convinced that in Australian political discourse a rhetorical agreement about the value of promoting cultural diversity could be relatively easily achieved. As long as cultural diversity remains notional and undefined, and prior to it being attached to any particular political reform agenda or spending priority, Australians could probably agree that it is a good thing. I call attention to this assumption, however, to denote that my comments are primarily arguing within the logic of the paper, rather than arguing from outside it. That is, I think the assumption serves a useful purpose even if it could be fruitfully attacked.² Further, a rhetorical commitment to cultural diversity may be one of the strongest tools a dominant cultural group within a state can deploy in the face of claims for greater legal provisions for cultural heterogeneity because it facilitates containment of these claims and it can foster a politics of paternalism.

Devolution of sovereignty interacts differently with both geography and identity than either the individual or group rights which Post focuses on throughout much of his paper.³ Both geography and identity are vital to national ethos as they are directly linked to the questions of who we imagine ourselves to be and what space in the world is ours. That is, both are crucial to Post's central concern with the national ethos that the constitution expresses.

While there is not a theoretical or imaginative barrier to devolution of sovereignty without a geographic dimension, the examples that come most easily to mind do have an associated geography.⁴ The examples Post uses—the states in a federation, a 19th-century Mormon state, or the tribal law of American Indian reservations—are of this nature. Regarding the constituent parts of a federal democracy like the United States or Australia, geography and identity have an important interaction. In these federations the states legalise and therefore reify differences between groups of people that by and large fall short of being 'cultural' in the true sense of the word. While the statement that 'Being a Queenslander is a way of life' has a certain resonance, it is as humorous as serious and few among us would assert that the unique and fragile characteristics of 'being a Queenslander' require special rights in either a group or individual formulation. On the contrary, the idea of 'being a Queenslander' persists largely because of the existence of the state of the same name. The state, and the constitutional framework that enshrines and protects its existence supports, sustains, and extends the possibility of an individual self-identifying as a Queenslander. In the case of the geographic

² I think it would be useful to explore the argument that no state can be fully committed to protecting the maximum degree of cultural diversity compatible with its existence. Post does not ignore the potential of this argument, but rather sidesteps it, and I do the same.

³ Post's discussion of devolution of sovereignty commences, 189.

⁴ Mark D Rosen discusses a range of possibilities for variance from American constitutional norms, each with a geographic component, in 'Our Nonuniform Constitution: Geographic Variations of Constitutional Requirements in the Aid of Community' (1999) 77 *Texas Law Review* 1129.

components of many federal states—the United States and Australia are cases in point—the constitutional arrangement creates the conditions to sustain this geographically based identity.

This point varies from Post's argument in the following way. His point of departure is that a federal arrangement may be used to ensure that cultural diversity is accommodated within the state. Indeed, he claims that devolution of sovereignty is a more powerful mechanism for accommodating cultural heterogeneity than either individual or group rights because it 'sharply circumscribes' the dominant culture's control.⁵ Accordingly, at the moment when the federal nation was formed, the cultural divisions between the component parts must have been the most important cultural divisions in the polity. In the cases of Australia and the United States, this argument does not necessarily hold. What is true, however, is that the component parts that became states were already demarked by their political power. In both nations today, cultural diversity is not perceived as linked to the states. My argument, therefore, is that units which achieve and retain political power foster the development of cultural identity and differentiation even among groups of 'settlers' who prior to becoming Queenslanders, West Australians or New Yorkers shared a broadly common cultural heritage.

Post does not ignore the complicated interrelationship and overlapping reliance of law and identity. But in questions of devolution of sovereignty I want to emphasise the importance of considering how the law and identity puzzle is put together. Or taken apart as the case may be. The constitution of a democratic federal state has a part in fostering some 'cultural' identities in much the same way as Post asserts that group rights hand to the national court system the profound power to define the group and police its boundaries.⁶

Canada serves as an example here, and indeed Post uses Canadian federation—and its ever imminent and averted failure—as an example of a nation teetering towards dissolution.⁷ The constituent parts of the Canadian nation⁸ do not all have the same relationship between geography and identity, which is the factor at the core of Canada's constitutional dilemma. The constitutional arrangement is similar to those of Australia or the United States, but the national ethos is not, or at least not entirely. The constitutional arrangement has reified geographically based identities in an overreach of a foundational intent to accommodate many factors, at least one of which was English-French biculturalism. The principle resistance to an accommodation of Québec within the Canadian constitutional compromise is the power of the *other* constituent parts. That is, the formal symmetry of the constitutional arrangement is opposed to the asymmetry of the historical evolution of the nation.⁹ What sustains the Canadian union is the myriad of *non*-constitutional

⁵ Above n 1, 201, IV [2].

⁶ See in particular his discussion of the role of national courts in determining group identity when group rights are at stake, above n 1, 195, III [16].

⁷ Above n 1, 197, III [24].

⁸ I use the term nation deliberately and argue elsewhere that Canada is a nation in itself, plagued by the persistence of a 'two nations' thesis.

⁹ Will Kymlicka argues that the constituent parts of a federation need not have identical powers and refers to the supports of symmetry as... 'prisoners of their own

compromises that do accommodate the difference between the provinces which is hidden by constitutional symmetry. What threatens it is the symbolic resonance of the constitution.

I disagree with Post's suggestion that the tension in the Canadian union derives from language. It is *not* linguistic difference that threatens Canadian cohesion. It is rather something more far-reaching and integral, something more complete, cultural more all consumingly. There is a persistent hostility in the Quebec nationalist/separatist movement to the presumption that language might be either the sum of the problem or of the solution. Canadians are quite adept at learning each other's languages; but bilingualism only makes more transparent the differences between Canadians which persist nonetheless. Rather the tension is Post's central concern; cultural heterogeneity.

The case of federations is really beside the point, however, as a federal arrangement does not represent a devolution of sovereignty. A federal arrangement is a conflation of sovereignty. Post's proposal is that sovereignty can be devolved onto some groups and that this will accommodate cultural diversity within the constitutional arrangement in a more powerful way than either individual or group rights. The lessons of federal arrangements are important to evaluating the proposal. First is that this is most achievable, but probably not exclusively achievable, where the group identity is geographically based. I think we need to work imaginatively to envision devolutions of sovereignty, for example for First Nations people, which are not subject to exclusively geographic definitions. The lack of examples proves the challenge of this task. Devolution of sovereignty poses potentially profound threats to the national ethos which grounds Post's vision of constitutional democracy. The examples of tribal law or the Amish community show devolution of sovereignty to groups that tolerate rather than embrace the nation. Both operate in circumstances where we imagine the group sees itself has having no choice about belonging to the nation.

When sovereignty with a geographic dimension is devolved onto a group with an identity grounded in things other than geography, the threat to the national community is enhanced. This strengthens the case for finding ways of devolving sovereignty to non-geographically based identities—where the absence of control over space would counter the centrifugal force that a devolution of sovereignty generates. An example of this would be self government for urban Aboriginal peoples in Australia where the areas of legislative competence to be devolved would not include exclusive control of a space, but may include areas such as health care, education, or social services, where the capacity of the dominant culture to effectively govern has been amply disproved.

Post asserts that democratic constitutionalism relies on a shared ethos, a 'unifying principle of identification.'¹⁰ In cases where devolution rather than

a priori definitions of federalism or *a priori* assumptions about the possible basis of unity.' Will Kymlicka, 'Individual and Community Rights' in Judith Baker (ed), *Group Rights* (Toronto: University of Toronto Press, 1994) 1, 27.

¹⁰ Above n 1, 186 [1] this volume.

conflation of sovereignty are to provide the solution, the shared identification may be appropriately thinner than Post suggests. Aboriginal and non-Aboriginal Australians do not share the same identifications with this geography. But their identifications are strong, passionate, cultural, and thus a shared commitment to the pragmatism of no alternatives, and democratic values, may be enough to ground the nation. This amounts to more than a mere commitment to individualism.¹¹ Each group grounds their identity in this particular geography. It is no mere consociationalism because it cannot be unravelled. The Aboriginal and non-Aboriginal existence of Australia did not grow from a conflation of sovereignty, but rather from conquest. Post points us to devolution of sovereignty as a way forward. The concept has enormous relevance for contemporary Australia, more than Post accords it.

The second point raised by Post's analysis that I want to discuss briefly is the role of a constitution in capturing and expressing national ethos. If one takes seriously the assumed commitment to promote cultural heterogeneity, this must offer some guidance at moments of constitutional reform. In the recently rejected proposals for constitutional change in Australia, neither rights nor devolutions of sovereignty were at issue. Nonetheless, the question of national ethos was embedded in both the question of whether to become a republic and the proposal for adding a preamble to the Australian constitution.

One insight to be drawn from this is that any discussion of constitutional change necessarily implicates national ethos. To the extent that this is ignored the issue is obfuscated (as many will undoubtedly now argue was the result of the form of the recent referendum questions) and thus the impetus for change is lost. The broader insights raised by Post's assumption, however, go to the issue of inserting a new preamble. If the constitution embeds national ethos, ought we pin that down and spell it out? The proposed new preamble attracted more attention during its drafting than later in the actual referendum campaign. The public debate surrounded whether the chosen words did capture the national spirit. Moving words are best forged in constitutional moments when the force of will to change can prevail over the parsing of sentences.¹² Post draws on Hanna Pitkin in reminding us that a constitution captures a moment between being and becoming—it is a bit of what we are and a bit of what we aspire to.¹³ If we take seriously a commitment to cultural heterogeneity, a constitutional preamble offers a unique opportunity to ground that principle.

In doing so, it is imperative to remember the moment between being and becoming. The attempt to immunise constitutional interpretation from the effects of a preamble is hubris. The present judiciary may follow such a prescription, as may the future High Court judges now sitting in our first-year classes. But the moment of becoming is long. With any luck this constitution will endure far beyond those generations. Mere 20th-century techniques of constitution reading are enough to

¹¹ Post draws on Durkheim's hypothesis to make this point; above n 1, 190 this volume.

¹² Avashai Margalit makes this point in his contribution to this volume, 347.

¹³ Above n 1, 186 [2].

circumvent the attempt to make the preamble meaningless. The lesson of Post's reminder that the constitution expresses a national ethos that endures beyond the horizon of the unimaginable future tells us that our powers to limit future interpretations of the constitution are limited indeed. We should not need the reminder. The lesson of Post's assumption of promotion of cultural heterogeneity is that if we are ever to do more than postulate this as an argumentative building block, writing it in the constitution is a powerful tool. The subversive potential of constitutional change should not be underestimated just because it is beyond our imagination.

The questions of devolution of sovereignty and expressions of national ethos are linked in a way that can support Post's argument, although he seems not to agree on this point. An enduring constitution does draw on more than a mere *modus vivendi*. National ethos can carry a federal nation through crises of unity¹⁴ or of constitutional interpretation. Considering the geography and identity configurations of the constituent parts of federal states demonstrates that political units breed their own identities. An enduring *modus vivendi* can engender a national ethos that is more than that—and the contractual terms need not be changed to achieve this.¹⁵ Further, the commitment of all groups to the national enterprise need not be the same. Divergences make it difficult to capture the national ethos in a few poetic phrases. They alone do not make the nation frail, provided that each group's commitment intertwines both geography and identity—who we are and where we belong.

¹⁴ Arguably this is the analytic point where contemporary Canada is the best case in point.

¹⁵ See Post's reference to John Ferejohn, above n 1, 197 fn 48.