Group Rights in Comparative Constitutional Law: Culture, Economics, or Political Power?

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CHAPTER 53

GROUP RIGHTS IN
COMPARATIVE CONSTITUTIONAL LAW: CULTURE, ECONOMICS, OR POLITICAL POWER?

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I. Introduction

Group rights are part of the grammar of contemporary constitutional politics. In divided societies, in which ethnicity serves as the principal basis of political mobilization, ethnic groups—especially ethnic minorities—assert a range of group rights directly, or as the underlying root of a range of public policies. It is claimed that there are group rights to separate educational and social institutions, to federal subunits in which ethnic groups exclusively wield or dominate the exercise of political power, and to land and resources. Group rights are the basis for rules on internal migration and land ownership, for distinct systems of religious personal law, for official multilingualism, for executive power-sharing, and for a share of natural resource revenues. Moreover, the assertion of group rights is not just a political claim; it is also a legal claim directed at the very design of the constitutional order and its subsequent interpretation. Group rights serve two constitutional functions. They are shields and swords against majority rule, which protect ethnic minorities from being outvoted on policies that affect the interests that those rights protect. But equally importantly, the entrenchment of group rights reflects and projects a conception of the very nature of the constitutional order itself, in which the group which holds rights is constitutionally identified as a constituent element. Citizenship in the broader political community is mediated through membership in the group. Thus, group rights have both regulative and constitutive functions.

In contemporary constitutional practice, group rights exist alongside the standard schedule of individual rights that are found in constitutional bills of rights—the liberal freedoms (expression, assembly, association, and religion), and the rights to bodily integrity and due process, to participation in the democratic process, and to equality. However, these two varieties of rights embody competing constitutional logics. Group rights institutionalize ethnic identity in the very design of the constitutional order, whereas individual rights are guaranteed irrespective of ethnic identity and are hostile to the institutionalization of ethnic difference. Rights to equality and non-discrimination presumptively prohibit the distribution of rights and opportunities on the basis of ethnic identity—for example, through rules governing preferential treatment in public sector employment, the receipt of public services, or in land ownership. The guarantee of rights on equal terms—for example, the right to vote and hold public office, the right to property—presumptively forbids the unequal enjoyment of the interests protected by those rights, including on the basis of ethnicity. More fundamentally, individual rights call upon citizens to abstract away from race, religion, ethnicity, and language, which have previously served as the grounds of political identity and political division. They encode a vision of political community built around citizens who are equal bearers of constitutional rights—a constitutional patriotism or civic nationalism—a transcendent form of political membership unmediated by group identity.¹

Individual rights clearly have regulative and constitutive functions as well, and these functions not only differ, but also conflict with the parallel functions served by group rights. So one of the most pressing issues of contemporary constitutional law is to understand the precise interrelationship between group and individual rights. Yet the most serious work on this question

is found not in the literature on comparative constitutional law, but in the cognate discipline of political theory, which often presupposes the constitutional practice of group rights, in order to better understand the political sociology of claims for those rights, and to assess them normatively. Constitutional scholarship, in turn, is parasitic on political theory. Indeed, because of its orientation around real-world examples, the political theory literature informs contemporary debates over group rights in constitutional politics, especially during moments of constitutional transition.

Political theorists presuppose that group rights entail the right to self-government over matters integral to cultural identity. But on careful examination, there is a gap between the constitutional image of group rights relied on by many political theorists and the actual constitutional provisions that can lay claim to constituting group rights. Group rights often arise out of conflicts over economic and political power that may bear little connection to questions of cultural difference, or whose relationship to culture is more complex than political theorists would suggest. Normative theorizing and constitutional analyses about group rights are therefore premised on inaccurate foundations. Moreover, the inaccurate image of extant constitutional orders may distort practical debates over constitutional design and interpretation. The goal of this contribution is to sketch an alternative picture of group rights and the political sociology that underlies them. This kind of descriptive and analytical work yields not only a different picture of group rights, but reframes the precise character of the conflict between individual and group rights, which is the precursor to normative analysis.

**II. Group Rights in Political Theory**

An analytic and descriptive account of constitutionally entrenched group rights should have the following components: (1) the interests the group right seeks to protect; (2) which groups claim and hold such rights; (3) the juridical structure of these rights, including what is the subject matter and scope of such rights, who are the rights-holders, who owes corresponding duties, how those rights are exercised, and the relationship of group rights to territory; and (4) the nature of the relationship between group rights and individual rights.

The political theory literature on group rights is vast, is riven by internal debates, and resists easy generalization. However, we can distill a shared set of answers to these questions from political theorists: (1) group rights protect the interest of members of ethnic groups in cultural survival or integrity; (2) group rights are primarily held by three kinds of minorities—national minorities, indigenous minorities, and religious minorities; (3) group rights consist of rights to decision-making authority over matters integral to cultural survival, are held by groups collectively, are exercised by the group through its governing institutions or on the group's behalf by an unelected leadership, often but do not necessarily entail territorial jurisdiction, and can bind both members and non-members of the group; and (4) group rights come into conflict with the individual rights of group members, but do not raise serious issues regarding the rights of non-members. I address each point in turn.

1. **Group Rights Protect Culture**

For political theorists, what defines ethnic groups, and distinguishes them from each other, is a distinct cultural identity. As we shall see, different kinds of groups vary in terms of what defines their cultural distinctiveness (eg national minorities versus religious minorities),
which in turn shapes the subject matter of their group rights (eg official language policy versus family law). But notwithstanding these differences, group rights have the common goal of protecting the integrity and survival of distinct cultures. As Jürgen Habermas writes, group rights are aimed at 'protection of cultural lifeforms.' The leading normative justification for group rights is the liberal culturalist account, offered by Joseph Raz, Will Kymlicka, David Miller, and Yael Tamir. From within the liberal tradition, liberal defenders of groups conceptualize culture as a primary social good in the Rawlsian sense. A stable culture provides a context of choice for individuals within which they formulate their life-plans. Cultures furnish individuals with options for how to pursue their lives, and assign values to those options. The future viability of a culture is determined by myriad public decisions (eg regarding official language policy across the public and private sectors, religious establishment or disestablishment, land ownership, internal migration etc) and private decisions within that publicly enacted legal framework. Minority cultures are vulnerable to the economic and political decisions of the majority. In some cases, this will be a product of deliberate hostility, with the goal of eradicating or denigrating the minority culture because it is inferior or primitive (eg traditional religions), fueling demands for recognition or respect. But in other cases, it will be considered to be the unavoidable by-product of policies designed to promote a common national identity necessary to underwrite liberal democratic policies or distributive justice (eg official language policies). In yet other cases, minority cultures may be vulnerable to indifference or inadvertence by political decision-makers who lack first-hand experience or knowledge of the minority culture. By contrast, majority cultures do not face these dangers. It is the unequal risks faced by minority and majority cultures that give rise to claims for group rights.

2. Group Rights are Held by Specific Groups

The definition of culture is broad enough to encompass a broad range of social groups and, indeed, political theorists often tie treatments of group rights to the larger phenomenon of identity politics, which encompasses claims to recognition by racial minorities, gays and lesbians, and women. However, when political theorists discuss group rights, they have narrowly focused on three sets of ethnic groups: national minorities, indigenous peoples, and religious minorities.

National minorities constitute a majority in a traditional homeland over which they previously exercised self-government, but were incorporated into a larger state involuntarily, for example through conquest (Quebec, Catalonia, Russia) or royal marriage (Scotland). Even apparently voluntary unions may have been entered into under the direction or pressure of large international powers (eg Belgium, Czechoslovakia). In many cases, they possessed a complete set of economic and political institutions prior to their incorporation into the larger state, which may have survived and are regarded as the institutionalization of group identity. A further distinction can be drawn between national minorities who constitute a majority in a neighboring or kin state (eg the Hungarian and Russian minorities in many Central and East

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6 Yael Tamir, Liberal Nationalism (1993).
European states) and those that do not (the Quebecois, Catalans, Kurds). The latter subset of national minorities are sometimes referred to as losers in the process of state formation and consolidation, who could easily have ended up with a state of their own, whereas the former subset appear to have ended up on the wrong side of an international border.\(^7\)

Indigenous peoples are difficult to define, and indeed, which groups can lay claim to indigenous status is a matter of considerable controversy under international law. But the paradigmatic examples are the original inhabitants of the settler societies of North and South America and Australasia. Because of their status as prior occupants and sovereigns, they are similar to national minorities. But there are many important differences: indigenous peoples are usually far less numerous, occupy relatively smaller territories, are not integrated into modern economic and political life, and suffer from extreme socio-economic deprivation. Moreover, their pre-colonial institutions are rarely intact, and even if restored, could not operate across the whole range of spheres of modern life. As we shall see, although the political language surrounding the justification for indigenous rights and the rights of national minorities is often the same (i.e., the right to self-determination), these differences shape the scope of their respective rights.\(^8\)

Finally, political theorists often analyze the group rights of religious minorities, and have almost exclusively focused on the insular minorities who lead traditional lifestyles, and severely limit their participation in shared economic and political institutions by choice (e.g., Amish, Mennonites, Hutterites, and Orthodox Jews). In principle, religious identities are not necessarily ethnic (because of the possibility of conversion) or territorial (because the claims of religious groups often concern in-group relations without a territorial component, for example marriage and divorce). But in practice membership in these religious communities is inherited, and members often live in self-contained rural communities or segregated neighborhoods. This renders religious minorities analogous to national and indigenous minorities, and connotes parallel constitutional strategies for group rights.\(^9\)

3. Group Rights as Collective Rights

Avishai Margalit and Moshe Halbertal describe a group right in terms of the right to culture:

Human beings have a right to culture—not just any culture, but their own…. A culture essentially requires a group and the right to culture may involve giving groups a status that contradicts the status of the individual in the liberal state. The right to culture may involve a group whose norms cannot be reconciled with the conception of the individual in a liberal society. For example, the group may recognize only arranged marriages and not those resulting from the free choice of the partners.\(^10\)

Margalit and Halbertal’s description sets out the essential, juridical features of a constitutional group right, as conceptualized by political theorists.

First, group rights are held collectively—that is, they are held by the group as a whole. Yael Tamir likewise holds that group rights ‘are bestowed on a collective as a whole’ rather


\(^10\) Avishai Margalit and Moshe Halbertal, ‘Liberalism and the Right to Culture’ (Fall 1994) 61(3) *Social Research* 491, 491.
than on individual members of the collective.'\textsuperscript{11} Even Will Kymlicka, who distinguishes between 'the rights of communities (as opposed to individuals)' and 'community-specific rights' supposes that both rights are held collectively, and differ only in their scope, with the former encompassing the power to violate individual rights, while the latter not.\textsuperscript{12} Moreover, as Allen Buchanan explains, group rights are still held collectively even when individuals have standing to enforce them.\textsuperscript{13} For example, the right of individuals to minority language education is legally enforceable by individuals, but (1) only operates when there is a critical mass of minority students to make such institutions viable (and so cannot be enforced by an individual without the existence of a minority community), and (2) also entails a collective right by a minority linguistic community to manage and control those facilities. The bare legal form of a group right may conceal its collective character.

This leads to the second point—that group rights necessitate a procedure for the collective exercise of a right. As James Nickel has argued, inherent in the very idea of group rights is the problem of agency.\textsuperscript{14} Broadly speaking, procedures for group agency can be categorized along two dimensions: (1) the degree of institutionalization, and (2) the extent of democracy. Political theorists do not set out a specific concept of agency that applies across all group rights. But they appear to assume that decision-making within indigenous peoples and religious minorities is undemocratic (eg led by unelected religious and/or traditional leaders), although it can vary in its degree of institutionalization. By contrast, there is a tendency to assume that decision-making among minority nations is democratic and highly institutionalized, often in the form of federal subunits or, in the event of secession, an independent state. As we see below, there is a link between the agency issue and the precise character of the internal minority problem.

The third point is the nature of the right. For political theorists, the core group right is decision-making power or jurisdiction over matters that are integral to cultural survival. This translates into a different set of competences by group, depending on the scope of its culture. For minority nations, a culture is built around a common national identity, a shared set of economic and political institutions, and a common language. Accordingly, the group right is a right to autonomy or self-government over policy areas necessary to engage in nation-building, and is very broad, encompassing education at all levels (including the language of instruction), the official language of the public and private sector, and both international and internal immigration.\textsuperscript{15} The vehicle for self-government is either a federal subunit with extensive jurisdiction in which the minority nation constitutes a significant majority, or an independent state. Accordingly, some scholars link group rights for minority nations with the right to secession.\textsuperscript{16} The link is clearest in national self-determination theories of secession, such as the one set out by Joseph Raz and Avishai Margalit, who argue for the right of a group to statehood in

\textsuperscript{11} Yael (Yuli) Tamir, 'Against Collective Rights' in Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge (eds), Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz (2003), ch 11, at 183 n 1.


\textsuperscript{13} Allen Buchanan, 'Liberalism and Group Rights' in Jules Coleman and Allen Buchanan (eds), In Harm's Way (1994), ch 1.


\textsuperscript{15} See Margaret Moore, The Ethics of Nationalism (2001); Levy (n 9).

cases where it is necessary for the viability of that group’s culture." But remedial theories of secession (e.g. Allen Buchanan’s) in which the right to secede flows from the serious violation of basic human rights (e.g. genocide) or systematic and enduring discrimination in the distribution of economic and political power can also support a group right for minority nations to statehood, because minority nations are disproportionately likely to be the victims of those wrongs.¹⁸

In contrast to minority nations, indigenous peoples lack the institutional capacity to exercise extensive rights of self-government over issues integral to cultural survival. As Jacob Levy points out: ‘Their languages have frequently fallen into near or total disuse; the land they occupy is often not their traditional homeland (because of forced population transfers); and sometimes they do not have any discrete territory or homeland at all.’⁹ Accordingly, while indigenous peoples might possess the same interest in cultural integrity as minority nations, political theorists argue for a group right that is far more limited in scope than for minority nations. The territorial base is smaller, and may be too small to constitute a federal subunit. But the substantive focus is the same—cultural integrity—and therefore would encompass the right to live under institutions operating according to traditional modes of governance and decision-making, and with a particular focus on membership, land use, and family law, in order to preserve traditional indigenous lifestyles and communities.

Political theorists also argue that religious communities have constitutional rights to self-government. Unlike for national minorities and indigenous peoples, there is no assumption of territorial jurisdiction (e.g. religious federalism). The focus has been on non-territorial modes of self-governance over matters that are integral to the survival of distinct religious identities. Principal among these has been personal law, a broad category that encompasses marriage, divorce, child custody and support, and inheritance. Another important area of jurisdiction is education. In addition, since insular religious communities are territorially concentrated, political theorists have sometimes posited that their group rights include control over the character of social and economic rules in their communities—for example, days of rest, public dress codes, and commercial life (e.g. liquor licensing etc.).²⁰

Finally, group rights carry with them the power to impose legal duties in exercise of the jurisdiction over cultural autonomy, although they vary with respect to who is subject to the legal duties imposed by groups. On the political theorists’ account of group rights, this varies on the basis of whether jurisdiction is territorial or non-territorial. Territorial jurisdiction—possessed by national minorities and indigenous peoples—extends to anyone within the group’s territory, which in principle includes both members of the group as well as non-members. By contrast, non-territorial jurisdiction—held by religious minorities—extends only to members of the religious community. As I explain below, this difference creates an ambiguity over who constitutes an internal minority that has standing to challenge exercises of group rights for violating individual rights.

¹⁷ Margalit and Raz (n 3).
¹⁸ Buchanan (n 16).
4. Group Rights and Internal Minorities

It is often argued that there is an irreconcilable tension at a conceptual level between group and individual rights, because of their conflicting logics. The political theorists' constitutional model of group rights supplements this abstract claim with an account of how these rights generate legal conflicts in practice. If a constitutional order grants an ethnic group the legal power to preserve its cultural integrity, that group may impose legally binding obligations that may conflict with individual rights protected by a bill of rights. It is this problem which lies at the heart of the political theory literature, which relies on a stock set of recurrent examples to illustrate this point:

(a) National Minorities

Nation-building policies designed to promote the language and cultural identity of a national minority that constitutes a majority, either in a federal subunit or a newly independent state, may conflict with individual rights to freedom of expression and assembly, the right to non-discrimination, and/or rights to participate in the democratic process. Quebec's language legislation, which seeks to establish French as the common medium of social, political, and economic life, and attempted to do so by establishing French as the sole language of the legislature, the executive, and the courts, by restricting the use of English in advertising and private sector employment, and restricting access to English language education, was attacked on these grounds.

(b) Indigenous Peoples

For indigenous peoples, the two leading examples come from the Pueblo Indians. One concerned the impact of marriage outside the indigenous community on membership. Women who married non-Pueblo lost their membership, whereas men who married non-Pueblo did not, a practice that constitutes discrimination on the basis of sex. The Pueblo also presented an instance of theocracy, with indigenous beliefs constituting an established faith. Pueblo who converted to Christianity and refused to participate in communal activities centered on the celebration of indigenous spiritual traditions were deemed by the group's leadership to be apostates, and were denied access to public resources, challenged these policies on the grounds of freedom of religion and the right to non-discrimination.\(^\text{21}\)

(c) Religious Minorities

The most frequently discussed issue concerns religious personal law, especially the rules governing divorce, property division, and spousal support. Under most systems of religious personal law, women face discrimination on some or all of these issues. The most celebrated example is the Shah Bano case, concerning the inadequate levels of maintenance upon divorce under India's Muslim personal law, which was attacked for constituting discrimination on the basis of sex.\(^\text{22}\) Another issue that has attracted attention is the problem of religious education, in which religious groups assert the right to withdraw their children from state schools and/or to exempt them from a secular curriculum, and instead provide them with a curriculum that reflects religious beliefs in schools under the control of the religious community. The question

\(^{21}\) See Chandran Kukathas, 'Are There Any Cultural Rights?' in Will Kymlicka (ed), The Rights of Minority Cultures (1995), ch 10; Shachar (n 9), ch 2.

is whether this infringes the right of children to develop the capacity to exercise free religious choice as adults.\textsuperscript{33}

On the political theorists' account of constitutional order, the conflict between group and individual rights raises two issues. The first issue is whether exercises of group rights are even subject to individual rights entrenched in bills of rights. Some theorists (e.g., Will Kymlicka) argue that if group rights allow the creation of binding legal obligations irrespective of individual consent, groups wield a power analogous to that wielded by the state.\textsuperscript{34} Since the corollary of coercive state power is the obligation to comply with individual rights, exercises of group rights must also comply with bills of rights. This is a point of dispute among political theorists. Chandran Kukathas, for example, argues that groups should be free to violate individual rights, and that the appropriate remedy for individuals to protect their rights is the right to exit from the group, which falls within the scope of the right to liberty.\textsuperscript{35} The argument from exit has been attacked along two lines. One response has been to suggest the implausibility of exit, either for children (who lack legal capacity), or for community members for whom the economic, social, and cultural costs of exit from a religious community that is core to their identity are too high. But the main difficulty with this argument is that exit is a corollary of a model of group rights built around private associations, with groups acting in their private capacity and creating binding obligations among individuals who voluntarily associate with a group. While private associations must operate within the general law (e.g., the criminal law), they are not subject to bills of rights, which bind coercive public power. The question of whether the application of bills of rights should be extended to private associations is a genuinely hard question, because it pits those rights against the right of freedom of association. But if groups wield coercive public power, the idea that they must presumptively comply with the constraints on public power, including bills of rights, is not a difficult one. The more challenging issue is how to structure the relevant constitutional inquiry, a point that political theorists are silent on, and to which I return toward the end of this chapter.

The second issue is who constitutes an internal minority whose individual rights are at risk through exercises of group rights. This label implies that: (1) groups exercise their rights to create legal obligations that reflect the preferences (as expressed through a democratic process) and/or the norms of the majority of a group (either through a democratic process, or through unelected traditional or religious leaders), and (2) a minority of group members is bound by these obligations and opposes them. However, upon closer examination, who is an internal minority varies depending on whether the group right is non-territorial or territorial. For religious minorities, jurisdiction is structured on a non-territorial basis, and is only applicable to members of the religious group, but not to non-believers. Internal minorities are group members (e.g., women, apostates, religious reformers). By contrast, since national minorities possess territorial jurisdiction, there are two kinds of internal minorities—members of the group and non-members who live within the territory. Indeed, the leading examples of internal minorities opposed to nation-building policies are non-members (e.g., English speakers in Quebec). A parallel situation holds for indigenous peoples, who also possess territorial jurisdiction. While the leading examples of rights-based objections to policies to promote


\textsuperscript{34} Kymlicka, \textit{Multicultural Citizenship: A Liberal Theory of Minority Rights} (n 4).

\textsuperscript{35} Kukathas (n 21); Chandran Kukathas, \textit{The Liberal Archipelago: A Theory of Diversity and Freedom} (2003).
indigenous identity come from within indigenous communities (eg within the Pueblo), this simply reflects the fact that indigenous communities tend to be ethnically homogenous. But in principle, internal minorities vulnerable to exercises of indigenous rights can consist of both group and non-group members.

The impact on the nature of a group’s jurisdiction on the definition of an internal minority has important implications for how to understand the clash between group and individual rights. Political theorists disagree over whether and the extent to which internal minorities can constrain exercises of group rights that violate individual rights, and have devoted considerable attention to this issue. By contrast, they are in apparent agreement that group rights do not pose any such threat to the rights of individuals in the majority, an issue on which there is surprisingly little commentary. Kymlicka, for example, sets out the distinction between ‘external protections’ and ‘internal restrictions’ as a principle of constitutional design. External protections are group rights that protect a minority group from the economic and political decisions of ‘the larger society’ or ‘other groups’, supplement but do not restrict individual rights, and are accordingly permitted. Internal restrictions are directed at ‘a group against its own members’, entail ‘restricting individual rights’, and are prohibited. These definitions bundle together (1) the target of the exercise of a group right (external restrictions apply to non-members, internal restrictions apply to members) and (2) the effect of that exercise on individual rights (external restrictions do not infringe individual rights, whereas internal restrictions do). But the relationship between the targets of the exercise of a group right and its effect on individual rights will depend on the nature of a group’s jurisdiction. If a group’s jurisdiction is non-territorial, and hence limited to its own members, the exercise of a group right cannot violate the rights of non-members. But if its jurisdiction is territorial, it clearly can. Language laws (eg those in Quebec and Catalonia) are a well-known example. Another example would be rules governing land alienation in areas governed by indigenous peoples. Under the Malaysian and Indian Constitutions, federal subunits or areas within subunits dominated by indigenous peoples have the constitutional power to restrict the alienation of land, in order to stem in-migration by non-indigenous persons and to preserve the indigenous character of the region. These restrictions on land ownership collide with the right to mobility and right to non-discrimination of members of the majority. So as a descriptive matter, political theorists cannot argue that non-members do not face the risk of having their individual rights violated by the exercise of group rights. Moreover, as we shall see, expanding the range of persons whose rights are at stake to encompass non-members is part of a broader strategy to pierce behind the veil of the claim that exercises of group rights are always genuinely rooted in the protection of cultural difference.

III. GROUP RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW

So this is the constitutional image of group rights that is presupposed by political theorists, and which shapes contemporary constitutional debates over group rights. But if we turn to the actual comparative constitutional law of group rights, a picture emerges which is at odds with this picture along every dimension. According to this counter-narrative: (1) group rights are a response to political mobilization not only on issues of cultural survival, but around the unequal distribution of economic resources and opportunities, the unequal enjoyment of public services, and unequal access to political power; (2) group rights are claimed by a broad

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27 Fifth Schedule to the Constitution of India, ss 5–6; Federal Constitution of Malaysia, Art 161A.
variety of groups, including territorially dispersed minorities and groups that may constitute a majority in the state; (3) in addition to rights to self-government or autonomy, group rights relate to political power, and are designed to ensure representation and participation in common institutions, take a broad variety of forms (exemptions, accommodations, guaranteed representation, difference-conscious but facially neutral rules), arise in a variety of institutional contexts (electoral system design, political party regulation, legislative voting rules, the structure of political executive, courts), are usually not held and exercised by groups acting as a corporate entity, and are sometimes best understood as mechanisms to incorporate a group perspective into collective decision-making; and (4) these group rights produce a variety of conflicts with the individual rights of group members and non-members that are materially different from the kinds of rights violations that the political theorists' constitutional image of group rights would suggest.

1. Demands for Group Rights are Rooted Not Just in Claims to Protect Culture

Political theorists assume that demands for group rights flow from political mobilization to protect and promote distinct cultural identities, which in turns shapes the content of those rights. However, in contemporary constitutional politics, conflict among ethnic groups, even where culture is both a subjective and objective marker of group difference, is not necessarily about culture. Indeed, the comparative politics literature on politics in deeply divided societies has long understood ethnic conflict to arise out of: (i) competition over economic opportunities, (ii) the equal enjoyment of public services, and (iii) the distribution of political power, which underpins points (i) and (ii). The relationship of these conflicts to cultural conflict is complex and highly variable.

First, consider the material roots of group conflict, which have suffered from comparative neglect in normative political theory. To be sure, nation-building by national minorities concerns questions of identity, and involves the promotion of an official history and culture to create a subnational identity. But the centerpiece of minority nationalism is official language policy. The designation of a language as official certainly has an important bearing on cultural survival. If a language is the official language of the state and therefore attracts the state’s support for its use as the medium of cultural life, it thereby privileges the cultural identities that are associated with that language, and disadvantages those that are not. But official language status also operates to distribute economic opportunities. The designation of a language as the official internal working language of the public sector distributes employment opportunities in favor of those fluent in the language, and disadvantages native speakers of other languages. Moreover, the internal working language of government has a network externality effect on the language of the private sector. The same holds true for the language of higher education. And so political competition among language groups over official language policy, framed in the language of group rights, is often fuelled by economic competition, not claims for cultural respect and recognition. In comparative constitutional law, perhaps the leading example of economically-driven constitutional change rooted in group conflict is the redrawing of state boundaries on a linguistic basis in post-independence India. This was largely driven by disputes over official language policy and its impact over public sector employment within multilingual states among speakers of different languages.28

Cultural difference may also serve to demarcate economic hierarchies and divisions of labor, apart from and outside the public sector. In many countries, national governments have undertaken projects of internal settlement, to encourage the migration of members of the ethnic majority into less populated areas occupied by minority groups. Contemporary China furnishes many examples of this kind of policy, with the vast internal migration of Han Chinese into Xinjiang and Tibet. On a culturalist interpretation, the primary motivation behind internal settlement is cultural nationalism, and its objective cultural assimilation. But the goal underlying the promotion of Han migration is economic modernization through the integration of the periphery into the national economy through the development of natural resources and/or industrialization in urban areas. What Han migrants encounter is not just a different culture, but also different, traditional modes of economic production. The conflicts that have arisen from this mass migration are not just about cultural difference, but also competing economic models which distribute opportunities unequally. An urban, market, industrial economy values literacy and formal education much more than an agricultural or pastoral economy, and these employment attributes are distributed unequally across different ethnic groups. There may be cultural consequences to economic competition. Cultural practices which may be centered in rural communities and underpinned by agricultural and pastoral lifestyles may be threatened by economic modernization. But the ethnic conflict given rise to by economic transitions is primarily about distribution, not about culture. While the case of contemporary China presents a situation where Han migrants may eventually outnumber the local majority, the same dynamic may come into play with the migration of small, literate elite minorities. A leading example would be the migration of Bengalis into Assam in the nineteenth and twentieth centuries.

Ethnic conflict is often rooted in controversies over unequal access to public services. A core complaint of minority groups is that the state discriminates in the distribution of primary social goods in the Rawlsian sense, particularly liberty, opportunity, income, and wealth. The focus is not educational policy or family law—the principal arenas of group conflict identified by political theorists—but public programs that are far removed from questions of cultural identity and survival, such as the criminal justice system, the provision of infrastructure, and the welfare state. There are two kinds of situations here. First, public services or expenditure may be administered in a discriminatory fashion. While cultural antipathy may fuel discrimination, the dispute between minority and majority groups over public services is not an instance of cultural conflict. The claim is not that cultural difference must be taken into account in the delivery of these programs, but rather that those programs be administered without distinction on the basis of cultural difference—a traditional but powerful claim of formal equality. A leading example of this kind of political dynamic is Northern Ireland, where the Roman Catholic (Nationalist) minority long suffered systemic discrimination in public housing and employment at the hand of institutions dominated by the Protestant (Unionist) majority. The demand was for not cultural rights (eg on questions of religion), but in the first instance, for non-discriminatory treatment. Secondly, cultural difference may serve as a barrier to the equal enjoyment of public services, which leads to demands for modifications in the design of public services. The main cultural difference that

30 Myron Weiner, Sons of the Soil: Migration and Ethnic Conflict in India (1978).
31 Brendan O'Leary and John McGarry, Understanding Northern Ireland: Colonialism, Control and Consociation (3rd edn, 2011).
impedes equal enjoyment of public services is language. An example of this is in Belgium where in 2007, the Flemish Minister of the Interior Government refused to appoint three French-speaking mayors in Flemish municipalities, despite their being democratically elected. The municipalities in which they were elected had a large number of French-speaking inhabitants as well as special language arrangements ('linguistic facilities') entitling those inhabitants to request that French be used in their dealings with public authorities (even though the official language of these municipalities is Dutch). The Minister refused to appoint the three mayors on the basis that they had communicated with French-speaking electors in French and had allowed members of their municipal council to use French during their meetings.32 The goods whose unequal distribution fuels conflict in this case is not primarily respect or recognition, but the ability to enjoy equal and effective access to public services, such as health care.

Finally, ethnic conflict among culturally distinct groups may concern the distribution of political power. As a large body of research in comparative politics has demonstrated, in a divided society, where ethnic identity is the principal basis of political mobilization, ethnic diversity translates into political division, and fosters the rise of ethnic political parties. Whereas in a polity in which cultural differences have not become the principal axis of political cleavage, minorities form part of shifting majority coalitions who compete for their support, in a divided polity, political competition occurs across, not within groups. The result is a process of ethnic outbidding that produces a flight to the political extremes, and dampens the incentives for moderation and cross-ethnic political cooperation. Ethnic groups may be systematically excluded from public power in one of two kinds of situations. The clearest case is where there is a dominant majority group, and an ethnic minority that is frozen out of power in perpetuity—for example, as is the case in most of the countries of Eastern and Central Europe. This problem also arises in an ethnically fractured polity with no clear majority, which may offer greater opportunities for groups to wield power as members of a governing coalition, but which nonetheless face the prospect of exclusion for a lengthy period. Groups that are perpetual losers in the political process may demand group rights that guarantee them access to political power.

There is a fundamental link between the systematic exclusion of groups from political power and the various non-cultural roots of group conflict. Ultimately, conflicts arising from economic competition and unequal access to public services are rooted in public policy decisions. And so not surprisingly, alongside questions of cultural integrity and survival, it is these issues that are at the heart of the platforms of ethnic political parties, which compete on the basis of their ability to ensure that their members secure public sector employment, profit from the economic opportunities made possible by decisions regarding economic development, and have their needs met in the design and delivery of public services. The ability of a political party to protect its group's interests in these spheres will be a direct function of its political power. So political power in institutions that make these decisions is perhaps the most basic constitutional demand of ethnic groups.

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32 Robert Mnookin and Alain Verbeke, 'Persistent Nonviolent Conflict with no Reconciliation: The Flemish and Walloons in Belgium' (2009) 72 Law and Contemporary Problems 151; Council of Europe, Congress of Local and Regional Authorities, Chamber of Local Authorities, 'Local democracy in Belgium: non-appointment by the Flemish authorities of three mayors,' October 31, 2008, CPL(15)8REP.
2. Group Rights are Demanded by a Diverse Set of Groups

In addition to broadening our understanding of the sources of ethnic conflict, we also need to broaden the range of groups who claim constitutional rights as groups. The political theorists’ constitutional model of group rights focuses on the claims of two kinds of territorially concentrated groups, national minorities and indigenous groups, as well as insular religious groups that are not territorially dispersed. However, contemporary constitutional politics reveals a broader range of cultural groups that voice constitutional claims for group rights.

First, there are ethnic minorities that are territorially dispersed, who live among members of the ethnic majority or other groups from which they are culturally distinct, but where the principal point of cleavage is not religion.33 Consider a few examples. In some cases, the point of cleavage is on the question of national identity, and the ethnic minority makes claims to self-determination, but it is not territorially concentrated and is therefore incapable of asserting claims to federalism and self-government. Northern Ireland again provides an example.34 Although the communities use the labels Protestant and Roman Catholic to name themselves, the principal point of dispute is over national identification, not religion. In another set of cases, the members of a territorially concentrated ethnic minority do not dispute a shared national identity with their fellow citizens, but nonetheless frame their political claims in the language of group rights. For example, Croatia contains a dizzying area of ethnic minorities which have all demanded and been accorded group rights (see below): Serbs, Hungarians, Italians, Czechs, Slovaks, Austrians, Bulgarians, Germans, Poles, Roma, Rumanians, Ruthenians, Russian Turks, Ukrainians, Vlachs, Jews, Albanians, Bosniaks, Montenegrins, Macedonians, and Slovenes. While it is true that many of these minorities belong to groups with states of their own, their demands are not for secession or federalism. In contemporary constitutional practice, there is a distinction between ‘minorities’—communities with a long-standing presence in the state that often predates the state’s creation—and more recently arrived immigrants.35 In yet other cases, the group is a sub-group within a larger community, such as the Scheduled Castes (also known as ‘untouchables’) in India, who occupy a subordinate position both outside and below the Hindu caste system that reinforces their social and economic deprivation, but who claim equal status within Hinduism.

Secondly, group rights are asserted not only by national minorities, but also by national majorities, even though they are not vulnerable to being outvoted on decisions as a minority would be. The majority may have lacked political power historically because power lay in the hands of an ethnic minority within the same state. Consider Belgium, where for most of the nineteenth century, a French-speaking minority that established French as the common language of economic and political life dominated Belgium. The story of twentieth century Belgium has been the demand by the Flemish majority for the reconfiguration of the Belgian state, which is now a highly decentralized and layered federation of three linguistic regions and three linguistic communities, each of which privileges a sole official language in political institutions and public administration. While the Flemish constitute a majority, they nonetheless view these policies as exercises of a group right to create economic and political

34 O’Leary and McGarry (n 31).
institutions that operate in Flemish. They invoke the language of group rights to justify a range of nation-building policies regarding the privileging of the group’s identity in national symbols, place names, official history, and the choice of official language in a manner identical to how a minority group would—that is, as a defensive response to majority nation-building, even though the creation of statehood has eliminated that risk. They are sometimes described as ‘minoritized majorities’. Indeed, in Brussels and the French-speaking parts of Belgium, they do constitute a minority, and assert rights that flow from that status.\(^{36}\)

3. Group Rights and Representation

At their core, many if not most group rights in contemporary constitutional law are designed to redress inequalities in those groups’ access to political power. Group rights can be further divided into arrangements for self-rule and shared rule. The political theorists’ image of constitutional law has been doubly narrow—in emphasizing shared rule over self-rule, and in emphasizing the protection of cultural integrity as the principal driver for self-rule arrangements. Constitutional practice illustrates how it needs to be expanded along both dimensions.

Arrangements for both territorial and non-territorial forms of self-rule protect members of a group from being outvoted on questions on important public policy, or from the discriminatory application and enforcement of government policies. Of these two, federal arrangements have commanded the greatest attention, because they have been offered as a mechanism for dampening or diffusing secessionist conflict, where the very existence of the state is at issue. Many states in the developing world have adopted federal arrangements to manage group conflict, such as India, Ethiopia, Iraq, and Nigeria. Moreover, the advocacy of federalism as a tool for managing group conflict continues to gather momentum around the globe. In South Asia, federalism has been advocated as a solution for group conflict in Nepal, Pakistan, and Sri Lanka. Federalism has also been proposed as a remedy to the frozen conflicts of the former Soviet Union: Armenia, Azerbaijan, Georgia, Abkhazia, South Ossetia, and Nagorno Karabach. In these cases, countries where federalism has been used to manage group conflict, such as Canada, Belgium, and Spain, are used as positive models of comparative constitutional experience, whereas the failed federations of Eastern and Central Europe—the Soviet Union, the Czech Republic, and Yugoslavia—have been held up as examples of how federalism can fuel, not dampen secession. As I have argued elsewhere, ultimately federalism dampens the secession in democratic states whereas it seems to not have done so in non-democratic states.\(^{37}\)

Halberstam, in Chapter 27 of this volume, addresses the full geographic range and diversity of existing federal arrangements, including in countries where federalism has been used to manage group conflict, so I will not dwell on those institutional details in this chapter. For present purposes, what bears emphasis is that the root of demands for federal arrangements are often not cultural, but material, and turn on disputes over public sector employment, the uneven impact of economic modernization, and discrimination in public expenditure and public


services. For example, in India, three new states were created in 2000—Uttarakhund, Jharkhand, and Chattisgarh—out of the existing states of Uttar Pradesh, Bihar, and Madhya Pradesh, respectively.\(^3\) An official ideology has built up around each state which emphasizes its distinct history and cultural identity, which supports an argument that the political movements for these states were framed around demands for respect and recognition. But at the root of the demands was not cultural difference or threats to cultural integrity, but rather, the allegation that these regions suffered from neglect in public expenditure and in public sector employment at the hands of a state government controlled by political elites whose electoral base and clientilistic networks were based in another part of the state. In parallel fashion, once new federal subunits have been created, we should be skeptical about the invocation of culture as the justification for particular exercises of a group right to self-government.

While self-rule in general, and federalism in particular, has dominated the constitutional image of group rights, there is a dense constitutional practice on the question of redressing inequalities in access to shared rule. These inequalities arise from the unequal impact of facially neutral rules that either (1) do not evince an intention to disadvantage political participation by a group, or (2) may be designed with this intent in mind. These concerns arise in a variety of institutional contexts, including electoral system design, political party regulation, legislative voting rules, the structure of political executive, and the courts. Although the institutional settings in which this concern arises vary, group rights for political power tend to take one of a standard set of forms: exemptions, accommodations, or new facially neutral rules that are group-conscious—that is, that are chosen because their effect is to promote the interests of minority groups.\(^3\)

Consider electoral systems, which translate votes into the allocation of legislative seats. Many features of electoral system design can operate to the political disadvantage of minority groups. For example, under systems of proportional representation, high thresholds disadvantage parties that appeal to a relatively narrow electoral base. In Turkey, for example, the 10 percent threshold has operated to the disadvantage of political parties that represent the Kurdish minority, which cannot meet that threshold because of their size.\(^4\) Comparative constitutional law provides a variety of models of ‘group right’ that could promote legislative representation by Kurdish parties. It could be a group-specific exemption, such as those that exist in Germany for elections to the Bundestag, and the legislatures of Brandenburg and Schleswig-Holstein, which waive the 5 percent threshold for parties representing national minorities.\(^5\) It may consist of an accommodation, such as the creation of reserved seats for the Kurdish minority, modeled along the lines for reserved seats for the Italian and Hungarian minorities in Slovenia.\(^6\) Alternatively, the legislative representation of Kurdish parties could be promoted through a facially neutral rule that does not distinguish on the basis of group identity. For example, the numerical threshold could be lowered to 5 percent, or it could even be eliminated entirely (as was done in South Africa in order to promote the inclusion of minority parties).\(^7\)

Constituency systems subject to plurality voting can be analyzed in a parallel manner, and are amenable to a parallel set of responses. Constituency systems produce disproportionality

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\(^3\) See Emma Mawdsley, ‘Redrawing the Body Politic: Federalism, Regionalism and the Creation of New States in India’ (2002) 40(3) *Commonwealth & Comparative Politics* 34.

\(^3\) See Weller (n 33).

\(^4\) Law no 2839 (Turkey), s 33.

\(^5\) Federal Electoral Law (Germany), art 6(6).

\(^6\) National Assembly Elections Act (Slovenia), art 2.

\(^7\) Schedule 3 to the Constitution of the Republic of South Africa, 1996.
between votes cast and seat count, which in a divided polity can disadvantage parties representing minority groups in securing legislative seats. In part, this may be a function of the delineation of electoral boundaries, which can impede the election of representatives from minority parties if they do not constitute a sufficiently large group in an electoral district. There are a number of constitutional strategies available to remedy this disadvantage. Within the constituency system, an accommodation would entail the redrawing of constituency boundaries in order to enhance the minority group's voting power, as has been done in favor of African Americans in the United States. Alternatively, legislative districts could be reserved for candidates from a minority group, as has been done in India, where 120 of the 543 seats in Parliament can only be contested by members of the Scheduled Castes or Scheduled Tribes, although elections are held on the basis of a universal voters' roll. A facially neutral mechanism to enhance the representation of minority groups that attacks the issue of disproportionality directly would be to move away from a pure constituency system, to a mixed electoral system (eg mixed-member proportional or MMP) or a system of proportional representation, as occurred in Northern Ireland in order to overcome the persistent election of Protestant majorities.

These examples raise a number of important points. In contemporary constitutional politics, groups may refer to the whole range of these policies as 'group rights'. However, they vary greatly in their juridical structure. Thus, an exemption leaves a facially neutral rule in place, but holds it inapplicable to groups. Accommodations, by contrast, require positive measures that exist alongside a facially neutral rule. Both exemptions and accommodations, however, incorporate group identity into their very structure, because only group members and the parties that represent them, not voters or political parties at large, can invoke them. By contrast, a group right may entail the adoption of new facially neutral rules that are group-conscious—that is, that are chosen because their effect is to promote the interests of minority groups. To be sure, changes such as lowering thresholds, or moving to a proportional representation system, would benefit all small political parties, not merely those that represent groups. However, these constitutional practices may be primarily identified as measures to enhance group representation, and may give rise to a defensive constitutional politics that resists amendments to those practices because of their deleterious effects on groups. This is even true for electoral rules not initially adopted to protect groups, but which come to take on this function. For example, the tendency of constituency-based electoral systems toward disproportionality hurts parties representing minority groups except for regional minorities. In Canada, this has benefited the Quebec nationalist party, the Bloc Quebecois, and has fuelled resistance to proposals toward MMP.

Political party regulations provide another illustration of how facially neutral rules may be nonetheless viewed as a form of group right, against the backdrop of a divided political community and in comparison to another facially neutral rule that disadvantages political parties that represent minority groups. There are three kinds of regulations that are relevant: substantive policy bans, national scope requirements, and ethnic party bans. Substantive policy bans flow from the idea of militant democracy, which prohibits anti-democratic parties (eg in Germany, Poland, and Spain). In divided societies, constitutions may prohibit political

44 Constitution of India, Art 330.
45 Northern Ireland Act 1998, s 40.
48 Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos (Spain), Art 9.
parties from advocating issues that may lie at the very heart of a group’s political agenda. In Turkey, for example, the Constitution bans political parties that challenge the state’s territorial integrity, the idea of a single nation, equality, and national sovereignty.49 This has been a barrier to the formation of political parties that seek to represent the interests of the Kurdish minority by campaigning on a platform that promotes the idea of Turkey as a partnership between two nations, Turkish and Kurdish, that Turkey should be restructured as a federation and be officially bilingual, and that the Kurdish-majority portions of the country should have the right to secede. A national scope requirement is designed to encourage the formation of state-wide parties, and has a comparable effect on parties that represent small territorially dispersed groups or large groups that are territorially dispersed. For example, Russia requires political parties to have regional offices in at least 50 percent of Russia’s regions, and that each regional chapter have 500 members.50 Finally, many jurisdictions ban ethnic parties—indeed, on paper, at least 40 of 48 countries in Sub-Saharan Africa do so.51 Given that minority groups create political parties when they feel they cannot advance their interests through existing parties, this is the most direct form of regulatory constraint.

These policies can be attacked on two grounds. The first sounds in liberty, and argues that these restraints interfere with the liberal freedoms of speech and association. The second sounds in equality, and highlights that these restrictions are unequal in their impact on majority and minority groups. In divided polities, substantive policy bans protect constitutional provisions that entrench the policy positions of the majority from democratic contestation, national scope requirements do not affect majorities who are able to politically organize across the state, and ethnic party bans do not prevent majority groups from dominating parties that are formally not ethnic in character. The constitutional claim for a ‘group right’ is for a facially neutral rule that provides the space for minority groups to form their own parties, to advance positions on any issue, and to be able to operate in only part of the state. Indeed, this claim combines the arguments from equality and liberty, and can be understood as the demand for a rule that allows for the equal enjoyment of basic liberal freedoms across groups. The model would be the constitutional practice in Spain, Belgium, and Canada, where such legal restrictions on political parties do not exist. As for the case of electoral rules, these rules do not take the legal form of a group right, and the potential beneficiaries of these changes would not be limited to minority groups. Nonetheless, in constitutional politics these permissions are perceived as rights in those polities where they exist, and are framed in such terms in response to proposals to eliminate them.

Claims of group rights for minorities are often made with respect to legislatures and political executives. Indeed, for Arend Lijphart and those writing in the consociational tradition, this is the primary locus of power-sharing among ethnic groups.52 The goal is to ensure that electoral success and legislative representation translates into genuine political power. It is often assumed that the only constitutional mechanisms are accommodations that expressly empower groups through the design of: (1) legislative voting rules and (2) the constitution and decision-making of political executives. An example of the former is found in Belgium, where legislators must self-identify as French or Flemish, and many laws related to Belgium’s linguistic divide can only be passed when half of each linguistic group is present, by a double major-

49 Constitution of the Republic of Turkey, Art 68.
ity of each linguistic group, and by an overall 2:3 majority.\(^{53}\) Belgium's double-majority rules have inspired similar provisions in the Constitutions of Bosnia-Herzegovina,\(^ {54}\) Kosovo,\(^ {55}\) and Macedonia.\(^ {56}\) There are many examples of the latter. Belgium's Constitution mandates equal representation of French and Flemish speakers, although the French are a demographic minority.\(^ {57}\) In Switzerland, the federal executive is headed by a seven-member Federal Council, which is selected on the basis of a simple majority vote of the two federal legislative chambers. On its own, this would ensure the dominance of the German majority, but according to the 'magic formula'—a long-standing political tradition, now underpinned by a constitutional provision—non-Germans receive two seats on the Federal Council.\(^ {58}\) In Bosnia-Herzegovina and Northern Ireland, by contrast, the mandated group representation is limited to the head of the executive branch. In the former, there is a three-person collective presidency consisting of a Serb, a Croat, and a Bosniak, each directly elected.\(^ {59}\) In the latter, the First Minister and Deputy First Minister are elected as a pair by an overall majority of the legislative assembly, and a double majority of Roman Catholic and Protestant members, which in effect requires a Protestant First Minister and a Roman Catholic Deputy First Minister.\(^ {60}\)

But with respect to legislatures and executives, there is a role for facially neutral rules that are adopted with the express intent of protecting group interests, which are understood in constitutional politics to be a form of group right. Thus, in the place of the family of double-majority rules that proceeds from the labeling of legislators as belonging to different ethnic groups, one can substitute super-majority requirements to achieve the same end. In a parallel fashion, party standing in the legislature, as opposed to ethnic representation, can determine cabinet membership. For example, in Northern Ireland, cabinet seats are allocated through the d'Hondt formula, which was expressly adopted with the purpose of ensuring minority group representation.\(^ {61}\) The possibility of facially neutral, yet difference-conscious alternatives to accommodations that incorporate group identity into their very structure raises questions about the trade-offs between these options. Arend Lijphart usefully contrasted these two families of constitutional strategies as pre-determination versus self-determination, which has been helpfully recast by McGarry, O'Leary, and Simeon as a difference between liberal and corporate approaches to protecting group rights.\(^ {62}\) On the corporate conception, constitutional rules predetermine which groups are to be the beneficiaries of group rights, and carry with them assumptions about the political sociology of group membership—that is, assuming that the boundaries between groups are clear, that groups are internally homogeneous, and that group membership is immutable. Moreover, privileging ascriptive identities may not simply reflect preexisting patterns of political mobilization, but will create political incentives to mobilize on that basis, and disincentives to mobilize on other grounds, such as class. For the

\(^{53}\) Constitution of Belgium, Art 4.

\(^{54}\) Constitution of the Federation of Bosnia and Herzegovina, Part IV, Section a, 5–6, Arts 17a–18a.

\(^{55}\) Constitution of the Republic of Kosovo, Art 81.

\(^{56}\) Constitution of the Republic of Macedonia, Amendment X (replacing Art 69).

\(^{57}\) Constitution of Belgium, Art 99.

\(^{58}\) Federal Constitution of the Swiss Federation, Art 175.

\(^{59}\) Constitution of the Federation of Bosnia and Herzegovina, Part IV, Section b, 1, Arts 1–2.

\(^{60}\) Northern Ireland Act 1998, s 16A.

\(^{61}\) Ibid s 18.

same reason, these rules will empower existing group leaders. By contrast, the liberal conception permits, but does not require, group identity to serve as the basis of political identity. It allows for a different understanding of group identity, where boundaries between groups are not clear, where groups are internally diverse, and membership is mutable or even unimportant. Moreover, it allows for shifting patterns of political mobilization over time, and creates the institutional space for non-group-based modes of politics to arise.

As we shall see, the distinction between liberal and corporate forms of group rights is at the heart of the various objections leveled at group rights to political participation in the name of individual rights, and holds open the door to resolving or diffusing them. But if we put that distinction to one side for the moment, on either the liberal or corporate account, the structure of these rights does not square with the claim that group rights are usually not held and exercised by groups acting as a collective entity. The key point is the role of political parties as the intermediating institution between groups and legislatures. Within each group, parties compete for electoral support, which tends to produce intra-group cleavages. There is no singular entity that speaks for the group as a whole, but rather, a set of parties who vie for that role. A useful contrast can be drawn between the recognition of a single, official group institution, such as its religious leadership. Moreover, these questions of group agency become even more complex when one factors in how political executives are composed. McGarry, O’Leary, and Simeon contrast complete consociations consisting of a grand coalition representing all major groups, a concurrent consociation with representatives of the majority of each group, and plurality consociations in which at least a plurality of each group is represented in the political executive.\(^6\) Whereas the leaders of different groups could lay claim to speaking on behalf of the group as a whole in complete consociations, they cannot do so in either concurrent or pluralist consociations.

In sum, the premise behind group rights regarding political participation is that it enables minority groups to shape political decisions that affect a variety of interests, takes a variety of forms, and applies across a broad variety of institutional contexts. However, it does not necessarily entail in every situation that group representatives who hold public office will necessarily partake in the direct exercise of political power. This will often be the case for minority legislators from smaller communities, whose numbers are too small to give them sufficient leverage to wield decisive legislative power or secure representation in the political executive. The interesting question is whether there is nonetheless a way of understanding minority representation to be of value. We can come at this from another direction—the notion of a group right to minority representation on a constitutional court.\(^4\) Minority groups may demand this right because the various forms of group right to political participation may require judicial enforcement, and/or are open to competing interpretations. However, there are two kinds of group right at play. The first is to reserve to groups the power of appointment. For example, in Kosovo, the appointment of two of the nine members of the Constitutional Court requires the approval of a double majority of all members and those holding seats guaranteed to minority groups.\(^5\) In Bosnia-Herzegovina, the power of appointment rests with ethnically controlled constituent units, so that the Serb Republic appoints two judges, the Federation of Bosnia and Herzegovina (which is dominated by Croats and Bosniaks) appoints four, with the

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\(^6\) McGarry, O’Leary, and Simeon (n 62).

\(^4\) Sujit Choudhry and Richard Stacey, ‘Independent or Dependent? Constitutional Courts in Divided Societies’ in Colin Harvey and Alex Schwartz (eds), Bills of Rights in Divided Societies (2012).

\(^5\) Constitution of the Republic of Kosovo, Art 114, cl 3.
remaining three appointed by the President of the European Court of Human Rights.\textsuperscript{66} This is an indirect method of ensuring a court that includes judges from minority groups. The second is to mandate group composition directly. In Belgium, for example, it is required that the 12-person Constitutional Court consist of an equal number of French and Flemish-speaking judges.\textsuperscript{67} In Canada, there is a requirement that three of the nine judges be from Quebec, which has been understood to require at least two of those judges to be from the French-speaking minority.\textsuperscript{68}

What is interesting is that in all of these cases, courts make their judgments through simple majority vote—as opposed to a decision-rule that empowers judges from minority groups, such as a super-majority or double-majority requirement. But this type of representation is valuable, for reasons offered by Anne Philips.\textsuperscript{69} Anne Phillips has argued in favor of these policies under the rubric of a politics of presence. For Phillips, the value of guaranteeing representation of historically excluded groups is the increased likelihood that they will be particularly alert to the interests of their communities, and how they are affected by public policies, and will advance arguments and adduce evidence that the majority is less likely to do. The claim is that in the process of legislative deliberation, these arguments may resonate with members of the majority, who will be persuaded by the strength of the reasons and evidence offered. Phillips’s institutional focus is the legislature, but can be extended to the judiciary. On constitutional questions which go to the very nature of citizenship and identity in a multi-ethnic state, judges from excluded groups bring to bear arguments and evidence that draw upon their experience, in order to persuade their fellow judges from outside the community.

4. Group Rights versus Individual Rights

Recasting the nature of group rights forces us to reframe the conflict between individual and group rights. Although these conflicts still exist, their character is different. I approach this issue by setting out the standard method for rights-based adjudication that has taken root in most constitutional systems. Most individual rights are not absolute, and can give way to competing considerations, and most constitutional systems use the doctrine of proportionality as the juridical framework for the limitation of individual rights. Exercises of group rights count as a form of public power, and are assessed in the same way. The conflict between individual and exercises of group rights can play out at two different stages of a proportionality analysis: (1) the permissibility of limiting an individual right through the exercise of a group right in order to protect or promote a distinct cultural identity, and (2) the proportionality of the means for doing so.

If we examine contemporary constitutional politics, we can set a preliminary (and no doubt incomplete) taxonomy of the kinds of conflicts that arise between particular exercises of group rights and individual rights. As we shall see, these conflicts are quite different from the kinds of examples that preoccupy political theorists. For each, I will identify the stage of the proportionality analysis at which they would appear to play out (ie, legitimate purposes and/or proportionate means).

\textsuperscript{66} Constitution of the Federation of Bosnia and Herzegovina, Part IV, Section c, 3, Art 9.
\textsuperscript{67} Special Act of 6 January 1989 On the Constitutional Court (Belgium), art 31.
\textsuperscript{68} Supreme Court Act, RSC 1985, ch S-26 (Canada), s 6.
(a) **Group Rights Discriminate Against Non-Members**

As we saw earlier, for political theorists, group rights are external protections that do not violate the rights of non-members. But the notion of an internal minority is misleading in cases where groups possess territorial jurisdiction, because there are non-members who are subject to particular exercises of group rights. Consider the following examples. In Nigeria, states have come to be identified with specific ethnic groups, and many states only hire individuals of that state who are ‘indigenes’ of that state for the civil service. Individuals are considered indigenes if they are members of an ethnic group indigenous to the state, and have an official certificate that authenticates their status.\(^{70}\) The effect is that long-term residents, whose families may have lived in the state for many generations, may not qualify as indigenes, and are effectively barred from public sector employment. These hiring policies violate the right to equality. The main question under proportionality is what the actual motive underlying these policies is. They are defended as instruments to protect the distinct cultural character of states, often coupled with a claim of redressing historic disadvantage. However, the material motivations underlying demands for group rights in general, counsels a degree of skepticism about this stated objective. This skepticism is reinforced by the broad nature of these preferences, which are not targeted at disadvantaged individuals. Taken together, they suggest that the policy may be a form of economic self-dealing by political insiders. A second example concerns restrictions on land alienation. The Malaysian Constitution has exempted the states of Sabah and Sarawak from the right to equality, to allow them to restrict sales of private and public lands to native inhabitants, and to reserve lands to native inhabitants.\(^{71}\) The exercise of this group right would be a form of internal restriction, because it fetters the right of members to alienate property to outsiders. But (contra political theorists) it also limits the rights of non-members to equality and mobility, because they are barred from entering into transactions with insiders and taking up residence in that territory. Non-members lack the political power to check those rules because of their non-resident status, which those very rules perpetuate. The question is what the objective of this policy is. The economic roots of many conflicts over migration, settlement, and economic development argue for circumspection regarding the claim that these policies are strictly designed to preserve the cultural character of a district.

(b) **Under-Inclusiveness of Group Rights**

Another set of conflicts between group rights to political representation and individual representation arises if those policies are under-inclusive. For example, Poland’s electoral law exempts parties representing ‘national minorities’ from its 5 percent threshold.\(^{72}\) This exemption from a facially neutral rule is a group right, and is understood in constitutional politics in these terms. Under Polish law, there are nine officially recognized national minorities who can legally claim the benefit of this exemption: Belorussians, Czechs, Lithuanians, Germans, Armenians, Russians, Slovaks, Ukrainians, and Jews. Omitted from this list are Silesians, who assert their status as a national minority. Arguably, the exclusion of Silesians is a violation of the right to equality. The question is what the rationale is for denying official recognition to the Silesian minority. Polish authorities accept the existence of a Silesian ethnic

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\(^{71}\) Federal Constitution of Malaysia, Arts 153 and 161A.

\(^{72}\) *Case of Gorzelik and Others v Poland*, ECHR App no 44158/98, Judgment of 17 February 2004.
minority, but argue that it lacks national consciousness. Indeed, to grant it national minority status when it does not warrant it would constitute discrimination against other groups, and create the perverse incentive for them to claim national minority status, which could fragment Polish democratic politics. However, there is another possible explanation—the existence of a Silesian autonomy movement, which seeks an autonomous or independent Silesia. The unstated, yet barely, reasons for the government's stance is that Silesians do in fact possess national consciousness, and the fear that permitting a Silesian party to contest elections would facilitate political mobilization toward federalism and eventually secession, a threat not posed by any officially recognized minority. Let us consider both objectives under a proportionality analysis. For the first objective, there is a mismatch between the system of granting exemptions for national minorities, and the fear that such a system might encourage the proliferation of ethnic political parties. A mismatch between means and ends is indicative of a colorable motive. But taking the motive at face value, a proportionate alternative to this corporate consociational arrangement would be a facially neutral regime with a lower threshold or none at all. If the purpose is to stem secessionist mobilization per se, that is an impermissible purpose. A legitimate objective would be to prevent violent secessionist mobilization, which can be targeted directly by prohibiting political parties that advocate violence (as in Spain).

Another form of under-inclusion is to create distinctions among groups that hold group rights. Consider the long-standing constitutional dispute in Belgium over the BHV electoral district. Belgium's House of Representatives is elected on the basis of regional proportional representation, with separate lists for each constituency. There are 11 constituencies in total—five in (French-speaking) Wallonia, five in (Flemish-speaking) Flanders, and Brussels (which is in Flanders, but is a separate electoral district because of its large French-speaking population). The political party system is fractured along linguistic lines, with parties only fielding lists in their linguistic region. Moreover, parties do not attempt to collect votes outside of their linguistic zones, because the numbers of voters (eg French in Flanders, Flemish in Wallonia) would be too small to elect a representative. So linguistic minorities in practice must vote for a party operating in the majority language of the region. The one exception is BHV, an electoral district that combines Brussels with surrounding areas (HV) with a significant French-speaking population that are in Flanders and which would otherwise be in a Flemish constituency. Since French parties field candidates in Brussels, this allows French-speakers to cast votes for French parties, and for French parties to collect votes in Flanders. However, the converse is not true. Flemish nationalists object to this arrangement as discriminatory. Under a proportionality analysis, the questions would be the purpose served by the BHV constituency, and the proportionate alternatives to meeting this objective. If the objective is a legitimate one—to enable linguistic minorities to cast votes for parties from their language group—then the question would be whether comparable arrangements can be made for the Flemish minority in the border regions of Wallonia. This would be a corporate consociational alternative; a liberal one would be to have a single, Belgium-wide electoral district in which all parties could compete.73

(c) Compelled Identification and Association

Under some systems of group rights to political participation, the right of individuals to participate in elections requires that they self-identify as members of an ethnic group. Consider two examples.

Under the Cypriot electoral system, there are separate communal electoral rolls for the Greek and Turkish communities. This creates two parallel elections, each contested by two sets of parties which do not attempt to collect votes across the ethnic divide. In addition, there are three smaller Christian communities in Cyprus, the Armenians, the Maronites, and the Latins, who are not members of either community, and which are constitutionally recognized as religious groups. Article 2(3) of the Cyprus Constitution required those groups, within three months of Cypriot independence in 1960 to collectively join either the Greek or Turkish communities, the consequence of which is inclusion in its electoral roll.\textsuperscript{74} Individuals have a right of opt-out, but are then deemed to belong to the other community in its electoral roll. Turks and Greeks do not have any choice of the electoral roll to which they belong. The province of Bolzano in Italy has a similar electoral system. Bolzano is home to three linguistic communities—Italian, German, and Ladin-speakers. Political offices are allocated across the three linguistic communities. In order to hold elected office, individuals must self-identify with a linguistic community and stand for election as a member of that group. Unlike in Cyprus, individuals can choose to be unaffiliated. But if they do so, they are ineligible to stand for office (although they may still vote).\textsuperscript{75}

Both electoral systems require individuals to declare an ethnic identity, and condition their political rights (the right to vote, and/or the right to run for office) on that basis. Individuals who wish to exercise these rights unmediated by group membership have no ability to do so. Through the lens of individual rights, these arrangements can be objected to on three grounds—compelled identification, freedom of association, and discrimination. In Cyprus, individuals must identify themselves as members of a political community in order to exercise their rights to vote and stand for office; in Italy, group identification is a precondition to running for election. Compelled identification can be understood as a form of compelled expression, or as a violation of the right to privacy. The argument from freedom of association for members for the Greek and Turkish communities in Cyprus, and for all linguistic communities in Bolzano, would be this: the structure of the electoral systems compels political associations (ie, political parties) among co-ethnics and, conversely, prohibits or erects severe barriers to inter-ethnic or non-ethnic political parties. In addition, for the religious minorities in Cyprus, the argument would be the opposite—that it prohibits political associations among co-ethnics, and compels them to associate across inter-ethnic lines. The argument from discrimination builds on both of these lines of analysis: persons who do not wish to identify with an ethnic group enjoy unequal political rights relative to those that do (and for religious minorities in Cyprus, those who wish to identify with group members for political purposes cannot). These systems of group rights are designed to protect the political representation of minorities—Turks in Cyprus, and German and Ladin-speakers in Bolzano—a legitimate objective.\textsuperscript{76} The question is whether the means are proportional. Again, the possibility of

\textsuperscript{74} Constitution of the Republic of Cyprus, Art 2(3).

\textsuperscript{75} Special Statute for Trentino Alto-Adige.

achieving the same ends through liberal consociational means that permit political mobilization on the basis of ethnicity, but do not require it, is the issue.

IV. Conclusion

Political theorists rely on an image of group rights in which: (1) group rights protect the interest of members of ethnic groups in cultural survival or integrity; (2) group rights are primarily held by three kinds of minorities—national minorities, indigenous minorities, and religious minorities; (3) group rights consist of rights to decision-making authority over matters integral to cultural survival, are held by groups collectively, are exercised by the group through its governing institutions or on the group’s behalf by an unelected leadership, often but do not necessarily entail territorial jurisdiction, and can bind both members and non-members of the group; and (4) group rights come into conflict with the individual rights of group members, but do not raise serious issues regarding the rights of non-members.

A careful examination of constitutional practice reveals that: (1) group rights are a response to political mobilization not only on issues of cultural survival, but around the unequal distribution of economic resources and opportunities, the unequal enjoyment of public services, and unequal access to political power; (2) group rights are claimed by a broad variety of groups, including territorially dispersed minorities and groups that may constitute a majority in the state; (3) in addition to rights to self-government or autonomy, group rights relate to political power, and are designed to ensure representation and participation in common institutions, take a broad variety of forms (exemptions, accommodations, guaranteed representation, difference-conscious but facially neutral rules), arise in a variety of institutional contexts (electoral system design, political party regulation, legislative voting rules, the structure of political executive, courts), are usually not held and exercised by groups acting as a corporate entity, and are best understood as mechanisms to incorporating a group perspective into collective decision-making; and (4) these group rights produce a variety of conflicts with the individual rights of group members and non-members that are materially different from the kinds of rights violations that the political theorists’ constitutional image of group rights would suggest.

The principal goal of this contribution has been analytical—to lay the groundwork for future normative analysis by ensuring it proceeds on an accurate foundation. I defer that normative analysis to another occasion.

Bibliography

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