COMMENT ON ACCOMMODATING DIFFERENCES IN CONSTITUTIONAL LAW

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The issues surrounding multiculturalism and the accommodation of differences are not new, as Professor Colleen Sheppard illustrates in her brief review of the Canadian experience with the treatment of aboriginal peoples, racial and ethnic minorities, women, and others who historically have suffered discrimination at the hands of the dominant cultural, sexual, or political group.[1] The historical experience with multiculturalism and diversity in the United States is strikingly, and unfortunately, similar to that of Canada. That is to say, it was characterized by the most extreme forms of discrimination based on race, ethnicity, sex, national origin, and aboriginal status. The institution of slavery, implicitly yet clearly permitted by the United States Constitution,[2] is perhaps the most extreme example, but the treatment of Native Americans in the United States is certainly a close runner-up. The forced removal of the Cherokee Nation from their lands in the Southeast to the territory that later became the State of Oklahoma is sadly symbolic of the relations between the United States and the "domestic dependent nations"[3] of Indian tribes.[4] Other forms of

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1. Colleen Sheppard, *Constitutional Recognition of Diversity in Canada*, 30 VT. L. REV. 463, 466–71.

2. *See* U.S. CONST. art. I, § 2, cl. 3 (determining the population for purposes of apportionment by adding to the "whole Number of free Persons . . . three-fifths of all other persons"); *Id.* art. I, § 9, cl. 1 ("Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited" prior to 1808); *Id.* art. IV, § 2, cl. 3 ("No Person held to Service of Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service or Labour may be due.").

3. This conception of the Indian tribes, which has largely survived to the present day, was set forth by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15, 17 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 536, 561 (1832). That this conception of "nation" included some recognition of sovereignty, and therefore self-determination, is evident in Marshall's description of the status of the Cherokee nation in 1832:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of [the states] can have no force, and which the citizens of [the states] have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Id. at 561. However, six years later the relocation of the Cherokee nation pursuant to a transparently fraudulent treaty made clear the extent that tribal sovereignty is "dependent" on the federal government. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-14, at 1467–1469 (2d ed. 1988).

4. As a result of that shameful episode, four thousand Cherokee Indians died, either in

destructive, discriminatory treatment were visited upon Chinese immigrants and residents,[5] Japanese residents and Japanese-American citizens,[6] and women.[7]

It was not until the end of the nineteenth century that the Constitution was amended to prohibit slavery and incorporate a requirement of equality in governmental, but not private, action.[8] Yet even that requirement of equality went largely unenforced for more than half of the twentieth century as the most blatant forms of discrimination continued against Native Americans, freed slaves and their descendants, other African Americans, and women. In more recent times the constitutional requirement of equality has been somewhat more effective in limiting invidious discrimination by governmental institutions.

Ironically, what is perhaps the earliest case developing the modern equal protection doctrine that offers protection to minority peoples in the United States actually *upheld* governmental discrimination against Japanese-Americans. In that case, which carries the name of the recently deceased Fred Toyosaburo Korematsu, Justice Hugo Black wrote that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny."[9] From Justice Black's statements for the Court there has developed an equal protection doctrine that gives special judicial attention

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captivity or on the "Trail of Tears" to Oklahoma. TRIBE, *supra* note 3, § 16-14, at 1467–68 (citing GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 290, 294 (1972)).

5. JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 367–97 (2000).

6. *E.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (excluding all citizens and noncitizens of Japanese ancestry from a certain area); PEREA, *supra* note 5, at 398–412.

7. *See, e.g.*, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138–39 (1873) (upholding exclusion of women from practice of law).

8. U.S. CONST. amend. XIII, § 1 (abolishing slavery); U.S. CONST. amend. XIV, § 1 (requiring states to provide "equal protection of the laws"). By its terms the Equal Protection Clause does not apply to the federal government: "nor shall any *State* . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). However, the Court has applied the requirements of equal protection to the federal government via the Due Process Clause of the Fifth Amendment. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217–18 (1995).

9. *Korematsu*, 323 U.S. at 216. Forty years after the Supreme Court's decision, Mr. Korematsu successfully sought to have his conviction set aside. Korematsu v. United States, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984). In setting aside the conviction the district court relied on the report of a congressionally created Commission on Wartime Relocation and Internment of Civilians. *Id.* at 1416. The Commission's report found that the exclusion and detention of ethnic Japanese was not justified by military necessity, as the government had asserted, but was the result of prejudice, war hysteria, and a failure of political leadership. *Id.* at 1416–17 (citing COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1982)).

("strict scrutiny") to discrimination based on "suspect classifications," including race and national origin.

However, the requirement of equality derived from the Equal Protection Clause turns out to be a somewhat limited requirement. First, by its very terms the constitutional command of equality applies only to governmental institutions. Private persons and organizations are free to discriminate as far as the Nation's organic law is concerned. Second, the constitutional requirement of equality in the United States is largely limited to formal equality, that is to say, a prohibition of discrimination. Third, this nondiscrimination principle has virtually no force unless discrimination is made on the basis of a suspect classification—for example race, national origin, and, to a lesser extent, gender.[10]

Under the nondiscrimination principle, when government treats individuals differently on the basis of suspect criteria, the degree of judicial scrutiny is heightened, and the government's burden of justifying the differential treatment is significantly increased. However, when differential treatment is made on the basis of a characteristic that is not suspect, the nondiscrimination principle offers virtually no protection.[11] Thus, for example, the constitutional command of equal treatment is not an effective or reliable source of protection against discrimination based on sexual orientation since that classification has not been designated as "suspect." This limited conception of equality might be seen as the natural result of the extreme forms of discrimination that had prevailed in the United States before, and for some time after, the adoption of the Fourteenth Amendment. In the face of extensive discrimination on the basis of race, national origin, and gender, the first step toward realizing a constitutional requirement of "equal protection" was to prohibit those forms of discrimination under most circumstances.

The principle of nondiscrimination is also an element of the constitutional protection afforded religious freedom through the Free Exercise Clause of the First Amendment.[12] Any law that singles out for unfavorable treatment or otherwise intentionally discriminates against a religion, religious beliefs, or religious practices is subjected to the most

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10. For ease of reference, my use of the term "suspect classification" in this Essay will include all bases of classification that call for a more rigorous judicial review. Thus, I am including, for example, gender in the term "suspect classification" because gender-based discrimination triggers "intermediate scrutiny."

11. This far-reaching governmental authority results from a standard of judicial review under the Equal Protection Clause that is so deferential as to approach judicial abdication. *E.g.*, F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993). Of course, other constitutional constraints may be applicable, including equal protection limits that apply when a fundamental right is implicated.

12. U.S. CONST. amend. I.

demanding form of judicial scrutiny.[13]

As a general matter, the nondiscrimination principle should be considered a basic element of accommodating diversity in a multicultural society in that it prohibits hostile action by the majority against a minority. However, as Professor Manuel Carrasco Durán properly asserts, a mere prohibition of discrimination is not enough to achieve accommodation of diversity in a multicultural society.[14] Indeed, in some forms and in some contexts, the nondiscrimination principle may impose an impediment to the accommodation of diversity.

The very term *accommodation* of diversity suggests something more than equal treatment in the form of neutral action. Accommodation requires that in some circumstances different cultural, religious, or ethnic groups should *not* be treated the same or equally but should be treated *differently* to ensure an equal result. Neutral laws that treat all persons the same, regardless of their culture, race, or religion, may have a different, and adverse, impact on different persons and groups, in spite of, or more precisely *because of*, the fact that the law treats all persons the same. As Professor Carrasco puts it: "[N]eutrality should be conceived of as *active neutrality*. In this sense, neutrality is not indifference, but rather doing everything that is possible 'to help or to hinder' everyone to the same degree."[15]

In seeking the goal of accommodation in a multicultural society, the role of "active neutrality" is clear. Professor Carrasco notes that the disadvantage resulting from "equal" treatment will usually fall on a racial, religious, or cultural minority, because the treatment that applies equally will often reflect, whether intentionally or not, the culture and values of the majority.[16] A simple example illustrates this basic point: a law prohibiting the exclusion, on the basis of sex, of either men or women from public swimming pools treats all persons the same or equally—all men and all women are given access to public swimming pools. But such a law may have an unequal and adverse impact on Muslim women who, for cultural or religious reasons, will not use a swimming pool if men are present. Thus, a nondiscrimination requirement that prohibits the exclusion of either men or women has the effect of excluding a particular, and minority, class of women.

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13. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33, 546 (1993).

14. Manuel Carrasco Durán, *The Attitude of Courts and Public Institutions Towards the Multicultural Reality*, 30 VT. L. REV. 443, 461.

15. *Id.* at 444 (quoting JOSEPH RAZ, THE MORALITY OF FREEDOM 113 (1986)).

16. *Id.* at 443–44.

Professor Carrasco suggests that constitutional protection of the cultural differences of minorities may be required to compensate for the inadequacy of the nondiscrimination principle and the implicit bias of seemingly neutral laws that incorporate the cultural assumptions of the majority.[17] Professor Sheppard's account of the Canadian constitutional reforms of the 1980's suggests that such protection is afforded, in limited form, in current Canadian constitutional law.[18] For example, the Constitution Act of 1982, as subsequently interpreted, appears to protect the traditional practices and customs of aboriginal people in Canada.[19] Similarly, the Canadian Charter of Rights and Freedoms has been interpreted to require educational accommodations for minority linguistic communities.[20] Nevertheless, a constitutional mandate that substantive, and not merely formal, equality be afforded to minority groups appears to be the exception.[21]

As a general matter, the U.S. Constitution does not recognize a right to adhere to the practices of one's own culture or to be protected from seemingly neutral laws that adversely affect one's cultural practices. Under the Supreme Court's interpretation of the Equal Protection Clause, there is no affirmative requirement of accommodation on any basis. In the absence of intentionally discriminatory treatment on the basis of a suspect classification, the Equal Protection Clause does not require government to consider, or make accommodations for, the adverse impact that facially neutral laws may have on racial, ethnic, or cultural minorities. Thus, the requirement that public swimming pools not exclude either men or women would not run afoul of the Equal Protection Clause despite a disparate and adverse impact on Muslim women. The active neutrality that Professor Carrasco advocates is not part of the equality required by the Equal Protection Clause of the U.S. Constitution. The Clause prohibits intentionally unequal treatment but not unequal effects or results—even if the unequal effect falls on a group defined by a suspect classification.[22]

As to accommodation of religious practices, the constitutional doctrine developed under the Free Exercise Clause is more complex. In early cases, the Supreme Court declined to interpret the right of free exercise of religion as creating an obligation to accommodate religious practices. In 1878, the

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17. *Id.* at 461.

18. Sheppard, *supra* note 1, at 472–77.

19. *Id.* at 472–73.

20. *Id.* at 473–74.

21. Professor Sheppard indicates that a more general move toward substantive equality in Canadian constitutional law may be seen in judicial interpretations of the right of equality in the Canadian Charter of Rights and Freedoms. *Id.* at 475–77.

22. Washington v. Davis, 426 U.S. 229, 245–46, 248 (1976).

Court considered a claim that an exemption from a federal statute prohibiting bigamy was required by the Free Exercise Clause to accommodate the practice of having multiple wives under the religious doctrine of the Church of Jesus Christ of Latter-Day Saints (the "Mormon Church").[23] In finding no free exercise violation in the uniform and universal application of the statute, Chief Justice Waite stated that to hold otherwise "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[24]

In a small number of more modern cases, however, the Supreme Court has interpreted the Free Exercise Clause to require that state governments accommodate religious practices adversely affected by facially neutral state laws. Three of these cases involve unemployment compensation programs that denied compensation to individuals who became unemployed because they refused, on the basis of their religious beliefs, to comply with the requirements of their employers.[25] In each case, the Court held that the unintended, unequal impact of the compensation schemes violated the Free Exercise Clause in the absence of a justifying compelling interest.[26] Thus, the states involved were constitutionally required to create exceptions to their unemployment benefit policies to accommodate religious beliefs and practices of religious minorities.

In the most far-reaching case requiring accommodation under the Free Exercise Clause, the Court affirmed the Wisconsin Supreme Court's reversal of a conviction of an Amish parent for refusing to send his child to school beyond the eighth grade in violation of a state law requiring attendance until the child had reached the age of sixteen.[27] In *Yoder*, the Court appeared to require, at least in some circumstances, what Professor Carrasco has termed active neutrality with regard to religious practices and beliefs: "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it

23. Reynolds v. United States, 98 U.S. 145, 161–62 (1879).

24. *Id.* at 153, 166–67.

25. Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 137–39 (1987) (refusal to work on Saturday by a member of the Seventh-Day Adventist Church); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 709 (1981) (Jehovah's Witness Church member's refusal to work in a plant manufacturing munitions); Sherbert v. Verner, 374 U.S. 398, 399–401 (1963) (Seventh-Day Adventist's refusal to work on Saturday).

26. *Hobbie*, 480 U.S. at 146; *Thomas*, 450 U.S. at 719–20; *Sherbert*, 374 U.S. at 403, 406–07, 410.

27. Wisconsin v. Yoder, 406 U.S. 205, 207, 234 (1972).

unduly burdens the free exercise of religion."[28] However, because the constitutional requirement applied in *Yoder* is grounded in the protection of the free exercise of *religion*, it would not extend to the accommodation of cultural practices that are not religiously based. Indeed the *Yoder* Court expressly noted:

> [W]e must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief.[29]

Even this limited form of constitutionally required accommodation has been called into question, and possibly eliminated, by the Supreme Court. In 1990, the Court held that a state law prohibiting the possession of peyote could be applied to possession for sacramental purposes by the Native American Church without violating the requirements of the Free Exercise Clause.[30] In an opinion that appeared to reject decisively the very notion of substantive equality under the Free Exercise Clause, Justice Scalia wrote for a majority of five Justices:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself"—contradicts both constitutional tradition and common sense.
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> . . . . Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the

28. *Id.* at 220. The Court found that the compulsory attendance requirement applied uniformly to all citizens, did not facially discriminate against any religion, and was not enacted for discriminatory purposes. *Id.*

29. *Id.* at 215.

30. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 874, 890 (1990).

> society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[31]

In essence, the Court interpreted the Free Exercise Clause to track the Equal Protection Clause in that it requires only formal equality (nondiscrimination) with regard to religion.[32] Consequently, under current constitutional doctrine there may be no requirement that government accommodate cultural or other differences[33]—precisely the inadequacy that Professor Carrasco laments.

Within the intricacies of constitutional doctrine in the United States there is, however, substantial opportunity for government to act affirmatively, and voluntarily, to accommodate cultural differences. Although there are situations in which the nondiscrimination principle of the Equal Protection Clause cannot peacefully coexist with voluntary efforts to accommodate, those situations are largely defined by the use of suspect classifications. Consequently, there are few constitutional constraints on government's voluntary efforts to accommodate different *cultures* and different *cultural* practices, as long as the Court does not regard the cultural practices as identifying the favored group by its race, national origin, or other suspect classification.

With regard to the voluntary accommodation of religious practices, the Supreme Court has been consistent in its view that even when the First Amendment does not *compel* accommodation, it may *permit* it.[34]

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31. *Id.* at 874, 885, 888 (internal citations omitted) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988); Braunfeld v. Brown, 366 U.S. 599, 606 (1961); Reynolds v. United States, 98 U.S. 145, 167 (1879)).

32. *See id.* at 877, 879, 886 n.3 (finding that discriminatory effects of race-neutral laws do not require justification by a compelling governmental interest and neither do religion-neutral laws).

33. The much-maligned right of privacy may offer some constitutional protection for cultural diversity even if it falls short of requiring active neutrality. To the extent that the right of privacy includes elements of choice pertaining to matters of family, child rearing, and education, that constitutional right could also protect practices of minority cultures from governmental intrusion and restriction. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 397–98, 401, 403 (1923) (state education law may not restrict parental choice to have children schooled in a language other than English). It is certainly easy to overstate the effectiveness of the right to privacy in compelling government to accommodate difference, but, given the very limited constitutional law that is available, it should not be overlooked.

34. *See, e.g.*, *Smith*, 494 U.S. at 890 (recognizing the constitutionality of a "nondiscriminatory

Consequently, the Court has upheld statutory provisions designed to provide uniform accommodation to religious beliefs and practices.[35] This voluntary accommodation of religion is limited by the First Amendment's prohibition of the establishment of religion.[36] However, the Court has found "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[37]

The fact that accommodation may be constitutionally permissible does not necessarily justify governmental actions to accommodate different cultural practices. As Professor Sheppard points out, there are serious questions about the "legitimacy and fairness of according differential treatment to diverse social groups"[38] even for the seemingly benign purpose of accommodation. Sheppard offers a method for narrowing the inquiry somewhat by suggesting that accommodation may be justified by the need to remedy past and continuing discrimination.[39] Although the decisions of the U.S. Supreme Court leave some measure of uncertainty, it appears that, at least under some circumstances, the principle of nondiscrimination implicit in the requirement of equal protection permits remedial action that makes use of a suspect classification.[40]

Although the remedial justification can be far-reaching when interpreted to include remedies for unconscious discriminatory action and systemic or institutional inequities,[41] the remedial justification for

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religious-practice exemption" in state laws); Bowen v. Roy, 476 U.S. 693, 712 (1986) ("As a matter of legislative policy, a legislature might decide to make religious accommodations to a general and neutral system of awarding benefits . . . .").

35. *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 329–30 (1987) (holding that the exemption for religious organizations from Title VII's prohibition of employment discrimination based on religion does not violate the Establishment Clause); Zorach v. Clauson, 343 U.S. 306, 306, 315 (1952) (affirming the constitutionality of the public school releasing students during school hours to obtain religious instruction or attend devotional exercises); *see also* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1216 (2006) (holding that the Religious Freedom Restoration Act applied to require accommodation of religious use of hallucinogenic, sacramental tea).

36. U.S. CONST. amend. I; *see, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 706, 710–11 (1985) (finding that a state law that requires employers to excuse any employee from work on a day they observe as the Sabbath of the employee's religious faith violates the Establishment Clause).

37. *Amos*, 483 U.S. at 334 (*quoting* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)). An Establishment Clause challenge to an accommodation of religious practices may be defeated by "the general availability of any benefit provided religious groups or individuals." Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994).

38. Sheppard, *supra* note 1, at 481.

39. *Id.*

40. *See, e.g.*, City of Richmond v. J. A. Croson, Co., 488 U.S. 469, 509 (1989) (race-based remedies); Califano v. Webster, 430 U.S. 313, 316–17 (1977) (gender-based remedies).

41. Sheppard, *supra* note 1, at 481.

differential treatment is derived from a harm-based difference linked to violations of the nondiscrimination principle. That does not, of course, diminish the force of the justification, but it does mean that governmental actions taken on the basis of the remedial justification are, at least in part, a vindication of the nondiscrimination principle.

The more challenging claims to accommodation would be those encompassed by Sheppard's third justification: "the critical importance of celebrating and accommodating differences that are to be sustained in the future."[42] The cultural bias that Professor Carrasco suggests is inherent in societies that regard their national culture as the natural culture,[43] might be interpreted to mean that all accommodation measures may be justified as "remedial." It seems clear, however, that Professor Carrasco's argument for cultural accommodation is based on a broader justification derived from the right of each individual to dignity and autonomy,[44] which is related to, although not identical with, Professor Sheppard's third justification.

As Professor Sheppard ably demonstrates, the decision of whether, and how, to accommodate cultural differences is a complex one. Prominent among the complexities is the effect that recognition of a right to culture would have on the rights and interests of different members of a protected cultural group.[45] Although there are many versions of the conflict that could arise within a culturally protected group, the most obvious are those that concern women and children. That is to say, in some instances the protection of a cultural practice may have a significant and severe adverse impact on the least powerful members of the cultural group. Professor Carrasco's resolution of that issue is found in his view of the nature of a cultural right worthy of accommodation and protection. He suggests that the recognition of cultural rights must enhance, not restrict, the life choices of the *individual*.[46] A cultural right is an individual, not a collective, right.[47] Consequently, there is no right of the group to compel individuals to adhere to the cultural practices of the group:

> Characteristic behaviors of a group will be considered real cultural practices if they have no negative consequences for the members of that group to exercise their individual rights. If such practices restrict the individual rights of some members of the group, then we will not consider them real cultural practices, but

42. *Id.*
43. Carrasco Durán, *supra* note 14, at 447.
44. *Id.* at 444–46.
45. Sheppard, *supra* note 1, at 484–86.
46. Carrasco Durán, *supra* note 14, at 446.
47. *Id.* at 444.

> rather the result of power relationships that are generalized within the group. Power relationships cannot be characteristic of a culture but can be characteristic of a certain time.[48]

This emphasis on individual right and the exclusion of power relationships from the definition of "real cultural practices" may provide a clear resolution of relatively easy cases, such as that raised by the practice of genital mutilation.[49] However, it is not as useful in resolving more subtle cases. In many instances, cultural practices will be defined by, or include as an inherent element, relationships among members of the cultural group. This is perhaps most obvious in practices that touch on family relationships. For example, in *Yoder*, the Supreme Court protected the religious practice of the Amish parents by requiring that Wisconsin exempt the Amish from compulsory school attendance after the eighth grade.[50] However, as Justice Douglas suggested in his dissent in that case, the protection of the parents religious practice at least threatened to infringe the rights and interests of the children who would be denied a formal education after the eighth grade.[51] Although the majority avoided the issue, it seems clear that the religious practice the Court was protecting included a relational aspect regarding the authority of parents to make educational and religious choices for their children.

The relational aspect of cultural practices is evident in several of the examples discussed by Professor Carrasco. For example the Roma practice of dividing child custody by gender in the event of a divorce rather clearly reflects a cultural determination of the relationship between husband and wife as well as the relationship between parents and children.[52] Protecting that cultural practice by exempting Roma divorces from the requirement of the Spanish Civil Code that children be kept together after a divorce would necessarily involve the protection of a power relationship within the Roma community.[53] Similarly, a recognition in the criminal law that sexual relations between a twenty-four-year-old male and a fourteen-year-old female would not be sexual abuse if it occurs within the Roma community[54] protects a cultural practice that is, I think, inescapably linked to power relationships within the Roma community. This is not to say that such practices should be outside the realm of protected practices; but it is to say

48. *Id.* at 449.
49. *Id.* at 455–56.
50. Wisconsin v. Yoder, 406 U.S. 205, 207, 234 (1972).
51. *Id.* at 241–46 (Douglas, J., dissenting).
52. Carrasco Durán, *supra* note 14, at 454.
53. *Id.*
54. *Id.* at 455.

that the question cannot easily be resolved by excluding power relationships from the definition of "real cultural practices." Ultimately, the question presented will be whether the minority culture's power relationship should be recognized and protected (as would be the case in the Roma examples), or whether the power relationship of the dominant culture should prevail, as is suggested in the example of giving Muslim women access to divorce and separation under Spanish law.[55]

Ultimately, what these examples may illustrate is the wisdom of Professor Carrasco's observation that the recognition of cultural rights must be contextual and practical.[56] There is no single, general principle that will suffice to resolve the conflicts that necessarily arise when affording legal protection to different cultural practices. Some form of case-by-case determination that balances the different interests affected seems essential.

Another complexity associated with the protection of cultural diversity concerns the choice between assimilation and accommodation. In some instances, a refusal to accommodate a cultural practice may be justified, even if the practice does not involve the violation of the rights of individuals. Consider, for example, the practices of polyandry and polygyny. If a cultural minority engaged in the practice of having multiple spouses and did so in a way that protected the interests of the spouses and children to the extent that they are currently protected in monogamous relationships, there would be no (new) violation of individual rights in the practice. Nevertheless, the dominant culture may decline to protect the minority cultural practice, not because it is the "wrong" practice or an "unnatural" practice, but because it is not the preferred practice. That is to say, the majority culture may have some legitimate claim to the social cohesion fostered by shared values, a common language, and other elements of a cultural tradition. Professor Sheppard's discussion of the transformation of the dominant culture indicates that the choice is not a binary one.[57] Indeed, a majority culture in a multicultural society is almost inevitably an evolving one that is influenced by the views and practices of the minority cultures.[58] And that evolutionary process, a form of transformation, can be fostered through recognition, dialogue, political participation, and accountability.[59] In the final analysis, the most useful guidance may be found in Professor Sheppard's observations about a

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55. *Id.* at 455 (citing Código Penal [C.P.] art. 107 (Spain), *available at* http://digbig.com/4pgsw).

56. *Id.* at 450–51.

57. Sheppard, *supra* note 1, at 479–80.

58. *Id.*

59. *Id.* at 486.

"constitutionalism informed by the spirit of mutual recognition and accommodation of cultural diversity" that includes "the negotiation and mediation of claims to recognition in a dialogue governed by the conventions of mutual recognition":[60]

> The idea of dialogue within a context of "mutual recognition" has important implications. Firstly, it provides us with a middle ground between the dichotomous extremes of either nonrecognition (that is, assimilation into a dominant norm) or complete separation without bridging the divide of difference between communities. Secondly, it articulates a way of communicating across differences, endorsing a democratic constitutionalism that is attentive to adequate representation, mutual recognition, accountability, inclusive participation, consultation, and dialogue.[61]

60. *Id.* (quoting JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY 209 (1995)).

61. *Id.* (citing Council of the Haida Nation v. Minister of Forests, [2004] 3 S.C.R. 511, para. 60; SHERENE H. RAZACK, LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS 159 (1998)).