The Law of Majorities: A Rejoinder

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This has been an instructive discussion that has shed light on some of the most pressing issues of our time. Overall, there is an agreement on the existence of the social entity of the "majority group," although less on the criteria to identify a majority. Some interesting disagreements are found on the empirical question – whether the majority culture is indeed "needy" (how much, in which field, etc.) – and on the normative question: whether a culturally needy majority should be granted a right to defend its constitutional identity in the immigration context. Some comments raise a fundamental objection against the idea of cultural majority rights (this seems to be the view of Christian Joppke and Costica Dumbrava), while others accept the idea of cultural majority rights in principle yet raise objections regarding the ways in which it may be implemented in practice [1], its scope, and its application in a particular context, such as immigration law. Randall Hansen, for instance, casts doubt on whether immigration law, rather than education policy, is an effective and an appropriate means to deal with the challenges to the majority culture. I cannot do justice to all the subtle comments so let me briefly focus on three central issues: the existence of a majority, indirect "cultural defense," and needy majorities.

The Birth of a Majority

Do majorities exist? Current demographic categories, legal rules, and sociological typologies provide little help in pinpointing the concept of a majority. As other political communities (peoples, nations, minorities, etc.), majorities are largely imagined and socially constructed – majorities are made, not born. Of course, there are cases in which there is no one single majority, but spheres of majorities arrived at by applying different criteria. And surely, under certain criteria, majorities are presumed not to exist. However, although the concept of the majority is elusive, most Western societies contain a majority of some kind alongside minorities of some kind.

In the book (Ch. 5), I provide a first attempt to define a majority. There are formal and informal methods. Formal methods include census bureau categories and statistics. Informal methods focus on common social understanding – who is considered part of the majority by society, regardless of government classifications. Showing why a legal definition is not morally desirable or politically effective, I contend that majorities can be viewed as a cluster concept that ought to be identified by referring to typical cases. I offer three conceptions – an ethno-cultural majority, a sociological majority, and an idea-based majority – and support the recognition of the third conception. Certainly, other typologies exist: one can distinguish between "homeland majorities" (e.g., Serbs, Croats, Greeks, Turks), "migratory majorities" (e.g., Indo-Fijians and other groups brought by colonial rulers), and "settler majorities" (e.g., European settlers to the New World); and between a "political majority," defining by the voting system, and a "societal majority," determined by the entire population. By deciding who is entitled to vote and adopting a certain election system, countries design a political majority, which is different from a societal majority.

I advocate a concept of idea-based/normative majority, defined by a high level of abstraction – a society's core constitutional identity, which I term "national constitutionalism" (Ch. 5). This concept goes beyond constitutional patriotism and political liberalism – both accept national particularity *only by* different interpretations and applications of universal principles – yet does not go too far to include "national identity" or "societal culture" (Ch. 6). To be clear: a controversy on the criteria for defining a majority is welcome; the dividing line is not clear-cut and may include language, as emphasized by George Fletcher,

or ethnicity, as suggested by Eric Kaufmann – who is the first to develop a concept of ethnic majority. But such a controversy focuses on the methodology and is not a fundamental objection to the majority's social existence.

Christian Joppke is arguing against the existence of idea-based majorities. Western societies, he claims, include no "'groups' but 'individuals'"; idea-based majorities are so internally diverse to the point that it makes no sense to group individuals together and label them a "majority." Of course, given this proposition, talking about cultural majority rights seems old fashioned. But this view, even if normatively desirable, is far from contemporary Western reality. It may be that one day national identities will disappear and be replaced by a global or e-identity. It may be that we are witnessing the "swan song" of the old structure of national identity and that, sooner or later, our sense of groupness will exist in the virtual reality. This day, however, has not (yet?) arrived. In reality, group identities, minorities and majorities, are key players in national politics and international relations. At least in the near future, the majority is here to stay (Alex Yakobson persuasively demonstrates how and why national identity still counts) and begs for a legal birth.

Indirect Cultural Defense

Thus far, the defense of a majority-based constitutional identity has been done indirectly. One technique equates the majority with the state; the majority defends the "state culture," which simply mirrors the "majority culture" – its language, holidays, symbols, values, and institutions. A second technique is the "culturalization of religion"; the majority seeks to protect its religious icons, which, due to human rights law, are better protected by reference to their cultural aspect. For example, the display of crucifixes on the walls of public classrooms in Italy is considered part of Italy's cultural heritage. A third technique is "universalizing the particular"; it disguises the defense of the majority culture by using a universal argument. For example, Italy defends the display of the crucifix in public schools by claiming, among other things, that it is a symbol of democracy and Western civilization. Similarly, France defends the full-face veil in public spaces by invoking the principles of gender equality and "living together." This technique justifies particular identities, such as *laïcité*, by attempting to "universalize" them. A fourth technique is "legal white lies"; the law uses certain criteria, such as an income requirement or a minimum age of 24 for admission of a foreign spouse, which, although seemingly used to protect the welfare system and against forced marriages, are designed to "deal wisely" with undesirable immigrants.

Some of these techniques are insulting. Putting "the crucifix into the procrustean bed of state neutrality" is "misguided and offensive," Alexander Yakobson rightly observes, because the message is that the minority culture is "a deviation from universal moral standards and precepts – rather than just from the national mainstream," while the majority culture is an expression of universal morality. "Particularism clothed in universalist rhetoric" is much more offensive than "particularism that frankly acknowledges itself as such – provided, of course, that this particularism functions within a strong liberal framework" [2]. It presents the "other" as a risk to democracy and the public order, rather than as a challenge to the majority culture [compare to Joppke, [3]].

Liberal democracies should stop beating about the bush and directly tackle the question of majority rights. Under which circumstances, and based on what justifications, can majorities defend their essentials by using immigration law? Contemporary debates live in denial of the issue.

Is the Majority Culturally Needy?

Christian Joppke and David Owen agree that three out of the four paradigmatic cases of needy majorities – regional-minority majorities, victimized majorities, and minoritized majorities – may justify some "cultural defense" in immigration policy (Owen objects to the case of a minoritized-majority, but I take the objection to be empirical – a lack of a real threat – rather than normative). But these cases, Joppke argues, are marginal and do not address the reality of Western Europe (we must not forget, however, that the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland,

Slovakia – are all part of the European Union today). The main case, of diminishing majorities, cannot possibly be equated with a case of a needy majority because, empirically, there is no real "threat" to the majority culture in the West and, normatively, even if such a threat exists, the majority culture can be protected within the existing framework of cultural minority rights.

Empirically, I agree with Randall Hansen's critique: "I remain skeptical that majority norms are so fragile that they face existential threats." In several countries, there is a sense of threat – moral panic and demographobia – rather than a real threat. In other countries, however, the majority culture faces multiple challenges that, although their nature and scope is disputed, may be sufficient enough to bring the issue of cultural majority rights into the public debate. In the book (Ch. 1), I argue that the premise that the majority culture can take care of itself has been jeopardized due to nine macro and micro-level changes relating to immigration patterns (scale, character, intensity), Western society (population decline, changing lifestyles, new human rights regime), and the world (geopolitics, technology, globalization). Some of the challenges relate to liberalism – freedom of speech, gender equality, and gay rights; others are related to cultural identities in the public sphere – national holidays and symbols – and particular constitutional concepts, like the French *laïcité*. It is hard to confine the exact severity of the challenge and one should genuinely ask whether immigration restrictions might help minimize it and, importantly, what degree of threat justifies what measures and for what purpose. All in all, empirical evidence indicates that current cultural challenges posed by global migration have no historical precedent.

Global migration challenges some of the most fundamental assumptions in political theory. Thus, for example, Will Kymlicka's original proposition that cultural group rights are limited to indigenous peoples and national minorities is no longer valid in practice. Cultural group rights –linguistic rights, Sharia law, or exemptions from general laws relating to school curriculum and food – are invoked nowadays by immigrant groups, even if their demands are more confined than those asserted by national minorities. Kymlicka's propositions that immigrant groups are dispersed around the country, rather than geographically concentrated, seek to integrate into the national culture, rather than maintain their original cultural identities, and lack the institutional structures to form a distinctive community, do no longer accurately describe Western reality.

Normatively, Costica Dumbrava argues against cultural majority rights; in his view, if as a result of mass culturally distinct immigration, the majority becomes a minority, it would be entitled to minority rights in order to protect its culture. In his words: "I argue that if a current majority group is worried about its rights, it should genuinely support minority rights in anticipation of its future minority status … if one is anxious about the fate of diminishing majorities, one should make a case for anticipatory minority rights for majorities turning into minorities." Put differently: the majority may be entitled to invoke cultural group rights once becomes a minority.

The justifications for cultural majority rights are based upon similar rationales to those which justify cultural minority rights – the right to identity and personal autonomy. Majorities, like minorities, have an interest in protecting their cultural rights. Kymlicka himself observes that:

The fact is that national minorities are no different from the members of majority nations … Anglophones in Ontario (or Illinois) are as deeply attached to their language and culture as Francophones in Quebec or the Flemish in Belgium. If the demographics were reversed, and Anglophones in the United States were outnumbered by Francophones or Hispanics, then they, too, would mobilize to gain official recognition and support for their language and culture … were their identity to be threatened, national majorities would mobilize in just the same way as minorities.

Kymlicka's theory seeks to protect the minority culture when it is at risk due to the erosive effect of a majority-controlled laissez-faire democracy [4]. The analogy to the majority would be the protection of a *state-based* culture when a sub-state cultural protec-

tion – as a minority – would not be sufficient for the majority culture to flourish. In this case, the majority is justified in protecting its status as a majority as an instrument of protecting the existence and future development of its culture. I make this point in the book: "Why is a state-level, rather than a sub-state cultural defense, required? In a Utopian reality, where a majority culture can safely and independently flourish in sub-state political units, this may indeed be an option. However, there are cases in which there are grounds to believe that the majority, if it becomes a minority, may no longer be able to properly maintain its cultural essentials in sub-state arrangements" (p. 199).

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Whatever we think about majority rights, talks about this topic, from a non-jingoistic perspective, is something we are likely to hear more often going forward. As already said, with the growing popularity of extreme right-wing parties and "majority nationalism" in the West, disregarding the topic of cultural majority rights is both theoretically wrong and politically unwise.

[1] This seems to be the concern of David Abraham, who rightly warns against the "culture of resentment and anxiety among native, majority populations that *takes the form of cultural self-defense* – from the AfD and similar populist parties that have grown enormously in Europe to Donald Trump."

[2] Alexander Yakobson, "Muslims in Europe – Dilemmas of Secularism, Christian Heritage, 'Neutrality' and Religious Freedom," in *Muslim Minorities in Modern Times* (forthcoming, on file with the author).

[3] Christian Joppke, "A Christian Identity for the Liberal State," *British Journal of Sociology* 64, no. 4 (2013): pp. 597–616 at 606–607.

[4] The claim that liberal minority rights "are compensatory for historical injustices" or are only granted for "victims of historical … colonization" ignores Kymlicka's theory, which seeks to protect needy minorities *regardless* of past wrong.

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