Democracy and Heterogeneity

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Professor Post's essay aims to explore how a well-functioning democracy can accommodate cultural heterogeneity or what is often called multiculturalism. He confines his analysis to three legal or constitutional strategies for permitting minority cultures to thrive within a national democratic framework: permitting individual members of minorities to exercise rights to vindicate group interests (individual rights); permitting groups (in some kind of organisational form) to exercise rights on behalf of (individual or collective) cultural interests (group rights); and devolving state authority on (presumably organised) groups or cultures (devolution of sovereignty).[1] Each of these strategies is shown to have limitations of a kind that may threaten either the interests of the cultural group or the underlying values either of democracy or constitutionalism. This may be so in two ways: in the analytic sense that the exercise of individual or group rights lead to incompatibilities between cultural values and democratic or constitutional commitments; or dynamically, in the sense that the existence and exercise of such rights would produce sociological forces that would undermine either cultural or constitutional values. Post's analysis is, in this respect, a valuable and sobering treatment of the practicalities of reconciling multicultural claims with constitutional democracy.

These practical difficulties stem from three sources: first cultural groups sometimes demand special treatment, recognition, or access to resources, and the majority may not be willing to go along with these demands. The demand that Quebec be treated as a special society within Canada and not merely as one of ten provinces within the federal system seems to produce this kind of sentiment. Other Canadians are plausibly concerned that this kind of recognition, with whatever rights and devolved authority would be involved, would undermine (either statically or dynamically) Canadian democratic and constitutional values.

Second, some cultural groups do not accept the values that underlie

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1 It is not clear that devolution of sovereignty, as analysed in Post's paper, is a separate analytical category from group rights. In so far as sovereign powers are developed to the cultural group itself, it confers some rights of self government to the group or to its organisational representatives. Of course, devolution to an entity only contingently related to the group—to a state or province for example—would seem distinct from a group right. Such 'federal' devolution is more of a structural alteration in the political playing field that might give certain groups a better chance to prevail in their claims.

constitutional democracy: they may not regard all of their own members (or outsiders) as deserving equal treatment, either in terms of benefits or decision making authority. The assertion by some religious groups of a right to educate their young free from outside interference is an example here, as is the treatment of women within certain cultural groups. Again, state conferral of rights on such groups can impair the legitimate aspirations of minorities within the cultural group.

Finally, and this is the focus of much of Professor Post's essay, the legal policies available to the state may match up poorly with the cultural values held by either the minority group or the majority. Individually exercised rights to pursue group interests permits the vindication of only certain values of the minority culture, and occasionally may work directly against such values altogether by encouraging individuals to see group membership as an individualised source of legal advantage. Moreover the value of individual rights is dependent on the state's recognition of which group interests count as legally cognisable. Similarly, as Post points out, organisational group rights separate the interests of organisational leaders from the group's culture and involve the state itself in intra-group politics. And, devolution of sovereignty will often work to advantage certain (categories of) group members as against others. Moreover, as in the case of individual and group rights, devolution involves the state's delegation of authority to organisations linked to the particular minority cultures.

Each of these problems makes accommodating cultural minorities an especially difficult problem for a constitutional democracy. Democracy, according to Post, requires a shared sense of authorship or agency—in which people have a common obligation to see themselves as symmetrically situated citizens sharing authorship of state actions. This is quite a strong conception of democracy, one that makes inclusion of minorities a particularly difficult problem. Cultural minorities, while seeking the benefits of inclusion, typically want to maintain and develop distinct identities and attachments to their heritage, language, and tradition. But, how can people who insist on maintaining different identities and attachments be integrated in the common democratic project, without losing the sense in which that project is truly shared among equal citizens? The contradictions between these demands—for integration and difference—often produces resentment over minority insistence on special treatment and majority insensitivity. Such sentiments are particularly prone to devolve into self-righteous politics that too easily become uncomprehending, intolerant, and sometimes violent.

It is in order to contain or regulate this volatile mix of self-righteous passions and self-serving politics that constitutional or legal policies of dealing with cultural heterogeneity seem attractive. Each of the legal strategies that Professor Post considers seems to involve state recognition of minority cultural claims.[2] Given his strong conception of democracy, I read Post as requiring us to think that this recognition involves some kind of positive act, embodied in some act

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[2] This seems less clearly the case with what I called federal devolution strategies—placing sovereign authority in (geographic) units in which minorities might have a better chance to prevail. However, the recent politics of redistricting in the United States suggests that such strategies may imply such official recognition.

of common agency such as a constitutional or statutory provision. The kind of act over which we, as citizens, could understand as involving shared authorship. If this is what he has in mind, Post's attempted reconciliation of democratic constitutionalism with cultural heterogeneity seems to establish what might be called a politics of recognition in which minority groups (or rather, organisations that claim to represent such groups) petition the state or the majority for (more or less discretionary) acts of tolerance and recognition that may take various of the forms that he analyses.

By embroiling the state, or the majority that controls it, in directly managing cultural claims, we run the risks that Post discusses: the majority may be tempted to pick and choose arbitrarily among minority cultures, their specific values, and their organisational representatives. Secondly, the state may interfere too much (or too little) in the internal workings of groups that it recognizes. And, while Post does not emphasise this, the demand for state recognition is likely to distort the internal politics of ethnic and cultural minorities, inducing group leaders or factions to bargain for, plead for or demand that the state accord recognition of the kinds mentioned above. Ethnic groups will, in such a legal and political environment tend to be state-centred petitioners, or frustrated rebels who have been denied constitutional or legal recognition. The state itself will appear, in this domain anyway, as a whimsical dispenser of certain kinds of privileges and benefits to supplicant groups. This is a pretty demeaning picture all around.

I.

Post's essay begins with the idea that democracy requires the creation of a kind of collective agency—the 'constitution' of a unified people in whose voice the laws speak. This idea, apparently drawn from Kantian notions of agency or authorship, seems plausible as long as not too much is read into it. The sense in which we, as citizens, can be understood actually to be authors of our collective fate is difficult to give non-metaphorical meaning to, at least unless the notion of authorship is given a fairly loose construction. The danger in the idea of unified or collective agency is especially great when considering issues of membership, in that it may seem to impose onerous requirements on each of us to surrender or subordinate our other allegiances, especially those of us with ethnic, linguistic or cultural attachments, in order to be admitted to full citizenship. Moreover, standards for membership will, on strong democratic assumptions, be set by the state itself.

Still, it does seem true that things will go better in a constitutional democracy if all of us can recognise that the laws have a claim on each of us and that a part of this claim originates in our playing some part directly or indirectly in authorising the making and enforcing of the laws. But this sense of law's claim on us is also furthered in so far as the law treats us all equally, in the sense of treating us with equal concern and respect. In turn, the notion of equal respect seems to require that the law accord respect to our conceptions of what living well requires as well as to our persons and other interests. And, in turn, this idea seems to require

a tolerant official attitude toward diverse life projects or identities and therefore to be welcoming to the identity claims ethnic and linguistic minorities. That law treats our persons and our interests equally in this sense makes personhood in the state, and respect for its laws, a valuable thing independently from our having authored or authorised those laws.

Moreover, I doubt that the requirement that constitutional democracies embrace reasonable cultural heterogeneity rests only or even mainly on collectively authorship in the making of laws but resides as much in the substantive properties of the laws (do they exhibit equal concern and respect for all citizens? Are they arguably good, on the whole, for minorities as well as majorities?) and their enforcement. This suggests that we should look as much to what might be considered the constitutional (or rights protecting) aspects of democratic constitutionalism as to its democratic features when seeking to integrate multicultural claims with democratic constitutionalism.[3] So, at any rate, I shall argue.

I doubt that there is a general normative requirement of tolerance—that public officials should be constitutionally required to tolerate religious and ethnic diversity—requiring the law actively to encourage cultural diversity or, if it must, how far that toleration must extend to encouragement. Must a democratic and constitutional state encourage diverse cultures independently of their contents, or are there some cultures that, while tolerated, need not be encouraged? And, how about the treatment of (constitutionally) objectionable cultural practices? Can the state (or better, when can the state) intervene in cultural practices, even if they central to the identities or values of their practitioners to regulate or forbid them? These questions illustrate how vexing issues of multiculturalism are in a society aspiring to be both liberal and democratic.

Nevertheless, diversity, if it poses problems and risks for a constitutional democracy, has many attractions. First, as James Madison suggested about factions (themselves an expression of diversity), directly regulating or repressing diversity may have worse consequences than learning to live with it, in the sense that it may impose too many burdens on liberty. But perhaps as important, as suggested by John Stuart Mill among others, a diverse society permits people to form their aspirations and life plans in full knowledge and acquaintance with attractive and familiar alternatives in mind. In such a society, the life choices we make are more truly our own, in being chosen in full deliberative awareness. So it seems that well functioning constitutional democracies are likely to find policies tolerating and promoting cultural heterogeneity attractive. The important question is what shape these policies will take.

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3 Constitutional norms need not be given their effect through non-elected bodies but can, as in those legal systems founded on notions of legislative supremacy, exercise their effect within the legislative process itself. But however they are given effect, it is the substantive protection of minority rights that earns legitimacy, not their institutional pedigree.

II.

As I read him, Professor Post sees the issue of including minorities as entailing two steps: the 'constitution' of a democratic people capable of common authorship, and as a 'stance' chosen by the democratic state or the majority that controls it, toward minority groups. From the point of view of creating a people, certain requirements are placed on minorities aspiring to full membership. They must be prepared to surrender or subordinate certain kinds of attachments in order to connect to the common democratic project in the right way. These requirements may be logical or practically necessary for the maintenance of a democratic order, or for a stable political order. Or they may be imposed by the majority as criteria for membership. But if criteria arise in this (positive) manner, they seem to stand in need of principled justification, in terms of what is actually required for democratic rule or social cohesion. As Post puts it, 'what begins as an examination of the relationship of democratic constitutionalism to cultural heterogeneity, tends to conclude as a discussion about the nature of democracy.'(4) He seems to doubt that such discussion will cast much light on these issues.

Post's essay places more emphasis on policies of recognition and inclusion which are seen, in the second perspective, as more or less volitionally chosen among those that 'range from suppressing diversity in order to establish the uniform culture believed to offer maximum support for democratic diversity, to tolerating cultural diversity, to actively promoting cultural heterogeneity.' (P. 3) He appears to assume that it is up to the majority to choose among these policies and deals with a state that 'has decided to promote the greatest degree of cultural diversity that is compatible with its own foundational commitment to democratic constitutionalism.' (p. 3)

By restricting attention to democratically chosen policies of multicultural recognition, perhaps Professor Post sketches too severe a perspective for those who hope that the aspirations of democracy can be reconciled with a flourishing pluralism. By characterising the state as the dispenser of recognition to aspiring cultural groups we make it the arbiter of the question of how far we can tolerate or encourage a groups claims without jeopardising the state's one-on-one connections with its individual citizens (either as subjects or collective authors)? The state itself is granted a kind of moral or even ontological priority over the cultural or ethnic groups. The alternative, Post implies, is to see the nation as a mere *modus vivendi* among groups, and the state (and its legal and constitutional apparatus) as dependent in some way on this *modus vivendi*. I think this is rather to give *modus vivendi* a bad name and I think that recent developments in international law (as well as historical examples) suggest that a more encouraging politics of accommodation might arise from such a starting point.

As one example of what I have in mind, let's consider the recent development of the European human rights regime.[4] Following World War II,

[4] The factual materials in the following paragraphs are reported in Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law: Text and Materials* (Oxford: Oxford University Press, 1995).

European nations (here I shall think of them as cultural groups) began, at first haltingly to adopt both enumerations of human rights (in the European Convention on Human Rights, and organisations (the European Commission of Human Rights, and the European Court of Human Rights), which would have the authority (beginning in 1955) to hear petitions from individuals citizens (as well as from states) and make binding judgments. The enforcement of such decisions was left, it is true, to the state organs, but in nearly all cases the implementation of such judgements (through re-opening court proceedings, reversing administration acts, or modifying legislation) has been automatic and uncontroversial. In recent years, these developments have accelerated as the Commission and the Court have been integrated into a single judicial institution, and as European states have successively incorporated the European Human Rights Convention into their domestic law. By incorporating the Convention, each nation's ordinary courts gain the power to enforce European human rights within their own borders, thereby increasing the likelihood of enforcement and compliance.[5]

I take this story, briefly told, to illustrate two points. First, out of what must be seen as a *modus vivendi* cautiously entered into by heterogeneous nation states, has emerged a substantial set of rights and values, protected by a set of increasingly authoritative organisations (especially the European Court of Human Rights in Strasbourg and, as importantly, legal specialists who bring actions in this forum), and an ideology or shared culture of human rights that seems to exhibit many of the values that one would associate with democratic constitutionalism. I admit that the system looks a lot more constitutionalist than democratic in the sense that the legislative enumeration of new rights proceeds slowly through the adoption of treaty protocols. Secondly, this whole development proceeded without very much direct involvement of the European nation states. Rather, the Commission and the Court were able to deal directly with individuals, articulating in an increasingly wide range of cases, what the shared commitments expressed in the Convention actually require. Moreover, the nation states have generally recognised their obligations to comply with the resulting Court decisions, even when those decisions are very hard to square with the domestic legal situation, and even where the decisions raised domestic political concerns.[6]

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5 Importantly, incorporation of the Convention authorises ordinary judges exercise some review of national legislation, an authority quite foreign to the British legal system. But, as Lord Bingham, CJ, has argued, British courts would exercise no more authority over statutes than the European Court at Strasbourg currently does, and in any case it would be up to Parliament to modify or abolish any statutes that could not be construed in a way to fit with the Convention. 'the overriding duty of the courts is to read Acts of Parliament ... conformably with the Convention wherever possible, but where it is impossible the courts cannot strike down Acts of Parliament...' Of course if Parliament refuses to adjust the statute, following a judicial declaration of incompatibility, Britain may remain 'in breach' of Convention obligations. Lord Bingham of Cornhill, 'The British Legal System and Incorporation of the European Convention on Human Rights: The Opportunity and the Challenge,' *European University Working Paper*, 99/5, Fiesole: EUI 1999, 33-35.

6 It is true that the European Commission and Court have been careful to recognise domestic legal traditions and practices and to create a national 'margin of

I suggest that the 'democratic deficit' exhibited in the development of European human rights law has generally operated to discourage minorities from trying to engage in a politics of recognition at the level of European political institutions. Such recognition would need to arise through the adoption of a protocol amending the Convention, an arduous political task. Claims for recognition can however be pressed in the European Court and Commission, through legal or interpretive arguments that established that a recognition of some group right follows from the Convention. But claims pressed in these forums must be articulated in terms of general legal and moral principles rather than as demands for political concessions. So while the politics of recognition is discouraged, the (constitutional) jurisprudence of recognition is given free reign.

Of course, claims for cultural recognition can, of course, still be pressed at the national level. And, governmental systems employed throughout Europe occasionally may lead to embracing or rejecting ethnic group demands by national or regional legislatures. But such national legislation can still be reviewed (directly or indirectly) by European institutions such as the Court for Human Rights. As I see things, the European 'solution' is to permit democratic rule to flourish at the national level while imposing 'constitutional' controls supernationally.[7] This seems a long move away from a mere *modus vivendi.*

I do not think the European Convention is especially unique in its treatment of minorities. One can understand the development of American constitutional protections prior to the Civil War in similar terms. Most legislation was done in the states but was subject to review ultimately by the Supreme Court. Much of this jurisprudence was aimed at protecting the interests of minorities—people who were not residents of the particular state for example. Substantial constitutional protections—via the Contract Clause or the dormant aspects of the Commerce Clause—were exercised by federal courts rather than the states or localities that produced the statutes. I am not arguing of course that everyone's rights were well protected in this system; obviously the growth of the slave economy in this period would refute such a claim, as would the discriminatory treatment of native Americans, Catholics, and other minorities. Rather, I am suggesting that in that system, as in the current European context, democracy and constitutionalism were reconciled by operating largely at different levels of government.[8]

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appreciation' for practices that might seem to raise human rights issues.

7 This statement does not mean to deny the equally extraordinary development of constitutional courts with judicial review powers at the national level. These courts are, in important respects, in competition with the European Courts of Human Rights and the European Court of Justice. But, for the most part, these courts enjoy somewhat less political insulation from national political institutions than does the United States Supreme Court.

8 I am not giving any normative endorsement to the outcomes of this system. To a great extent federalism—the two level system in which state and local governments were more or less vigorous democratic institutions, working within a constitutional system—permitted a great deal of majority approved discrimination. All that I am claiming that the dualist accommodation of democracy and constitutionalism avoided, at least until the 1850s, a politics of recognition at the national level. At that

That strict bifurcation has obviously disappeared completely in the United States, despite recent judicial attempts to restore it. Since the 1930s the evolving structure of the American economy and society have forced democracy and constitutional control to conflict more frequently at the federal level and this has produced increasing tensions between democratic and constitutional principles, as the Court is often asked to review the actions of the federal legislature. The American 'response' to this problem, one repeatedly chosen by the electorate, has been to limit the capacities of elected officials by insisting on fragmenting powers even more than Madison himself had recommended. The preference of American voters to elect divided governments not only limits the capacity of such governments to accomplish much legislatively, but also permits the Supreme Court an enormous range of actions it can take without much fear of a congressional response. But, in any case, when it comes to the politics of recognition (at the national level), the American system is nearly as hostile to it as the new European one and essentially for the same reasons: the fragmentation of parties and institutions creates a kind of democratic deficit within the federal government. For that reason, ethnic recognition in the United States as well as Europe is either pursued at local levels or is managed in constitutional forums rather than by legislative bargaining, and when Congress does attempt to enter that terrain as it did in the Religious Freedom Restoration Act, the Court has not been reluctant to reassert its control over the issue.[9]

III.

I think that this argument may help to illustrate what has gone wrong in places where accommodating cultural claims seems to have threatened the workings of an otherwise well ordered democratic state. Canada is everyone's sorry example nowadays and so I shall use it as an example of what can go wrong when ethnic claims are channelled into political rather than constitutional fora. Canadian governments and cultural minorities have restricted themselves to policies of the kind that Professor Post analyses, politicising claims for individual rights, group rights, and devolution of authority to cultural groups. The problem is this: francophones and other cultural groups within Canada have sought some form of recognition, toleration, or autonomy from Canadians generally or their government. The policies sought have been seen to be generally the kinds of things that could be offered or withheld discretionarily from this or that culture and not to flow from

point, the breakdown of the various sectional compromises that had protected (minority) southern interests, invigorated a recognition politics that rapidly led to secession and civil war. The particular issues of recognition involved, among other things, the question of whether the Fugitive Slave Act would be enforced, and whether free states could be admitted to the union without a matching number of slave states.

9 Of course, American government is not always divided and on occasion the politics of recognition does occur on the national political stage. Most notably the 1965 Voting Rights Act stands as example of the majority expanding political rights of excluded minority groups. While this act has had enormous implications for American political life, its implications are still intensely disputed.

pre-existing moral or constitutional requirements.

That ethnic politics in Canada has taken the political forms that it has is, I think, largely traceable to the majoritarian aspects of Canadian government. Canada's election system and governmental structure are largely patterned on the British model: single member district elections tend to produce both majorities for a single party and volatile election results. Its Senate is very weak and its parties tend to be quite disciplined. As contrasted with both the European and United States models, power in Canadian government is concentrated in whichever party controls the federal government. Moreover, since the patriation of the constitution in 1982, the Supreme Court's capacity to strike down federal or provincial legislation is limited by the capacity of these governments to shield legislation from such action. The power of the Court to check legislation is therefore both politically and constitutionally weak. It is not surprising, within such a system, that the claims of cultural minorities would be directed to elected officials rather than to courts since, ultimately, they will end up there in any case. In such a system, a politics of recognition seems nearly inevitable.

In the end, I do not disagree substantially with Professor Post's analysis. I agree with him that multicultural claims need to be fitted within a democratic and constitutional order. And, I agree that each of the policies he discusses—individual rights, group rights and devolution of authority—have important deficiencies. I would emphasise, however, that each of these policies is especially dangerous for the democratic organs of government to try to resolve, precisely because of the particular passions they evoke and the self-dealing politics they often produce, and that each might be better dealt with in other forums and in terms of more abstract principles of equality, democracy, and justice. Such issues—issues of membership and identity—seem better suited to treatment within a more deliberative and perhaps judicial forum that is well insulated from political forces.

The European and pre civil war United States cases suggest a mode of hierarchical insulation—in which the states are able to legislate freely and democratically, subject to a higher level of judicial or constitutional scrutiny. In my view, this does not imply that (constitutional) courts must or should have the authority to strike down or refuse to apply legislation that offends constitutional principles. That is an independent issue. As in the European Human Rights Convention, judicial authority may be limited to interpreting what legislation requires and indicating to the government that some adjustments in the offending laws seem necessary. It may remain to the legislature, as it does in many legal systems, to respond (or not) to such a judgment. But even with such a limited form of judicial 'review,' it seems to me that the politics of recognition may be transformed. A forum committed to constitutional values will have declared that, as a matter of fair and equal treatment, a minority ought to be granted some form of recognition. At the very least this should change the nature of the debate away from what the majority has the sovereign discretion to do, and into an issue of justice.