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## Premature Predictions of Multiculturalism?

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## NOTICE

### Premature Predictions of Multiculturalism?

*Kirsten Matoy Carlson*

THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA. By *Donna Lee Van Cott*. Pittsburgh: University of Pittsburgh Press. 2000. Pp. xvii, 340. Cloth, \$50; paper, \$24.95.

The late twentieth century ushered in a renewed interest in constitutional democracy as Latin American states revised earlier constitutions and post-Communist countries in Eastern Europe wrote new constitutions to reflect their democratic aspirations. Processes of constitution-making continued throughout the 1990s with new constitutions emerging in states throughout Africa, Latin America, and Europe.<sup>1</sup> The rejuvenation of constitution-making also renewed scholarly interest in comparative constitutionalism.<sup>2</sup> Scholars investigating constitution-making processes in Eastern Europe and Africa soon developed theories on how these processes and the contents of national constitutions changed in the late twentieth century.<sup>3</sup>

Donna Lee Van Cott<sup>4</sup> contributes to the new literature on comparative constitutionalism by focusing on the constitutional movement that swept through Latin America in the 1990s. Specifically, Van Cott suggests that Latin American countries contributed to the new era of constitutionalism by developing multicultural constitutions (p. 3). The basic aim of her project is to create a model to explain when states decide to create multicultural constitutions. She demonstrates the valid-

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1. See, e.g., CLETUS GREGOR BARIE, *PUEBLOS INDIGINAS Y DERECHOS CONSTITUCIONALES EN AMERICA LATINA: UN PANORAMA* (2000) (noting the differences in articles protecting indigenous rights in Latin American constitutions written in the 1990s); GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING* (1994) (applying formal modeling techniques to constitutional design); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000) (discussing the rise of constitutional courts in new Eastern European constitutions); Heinz Klug, *Participating in the Design: Constitution-Making in South Africa*, 3 *REV. CONST. STUD.* 18 (1996) (describing the process of constitution-making in South Africa).

2. See, e.g., SCHWARTZ, *supra* note 1; Klug, *supra* note 1.

3. For instance, Schwartz argues that the new constitutions promulgated in Eastern Europe included a new institution, namely the constitutional court or tribunal. SCHWARTZ, *supra* note 1, at 1.

4. Assistant Professor of Political Science, University of Tennessee, Knoxville.

ity of her model by applying it to the most recent Colombian and Bolivian constitutions.<sup>5</sup> She argues that the convergence of crises of representation, participation, and legitimation prompts political elites to perceive constitutional revision as essential (p. 8). Then, political elites engage in constitutional transformations that split from the liberal tradition and produce multicultural constitutions.<sup>6</sup>

Van Cott highlights the importance of the recognition of indigenous peoples in new Latin American constitutions. Constitutional recognition of the autonomy of indigenous peoples reflects a change — albeit most likely only a symbolic one — in Latin American politics, which has historically either marginalized indigenous peoples or artificially tried to align them with campesino<sup>7</sup> groups.<sup>8</sup> Even if merely symbolic, recognition serves a crucial function in developing ideas of multiculturalism and the relations between states and indigenous peoples.<sup>9</sup> As political scientist Danielle LaVaque-Manty suggests, recognition opens the door to multiculturalism by fostering the idea that “‘being an x’ is a fine thing.”<sup>10</sup> Although Van Cott does not expressly assert the importance of recognition to social and political equality, her focus on constitutional provisions recognizing indigenous peoples implicitly acknowledges this.

5. P. 1. Van Cott uses Bolivia and Colombia as case studies because the most change has occurred through the constitution-making processes of these countries. P. 17.

6. P. 8. The concept of multicultural constitutionalism is most often discussed in political theory as deviated or differentiated citizenship. *See, e.g.*, WILL KYMLICA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994). Within this body of literature, multicultural constitutionalism is not well-defined as several different theorists propose their own versions of multiculturalism. Legal scholars entering the debate over multicultural constitutionalism usually avoid defining it, *see, e.g.*, Robert Justin Lipkin, *Liberalism and the Possibility of Multicultural Constitutionalism: The Distinction between Deliberative and Decided Cultures*, 29 U. RICH. L. REV. 1263 (1995), suggest that many different conceptualizations of multicultural constitutionalism exist, *see, e.g.*, Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 LAW & SOC. INQUIRY 359, 383 (1997), or provide a simplistic, circular definition, *see, e.g.*, Mark Tushnet, *Thinking About the Constitution at the Cusp*, 34 AKRON L. REV. 21, 29 (2000) (“[M]ulticultural constitutionalism — the constitutionalism of a multicultural state.”). Van Cott neither provides a definition of multicultural constitutionalism nor indicates which of the conceptions within the political theory literature she most closely aligns herself with. Rather she vaguely mentions differentiated citizenship. *See infra* Section II.A.

7. *Campesino* is a term for peasant used in the Andean regions of Latin America. *See, e.g.*, EDUARDO P. ARCHETTI, *CAMPESINADO Y ESTRUCTURAS AGRARIAS EN AMERICA LATINA* 17 (1981).

8. *See* Dwight R. Hahn, *The Use and Abuse of Ethnicity: The Case of the Bolivian CSUTCB*, *LATIN AM. PERSP.*, Spring 1996, at 91.

9. Danielle Denyse LaVaque-Manty, *Will All of the Real Ones Please Stand Up? “Authenticity” and Ascription in Identity Politics* (1999) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

10. *See id.* at 21.

Van Cott does more than just highlight the constitutional recognition of indigenous peoples. Throughout her book, she not only applauds Latin American states for constitutionally recognizing indigenous peoples and their rights, she suggests that it benefits the state. The recognition of indigenous peoples, according to Van Cott, forces the state to contend with a value system inherently different from the liberal principles of the Western constitutional tradition (p. 9). While capitalistic society focuses on individual property rights, indigenous groups assert the importance of collective property rights and the good of the community over the good of the individual (pp. 9-10). Van Cott suggests that the ability of indigenous groups to raise these concerns indicates the benefits that indigenous peoples bring to the state.

The intersection of law and politics — particularly that of constitutional law, political development, and the politics of democratization — underlies the relations between indigenous peoples and the state in constitutional politics in Latin America. Rather than just limit her book to a detailed account of constitutional politics and negotiations between factions, Van Cott demonstrates how different political theories — those traditionally espoused by political elites as part of the liberal nation-state and those held by indigenous groups — interact to construct a legal system that affects democratization in Latin America.

Van Cott's model explaining the creation of multicultural constitutions in Latin America is admirable and compelling. But the evidence on which Van Cott relies raises questions about whether Latin American political elites have actually broken from the exclusionary politics of the past. This Notice argues that Van Cott's view of the development of multicultural constitutions may be overly optimistic because of tensions between the multiculturalism that Van Cott suggests is embedded in the new Latin American constitutions and the history of exclusionary politics in that region. Part I describes Van Cott's model for constitutional transformation in detail. It applauds Van Cott for demonstrating how legal processes affect ideas of multiculturalism and democratization and notes that she significantly contributes to the literature on identity politics by illustrating the importance of recognition issues. Part II argues that Van Cott fails to provide a clear definition of multiculturalism; it also argues that without fully considering the effects of implementation, Van Cott's assertion that the new Latin American constitutions are multicultural is premature.

## I. VAN COTT'S MODEL OF CONSTITUTIONAL TRANSFORMATION

Regime change and constitutional revision historically plague Latin American politics and often stymie attempts at democratic con-

solidation<sup>11</sup> in that region.<sup>12</sup> Thus, despite several attempts at democratization, most Latin American states are still transitioning to democracy. Scholars have attributed these failures to reach the democratic goal to both formalistic and normative issues (pp. 4-5). According to Van Cott, constitutional transformation could solve these transition problems by facilitating democratic consolidation in the region.<sup>13</sup>

Constitutional transformation occurs when the constitution-making process considers values traditionally excluded from the polity, such as indigenous values.<sup>14</sup> The process opens to the inclusion of indigenous values after the polity — especially political elites — have faced a political crisis and need to increase their political legitimacy (p. 6). Political elites realize that they cannot reach consensus through traditional political means and that they have to depart from politics as usual and engage in radical politics to achieve their goals and reestablish state legitimacy (p. 7). Thus, the political crisis convinces the political elites that they have more to gain by listening to and incorpo-

11. Democratic consolidation, a term common to literature discussing Latin American politics, occurs when the political actors in a state concede that democracy is the only game in town. LARRY DIAMOND ET AL., *DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA 3* (2d ed. 1999). Van Cott describes what happens in the process of democratic consolidation:

In a democratizing society decision-making becomes more inclusive and transparent; the legitimacy of democratic institutions increases and becomes more widespread; the interests and desires of an increasing proportion of the population are channeled more effectively through political parties and civil society organizations; civil society is increasingly autonomous, pluralistic, and organized; and the dominant political culture becomes more tolerant and solidary.

P. 4.

12. See generally *BUILDING DEMOCRATIC INSTITUTIONS: PARTY SYSTEMS IN LATIN AMERICA*, (Scott Mainwaring & Timothy R. Scully eds., 1995) [hereinafter *BUILDING DEMOCRATIC INSTITUTIONS*]; DIAMOND ET AL., *supra* note 10, at 337-43; ALEJANDRO MORENO, *POLITICAL CLEAVAGES: ISSUES, PARTIES, AND THE CONSOLIDATION OF DEMOCRACY* (1999).

13. P. 6. Van Cott adopts Istvan Pogany's definition of constitutional transformation: "[A] genuine transformation of the character and habitual mode of operation of a society's political and legal institutions. In other words, constitutional transformation can be said to have occurred only where the process of constitution making results in the general and habitual application of the new constitutional norms." P. 7 (quoting Istvan Pogany, *Constitution Making or Constitutional Transformation in Post-Communist Societies?*, 44 *POL. STUD.* 568 (1996)).

14. P. 4. Interestingly enough, Van Cott identifies the development of an autonomous indigenous sphere separate from the state as a part of indigenous values. For example, in asserting this, she overlooks the tensions in Bolivia during the constitution-making process when then Vice President Cardenas, an Aymara Indian and the leader of the indigenous political party, was criticized for not more actively supporting the constitutional inclusion of a separate sphere for indigenous peoples. See Xavier Albó, *And from Kataristas to MNRistas? The Surprising and Bold Alliance between Aymaras and Neoliberals in Bolivia, in INDIGENOUS PEOPLES AND DEMOCRACY IN LATIN AMERICA* 55-81 (Donna Lee Van Cott ed., 1994). Van Cott expands on indigenous values later by adding that "[m]ost indigenous cultures do not value the ethos of private accumulation or individual achievement that underpins capitalist society. The good of the community is almost universally considered more important than the good of the individual . . ." P. 9.

rating the demands of marginalized groups — in Van Cott's model, indigenous peoples — than by ignoring them.<sup>15</sup> In this way, elites engage in radical politics and gain access to a new source of legitimacy, namely that based on international norms and indigenous traditional culture by recognizing indigenous peoples and their claims.<sup>16</sup> Based on this theory that in certain post-crisis moments, the polity opens for a short period of time and allows for the inclusion of marginalized interests in the creation of a new constitution, Van Cott builds a model for constitutional transformation.

Van Cott's model includes three overlapping phases: constitutional conjuncture, transformation ("the creative phase"), and implementation (pp. 21-23 and fig. 1). The first phase of constitutional transformation, constitutional conjuncture, occurs when the crises of representation, participation, and legitimation converge, usually leading to some catalytic event, which prompts the election of presidential leadership with an electoral mandate to implement a reform agenda (pp. 25-27). This catalytic event also opens the political system momentarily to outsiders, such as ethnic minorities (p. 28). Ethnic organizations mobilize and become capable of expressing their constitutional claims at the national or regional level (p. 28).

The second phase of constitutional transformation, which Van Cott calls the creative phase, builds upon the first phase and focuses on the constitutional dialogue occurring between political elites and ethnic organizations (pp. 29-30). Van Cott contends that this phase only occurs if it is not unnecessarily delayed and if the ethnic organizations can effectively link their constitutional claims to the concerns of political elites (p. 31). She identifies six conditions necessary for the success of the creative phase: (1) continuation of presidential leadership, (2) implementation in the first two years of the president's term, (3) preservation of the neoliberal economic model, (4) acceptance of the procedural and substantive legitimacy of the project, (5) connection between ethnic rights and elites' goals, and (6) relevant international conventions are signed (p. 26 and fig. 2). If all six conditions are met, then political elites engage in constitutional dialogues with ethnic organizations during the creative phase (p. 29).

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15. P. 27. Van Cott explains, "Elites must believe that the costs of failing to reform will be higher than maintaining the status quo, even if their particular interests are somewhat disadvantaged by reform." P. 27.

16. Pp. 6-7. Van Cott draws a link between international and national legitimacy and the recognition of indigenous peoples. She argues:

The legitimacy of states is measured in international fora against their own constitutions as well as international norms, particularly with respect to how they treat their most vulnerable groups. Thus, the decision to provide unprecedented recognition and rights to indigenous peoples is part of a larger effort to restore state legitimacy at home and abroad.

P. 6 (citation omitted).

The final phase of constitutional transformation, the implementation phase, occurs when the political community accepts the constitution as legitimate (pp. 34-35). Additionally, an institutional guardian of the constitution, such as an ombudsman or constitutional tribunal, emerges as a viable protector of constitutional rights (p. 26 and fig. 2). To further ensure constitutional implementation, civil society organizations mobilize to defend and demand the implementation of new rights (p. 26).

Van Cott highlights the legal aspects of democratization by showing how representation and participation relate to legal frameworks. She contends that application of her model of constitutional transformation shows a shift in the political scene in Latin America as Latin American states recognize the importance of representation and participation in sustaining a consolidated democracy. Fledgling Latin American democracies have faced difficulties in consolidating their democracies because of the historic nature of Latin American politics, which has excluded peasants, indigenous groups, women, and racial minorities (p. 10). Van Cott argues that Latin American countries are tackling the exclusion rife in their pasts by creating more inclusive constitutional frameworks.<sup>17</sup> These states design more inclusive constitutional frameworks by focusing on participation and representation. Participation and representation are necessary to ensure the sustainability of the constitutional transformation. The state enacts policies to increase the political participation of historically marginalized groups (p. 9). Increased political participation and representation includes these groups in the polity so that they become stake-holders in the constitutional system. In turn, as stake-holders, marginal groups help to sustain the constitutional transformation. For Van Cott, the revolutionary aspect of the Latin American constitutional projects resides in the fact that Latin American elites are transforming the state from exclusive to inclusive and recognizing the sovereignty claims asserted by native groups (p. 10).

Van Cott's argument, however, extends beyond the idea that Latin American states merely recognize indigenous sovereignty claims. She contends that the new constitutions alter previous conceptions of the state as a nation-state (p. 8). By recognizing indigenous peoples as existing prior to the creation of the state, the state rejects the liberal tradition of inherent state political authority. The new state is revolu-

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17. She explains:

A decade after most Latin American countries began their transitions from authoritarian rule, most are searching for institutional reforms to extend the benefits of citizenship and the market to a larger proportion of their populations and, thereby, to enhance the legitimacy and efficiency of the state and the democratic regime.

tionized and distinct from the old state because it creates spaces for the exercise of indigenous authority (p. 8).

This break with previous conceptualizations of the state also reconstitutes the state such that nationality alone does not determine rights of citizenship (p. 10). Rather than mere recognition of the collective and individual rights of indigenous peoples, Van Cott applauds these constitutions as creating systems of deviated citizenship that provide indigenous groups with rights unique to their status as indigenous peoples (p. 10). In an unprecedented way, these constitutions recognize not only the individual rights of indigenous peoples but also their collective rights.<sup>18</sup> In providing indigenous groups with unique rights, deviated citizenship rejects notions of uniformly applied individual rights and maximizes the effective participation of diverse groups through the creation of autonomous indigenous institutions.<sup>19</sup>

Van Cott perceives the latest wave of constitutional reform as moving away from the Latin American trend of constitutional domination by elites (p. 15). She identifies five trends in the newest Latin American constitutions (pp. 15-16). First, the constitutions indicate "a propensity to create European-style constitutional tribunals" (p. 15). Second, they introduce the protection of new and previously unprotected rights, including all three generations of human rights (pp. 15-16). Third, the constitutions display an increasing acceptance of international law with particular emphasis on international human rights law (p. 16). Fourth, the constitutions incorporate procedural figures and institutions, such as the ombudsman, to protect certain fundamental constitutional rights (p. 16). Finally, the new constitutions focus on the creation of a more vital and efficient judiciary, which can address endemic governmental corruption (p. 16). According to Van Cott, this focus on the rule of law protects the new constitutionally created rights from state infringement (p. 15). Van Cott argues that these characteristics indicate a break from past constitutional projects in Latin America, which often led to the creation of constitutions that were neither enforced nor entrenched in the legal and political culture (p. 16).

Van Cott illustrates her model of constitutional transformation with two case studies to explain the creation of multicultural constitutions. She provides in-depth, detailed accounts of the constitution-

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18. Van Cott explains, "All three types of collective rights — rights to self-government, special representation rights, and polyethnic rights — are recognized, alongside individual rights; collective citizen-subjects join individual citizens; and a uniform state structure is made more flexible in order to incorporate diverse ethnic political structures." P. 8 (citation omitted).

19. P. 10. She explains, "Post-national constitutions reject universalistic notions of citizenship based exclusively on uniformly applied individual rights and emphasize multiple forms of citizenship through a variety of institutions and autonomous domains of sovereignty that maximize the effective participation of diverse groups." P. 10.



making processes in Bolivia and Colombia. Thus, she details the constitutional conjunctures, transformations, and implementations in both Colombia and Bolivia.

## II. AN OVERLY OPTIMISTIC MODEL OF MULTICULTURALISM

In assuming that the new Latin American constitutions are truly multicultural and not merely symbolic sharks without any teeth, Van Cott fails to consider fully the implementation phase of constitutional transformation. Even if the new constitutions appear multicultural, that does not mean that these states have abandoned the quest for a nation-state and adopted multiculturalism. Specifically, Van Cott fails to distinguish between two kinds of constitutional provisions — those granting indigenous autonomy and those seeking to increase the political participation of indigenous groups. Van Cott collapses these two types of provisions and risks missing how the two may conflict with one another. This Notice shows that, in asserting the benefits of multicultural constitutions, the tension between the recognition of indigenous autonomy and increased political participation must be addressed.

### A. *Multiculturalism Unpacked and the Latin American Quest for the Unified Nation-State*

Van Cott asserts that the constitutions written in Latin America in the 1990s are multicultural but she never establishes any criteria for determining whether a constitution is truly multicultural. Her only evidence of multiculturalism resides in the existence of constitutional provisions giving rights to indigenous groups (pp. 78-87, 175-78). Based on this observation, she contends that these constitutions are multicultural because the provisions granting autonomous rights to indigenous groups indicate that the state has rejected nationalism in the traditional sense of the nation-state and adopted a more radical structure of deviated citizenship and group autonomy (p. 10). Van Cott, however, does not explain why this model of constitutional government, which accepts split sovereignty and differentiated citizenship, is multicultural.<sup>20</sup>

In its most basic sense, multiculturalism is the “constituting of several cultural or ethnic groups within a society.”<sup>21</sup> If this is what Van Cott means by multiculturalism, then her argument seems superfluous

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20. Instead Van Cott suggests that liberalism as a political theory has failed in Latin America because it cannot address issues of diversity. Pp. 14-15. The failure of a political theory, however, does not provide any evidence as to why another theory is better; it merely points out the inadequacies of the first theory.

21. THE OXFORD DESK DICTIONARY AND THESAURUS 980 (American ed. 1996).

because multiculturalism already exists in Latin America. Thus, it seems unlikely that this is Van Cott's definition. Alternatively, multiculturalism may be broader and based on the acceptance and acknowledgment of differences among peoples. In this sense, multiculturalism seeks to give each individual, regardless of culture, religion, or background, dignity and respect. Although it seems more likely that this is what Van Cott means, one cannot be sure because she never clearly defines multiculturalism.

Note that a key aspect of both definitions of multiculturalism is its inclusiveness, which suggests (but perhaps does not mandate) that separatism falls outside of its realm. The inclusiveness of multiculturalism resembles the inclusiveness of concepts of nation-building. The concept of the nation-state, which developed in Europe in the nineteenth century and rapidly spread across the world, unifies the nation with the state so that cultural and linguistic differences map onto jurisdictional and territorial boundaries.<sup>22</sup> Nation-building focused on the development of one universal identity as well as equal rights for everyone in the nation. While multiculturalism recognizes differences (which earlier forms of nation-building did not necessarily do), its inclusive nature does not recognize jurisdictional differences or separate rights based on cultural differences, but retains an ideology of legal equality.

If by multiculturalism Van Cott means acknowledgment of indigenous groups by the government alone or the facilitation of inclusionary politics by the government, she may be right that the new Latin American constitutions foster multiculturalism. But then she overlooks a key flaw in her argument — namely that indigenous peoples (as she describes them) are interested in separate spheres of autonomy rather than inclusive politics (p. 4). In this way, inclusiveness proves problematic for Van Cott, as she argues that indigenous groups want autonomy from the state and thus reject traditional concepts of the nation-state. Inclusiveness — and the indigenous quest for something outside of it — illustrates the difficult questions that face social movements attempting to foster multiculturalism and the development of a nation-state. Who defines multiculturalism within the nation-state and determines what it is? Who fosters multiculturalism and how do they do it? What role does the nation-state play in facilitating multiculturalism?

Van Cott makes the problematic assumption that the inclusion of provisions recognizing indigenous autonomy transforms the state into

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22. Newly independent Latin American states, like Bolivia and Colombia, in the nineteenth century attempted to develop nations based on the nation-state model and focused on politics of assimilation and national unity to do so. Kevin Healy describes the nation-building project in Bolivia. KEVIN HEALY, LLAMAS, WEAVINGS, AND ORGANIC CHOCOLATE 1-16 (2001).

a multicultural polity. Van Cott's own evidence, however, undermines this assumption. First, her case studies suggest that "multiculturalism" in Latin America is not truly multicultural because it extends only to certain historically excluded groups (pp. 86-87). The Colombian case illustrates the limited extent of multiculturalism. The provisions in the Colombian Constitution, which she heralds as multicultural for protecting and preserving native rights, do not apply to other diverse groups in Colombia (pp. 86-87), namely the large population of African descent. Rather, these groups, who could have a greater political impact on the Colombian government, received fewer constitutional acknowledgements of their political and economic rights (pp. 86-87). A multicultural constitution, however, should address the political claims of *all* groups rather than focusing on the smaller, more easily appeased group, such as indigenous peoples in Colombia.<sup>23</sup>

Second, the provisions of the constitutions themselves provide an evidentiary problem. Van Cott's argument suggests that the transformations occurring in Bolivia and Colombia reject conceptions of the state as a nation-state in favor of a new kind of state (pp. 3, 10). She illustrates her argument by focusing on the constitutional provisions that indicate the multicultural aspects of the Bolivian and Colombian states (pp. 78-87, 175-78). However, both of these constitutions, as well as other newly written Latin American constitutions, include provisions advocating national unity and political inclusiveness in addition to their acknowledgments of autonomous indigenous rights.<sup>24</sup> For example, Van Cott hails Article 1 of the Bolivian Constitution as multicultural because it describes Bolivia as "multi-ethnic and culturally pluralistic."<sup>25</sup> The next clause of Article 1, however, reaffirms the existence of Bolivia as a "unitary Republic."<sup>26</sup> This suggests that the sovereignty of the state has not been split through the granting of juridical autonomy to indigenous groups as Van Cott suggests, but the state remains primarily concerned with nation-building. The Colombian Constitution, in contrast, does not purport to create a multicultural nation; rather Article 7 "recognizes and protects the ethnic and cultural diversity of the Colombian *nation*."<sup>27</sup>

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23. Van Cott describes the ease with which political rights could be granted to natives as opposed to blacks in Colombia, when she states, "Guaranteed proportional representation for Indians in the Colombian Senate was achieved relatively easily because it has no significant impacts on the operations of the institution, the dynamics of the political party system, or the prevailing racial hierarchy." P. 19.

24. For an overview of new Latin American constitutions including provisions granting indigenous rights, see Ana Irene Mendez, *Los Derechos de las Naciones Indigena en las Constituciones de los Paises Latinoamericanos* [The Rights of Indigenous Nations in the Constitutions of Latin American States] (2000) (unpublished manuscript on file with the author).

25. P. 175 (quoting CONST. OF BOL. art. 1).

26. CONST. OF BOL. art. 1.

27. CONST. OF COLOM. art. 7 (emphasis added).

Although these provisions may appear symbolic, the history of nation-building in Latin America indicates the continued centrality of nation-building in these states. Latin America has a long history of nation-building, which has often been frustrated by its history of exclusive politics and inability to extend the state into remote parts of its territory.<sup>28</sup> Thus, internal nation-building projects continue in several Latin American states. Evidence of these prolonged nation-building projects can be seen in the continued regionalism in Colombia and the historical fragmentation in Bolivia.<sup>29</sup> The continuing struggles faced by these states in developing a strong national identity indicates that they have not abandoned the quest for a state conceptualized as a nation-state in favor of the split sovereignty that Van Cott suggests.

B. *Exposing the Tension Between Political Inclusion and Indigenous Autonomy*

Instead of establishing criteria for what makes a constitutional provision multicultural, Van Cott suggests that two kinds of provisions provide evidence of multiculturalism: provisions that grant autonomous juridical rights to indigenous communities (pp. 83-84, 175-77) and provisions that seek to increase the political participation of indigenous peoples (pp. 78-79, 169). Van Cott fails to consider that the existence of these two kinds of provisions may actually foster different kinds of multiculturalism, if the former can be considered multicultural at all.<sup>30</sup> The two types of provisions identified as multicultural by Van Cott may actually contradict each other.

Indigenous sovereignty may undercut notions of political inclusion and multiculturalism by advocating a kind of political exclusion through the exercise of juridical autonomy separate from the state.<sup>31</sup> Van Cott argues that the provisions granting juridical autonomy to indigenous groups provide them with an alcove outside of state power while simultaneously suggesting that what makes the constitutions multicultural is the fact that the juridical autonomy exists within the

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28. See generally BUILDING DEMOCRATIC INSTITUTIONS, *supra* note 12; DIAMOND ET AL., *supra* note 10; MORENO, *supra* note 12.

29. Gamarra and Malloy argue that historically the Bolivian state has failed to penetrate the outer regions of its territory. BUILDING DEMOCRATIC INSTITUTIONS, *supra* note 12, at 399, 401. Similarly, Grindle notes that the Bolivian state remains weak due to lack of a centralized national identity. MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 97 (2000).

30. As suggested in Part I, provisions granting autonomous indigenous rights may not be multicultural at all. Further, articles focused on increasing political participation may not be multicultural if they impose a form of participation rather than take into consideration traditional forms of participation and a diversity of forms. See ANA MARÍA LEMA, DE LA HUELLA AL IMPACTO: LA PARTICIPACIÓN POPULAR EN MUNICIPIOS CON POBLACIÓN INDÍGENA (URUBICHA, GUTIERREZ, VILLA MONTES) 243-49 (2001).

31. See *supra* Section II.A.

national system (p. 177). In making this argument, however, she fails to see how the separateness of juridical autonomy may facilitate a tension between state and indigenous spheres of power rather than the harmony of an inclusive arrangement. This problem may be particularly acute in Latin America, where indigenous people are claiming a separate sphere from the state through the exercise of juridical autonomy<sup>32</sup> and thus, may resent national involvement in this sphere. Thus, provisions recognizing indigenous juridical autonomy may conflict with provisions aimed at increasing political participation because the first encourages a sphere separate from the state and the second promotes inclusion within the state.

In addition to provisions granting autonomous indigenous rights, Van Cott praises provisions facilitating the increased political participation of indigenous groups as multicultural (p. 224). These provisions encourage increased political participation through the creation of designated Senate seats in Colombia (pp. 78-79) and through the decentralization of the national government in Bolivia (p. 169). This latter set of provisions promotes the inclusion of indigenous groups through an increase in their political participation.<sup>33</sup> Thus, this type of provision envisions a model of multiculturalism based on inclusion rather than the exclusionary or split-sovereignty model of the first kind.

Van Cott ignores the inclusionary aim of provisions promoting increased political participation and how this aim contrasts with claims to indigenous autonomy. She argues that the states involved have rejected traditional models of statehood with undifferentiated sovereignty (p. 10). Arguably, this rejection of traditional models may eradicate the inclusion/exclusion problem because the newly conceptualized state can address indigenous communities as both internal and external to the state. Other scholars, who advocate the development of states that acknowledge differentiated citizenship and autonomous spaces for semi-sovereign groups, recognize the problems inherent in indigenous claims to self-government.<sup>34</sup> Political theorist

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32. JORGE LUIS VACAFLOR GONZALES ET AL., REFORMAS POLITICAS Y PARTICIPACION CIUDADANA 19 (1999); Confederación de Pueblos Indígenas de Bolivia, at <http://www.cidob-bo.org> (last visited May 15, 2002).

33. P. 224. Van Cott notes the importance of political inclusion to constitution-makers in Bolivia and Colombia. She states, "Bolivian and Colombian constitution-makers believed that their constitutional reforms would legitimate democratic institutions and that this would lead to increased voter registration and reduced abstention." P. 224. She continues, "Constitution-makers in both countries aimed to improve representation along two dimensions: improving the accountability of representatives to their constituents and improving access to public office for previously excluded groups." P. 225.

34. See e.g., Will Kymlicka, *Three Forms of Group-Differentiated Citizenship*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 153, 163 (Seyla Benhabib ed., 1996) ("Self-government rights, however, do raise problems for the integrative function of citizenship.").

Will Kymlicka, for example, notes that even in a state with differentiated citizenship like Canada, some conflict exists between ideas of political inclusion and exclusion.<sup>35</sup> In contrast, Van Cott ignores the tension between the ideas of political inclusion and exclusion embedded in the provisions that she categorizes as multicultural.

Although Van Cott fails to distinguish between the two kinds of provisions that she identifies as multicultural in the new Bolivian and Colombian constitutions, she contributes to the understanding of identity politics in Latin America by cogently giving voice to the demands for indigenous autonomy in both Bolivia and Colombia. Her work suggests that even if these constitutions do not reflect a transformation of the state, they do indicate the rising prominence of indigenous voices in national politics.

### C. *Applying the Model: The Implementation Dilemma*

The tension between inclusive and exclusive models of multiculturalism emerges in Van Cott's evaluation of the implementation of the new constitutions. She provides a cursory comparison of the implementation of the two kinds of provisions in both Bolivia and Colombia. Although she does not consider the implementation in depth, she admits that the inclusive provisions have been more readily enforced than the exclusive provisions (pp. 224, 238-41). Her failure to consider fully the implementation of the two kinds of provisions is interesting because she admits that the implementation of the provisions giving indigenous groups greater participatory rights in Bolivia was not immediately embraced by indigenous groups (p. 192). She attributes this lack of enthusiasm to the absence of direct participation by indigenous groups in the constitution-making process without really questioning why indigenous groups would find these provisions problematic (p. 194). The fact that indigenous groups did not initially respond positively to these provisions may indicate that indigenous groups may perceive a tension between their goals for autonomy and inclusion within the state through increased political participation.<sup>36</sup> Similarly, the Bolivian and Colombian states may focus more on implementing the inclusive constitutional provisions because these provisions more closely reflect their desires to foster the development of the nation-state.

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35. *Id.* at 164.

36. Hahn notes a similar disjuncture between the aspirations of indigenous groups and the aspirations of campesino movements. Hahn, *supra* note 8. Van Cott also perceives a difference between the goals of political parties and indigenous groups in some of her earlier works. Donna Lee Van Cott, *Party System Development and Indigenous Populations in Latin America*, 6 PARTY POL. 155 (2000).

Even if Van Cott could reconcile her conflation of two crosscutting kinds of provisions into one conception of multiculturalism, her assertion that the new constitutional regimes in Latin America are multicultural rests on the assumption that law — particularly constitutional law — matters. As law and society scholarship demonstrates, however, law may not matter if it is not known or enforced.<sup>37</sup> Consequently, Van Cott's limited evaluation of the implementation of the multicultural provisions embedded in these constitutions plagues her analysis. As suggested above, her analysis falls short of showing that the implementation of the constitutions enacted in Bolivia and Colombia fulfills the multicultural goals she attributes to the constitutions.

Van Cott's assertion that the new Bolivian and Colombian constitutions are multicultural may be premature because the prolonged history of constitutional revision and nonimplementation in Latin America<sup>38</sup> raises questions about the implementation of these constitutions.<sup>39</sup> The political history of Latin America develops through a complex story of political inclusion and exclusion accompanied by a never ending process of constitution-making and re-making. The instability of constitutional regimes, which tend to change with political regimes (and almost as often as the weather), suggests that constitutions in Latin America — unlike the United States Constitution — may not matter much. Van Cott admits that Latin America is a region of abundant constitution-making (pp. 14-15). She concedes that in the past 150 years, Latin American states have written approximately 200 constitutions, most of which have remained unimplemented (pp. 14-15). While in-depth research would be necessary to determine whether the multicultural provisions are more than merely symbolic, Van Cott, in her earlier work,<sup>40</sup> acknowledges the extent to which political elites have used indigenous groups to achieve their own ends rather than to further indigenous objectives. In Bolivia and Columbia, it is too early to tell whether multicultural transformations have fully occurred (p. 223), but Van Cott suggests that they have begun in earnest (pp. 90-91, 181).

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37. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Givelber et al. suggest a related problem with law, which is that its meaning to some extent depends on whether the people affected understand it. Daniel J. Givelber et al., *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, in *LAW AND SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* 627 (Stewart MacCauley et al. eds., 1995).

38. See, e.g., Hugo E. Frühling, *Human Rights in Constitutional Order and Political Practice in Latin America*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Douglas Greenberg et al. eds., 1993).

39. See *infra* text accompanying note 40.

40. P. 15; see, e.g., Van Cott, *supra* note 36, at 155 (“[E]lites in countries with proportionally significant indigenous populations in the early 20th century organized political parties to dominate subordinate groups . . .”).

To determine the extent to which the constitutions have been implemented, Van Cott evaluates the political and legal entrenchment of both kinds of provisions in Colombia and Bolivia. She considers three aspects of implementation, namely the educational programs sponsored to facilitate constitutional understanding, the passage of implementing legislation, and court cases seeking to enforce constitutional rights.<sup>41</sup>

Van Cott assumes that state-sponsored educational programs effectively teach individuals their constitutional rights under the new constitutions (pp. 91, 181). For instance, Van Cott applauds the Colombian government for translating the Colombian Constitution into seven languages so that the indigenous communities could know their rights (p. 91). She assumes that these one time educational programs effectively teach people their rights<sup>42</sup> but law and society scholarship indicates that education about the law does not ensure that people know their rights or understand the law.<sup>43</sup> This undercuts Van Cott's assumption that indigenous groups know their constitutional rights and can assert them against state infringement (pp. 90-91).

Van Cott correctly focuses on the passage of implementing legislation in Bolivia and Colombia because both states required such legislation for the constitution to take effect (pp. 91-92, 180-81). This focus, however, biases Van Cott's evaluation of the implementation process because it limits her analysis to the provisions requiring legislation. For instance, in the case of Bolivia, Van Cott looks almost exclusively at the implementation of the provisions seeking to increase indigenous political participation because these provisions required legislative action (pp. 181-92). In contrast, she only briefly considers the implementation and protection of indigenous rights and concedes that progress has been disappointing.<sup>44</sup>

Van Cott focuses more on both kinds of provisions in her analysis of the implementation process in Colombia (pp. 90-122). The Colombian Constitution includes provisions that protect indigenous rights while promoting political participation (pp. 85-86). Article 171 of the Colombian Constitution designates two seats within the Colombian Senate to indigenous representatives (pp. 85-86). Article

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41. Van Cott suggests that the implementation process in Colombia focused more on the strengthening of the judiciary than it did in Bolivia; accordingly, she includes judicial opinions in her analysis of the implementation process in Colombia, but not Bolivia. Pp. 91, 110-18.

42. She explains, "As a result of these targeted efforts, the indigenous population achieved a basic, general understanding of their constitutional rights." P. 90.

43. See, e.g., Givelber et al., *supra* note 37.

44. Pp. 213-26. When Van Cott does consider the implementation of the provisions granting juridical autonomy to indigenous groups in Bolivia, she fails to answer important questions, such as which law — indigenous or Bolivian — applies when the indigenous community adjudicates disputes. Pp. 213-19.



171, however, remains consistent with the focus on inclusion rather than exclusion because it seeks to increase the political participation of indigenous groups. In addition to her discussion of Article 171, Van Cott suggests that the courts have taken a more active role in the implementation process in Colombia (pp. 110-11).

While Van Cott focuses on the implementation of the provisions granting juridical autonomy to indigenous groups in Colombia (p. 113), she indicates that the application of autonomous indigenous rights through court rulings has been inconsistent (p. 116). She notes that the relationship between national courts and judicial autonomy in Bolivia also remains unclear. Unlike in Colombia, however, no Bolivian court has recognized the decision of an indigenous body. Thus, Van Cott concludes that Colombia is closer to developing legal pluralism than Bolivia.<sup>45</sup>

Van Cott does not address reasons why the political participation provisions might be implemented more than the indigenous autonomy provisions. One reason may be that the indigenous autonomy provisions are only symbolic. If that is so, however, this raises questions regarding the extent that these rights matter.<sup>46</sup> Further, it suggests that rather than transforming into a polity recognizing the value of differentiated citizenship, these states continue to pursue one national citizenship, while merely symbolically recognizing the existence of indigenous groups. For instance, Van Cott hints that the Colombian constitutional provision that allocates Senate seats to indigenous peoples under Article 171, may remain within the exclusive model because the provisions may be more symbolic than substantive.<sup>47</sup> This evidence suggests a more skeptical reading of the new constitutionalism in Latin America, which implies that these states have not transformed at all, but continue to manipulate indigenous groups much as they have in the past. Accordingly, the rights granted under the constitutions may exist merely to placate the indigenous groups for the present time.

By the end of the book, Van Cott's focus shifts from her original notion of differentiated citizenship based on the acknowledgment of indigenous autonomy to a discussion of how much more inclusive the Colombian and Bolivian polities are after the constitutional reforms (pp. 223-38). She concludes that Bolivia's constitutional project has been more successful than Colombia's because the Bolivian polity is

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45. See Donna Lee Van Cott, *A Political Analysis of Legal Pluralism in Bolivia and Colombia*, 32 J. LATIN AM. STUDIES 207-34 (2000).

46. Van Cott admits, "The greatest achievement of ethnic groups in both countries has been symbolic rights: formal state recognition of indigenous customs, traditions, authorities, and forms of political organization." P. 238.

47. P. 110 ("The congressional representation of ethnic minorities since the ANC has been mainly symbolic rather than substantive.").

more inclusive.<sup>48</sup> Yet she does not address the concern that indigenous autonomy may not have a place in the new inclusive politics. Rather she seems to abandon her original concern for autonomous indigenous rights and differentiated citizenship in favor of an inclusive definition of multiculturalism. Even this conclusion indicates the extent to which Van Cott fails to distinguish between the two kinds of constitutional provisions and the tensions that may exist between them. These tensions, bolstered by Van Cott's own evidence, cannot be resolved without discussing how implementation works in practice because calls for indigenous autonomy and separation from the state conflict with inclusion within it.

Although Van Cott's evidence may not fit her model of constitutional transformation based on a state with split-sovereignty and differentiated citizenship, her work suggests that Latin American states may be increasingly aware of the political preferences of indigenous peoples. Evaluating the new Latin American constitutions, however, raises the question of whether the inclusive aspects of the new constitutions actually reflect the voices of indigenous groups. For example, in the case of Bolivia, the indigenous peoples were not directly involved in the constitution-making process and did not readily embrace the constitutional reforms that increased their political participation on the local level (p. 192). If the new constitutions do not consider the voices of indigenous peoples, the "multiculturalism" espoused in the new constitutions sounds more assimilationist than multicultural. Even if these new constitutions cannot be considered multicultural, Van Cott contributes to understandings of politics in Latin America by bringing the importance of the indigenous voice to the forefront of constitution-making theory.

#### CONCLUSION

Although Van Cott provides a model for constitution-building, her contention that this model explains the creation of multicultural constitutions, which transform conceptions of the state, is unsupported by her evidence. As this Notice has shown, Van Cott's model fails to consider the tension between the provisions she categorizes as multicultural in the Bolivian and Colombian constitutions. This tension undermines Van Cott's argument because it suggests that two different views of multiculturalism exist in Latin America: one focusing on the development of autonomous spheres for indigenous rights and one facilitating the inclusion of indigenous groups into the national polity. Although the Bolivian and Colombian constitutions purport to both recognize indigenous autonomy and promote the political participa-

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48. P. 236 ("On balance, Bolivians had better success implementing their new participatory model of democracy than did Colombians . . .").

tion of indigenous groups, state implementation of the inclusive provisions shows that differentiated citizenship has not emerged in Latin America. Rather the recognition of indigenous autonomy in Bolivia and Colombia remains more symbolic than substantive.

Despite this flaw, the value of Van Cott's work illustrating the legal aspects of democratization should not be underemphasized. Although the new constitutions in Latin America may not transform the state into a multicultural polity, the increased legal emphasis on indigenous rights and participation may continue to alter the inclusionary/exclusionary dynamics in Latin America.