

BOOK REVIEW

LIBERALISM AND MEMBERSHIP

CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM.

By Brian M. Barry: ** Harvard University Press, 2001. Pp. 399.

*Reviewed by Eric J. Mitnick **

I. INTRODUCTION: CULTURAL RIGHTS

In an essay originally published in 1955, H.L.A. Hart was able to locate virtually any right within one of two categories.¹ Hart described “special rights” as those rights that arise in virtue of particular transactions between persons, or in virtue of some special relationship in which individuals stand to one another.² In contrast with special rights, Hart described “general rights,” or those rights (e.g., freedom of speech, due process of law) that arise simply in virtue of “the equal right of all men to be free.”³ The critical distinction between these two broad categories of rights is to be found in their differing scopes. Special rights serve the interests of, and impose duties upon, only those certain individuals privately involved with one another. General rights are held in common by all persons and thus serve the interests of, and impose duties upon, everyone.

Almost fifty years since Hart invoked his famous typology, the universe of rights is a less tidy place. Whether by virtue of a heightened sensitivity to the increasingly pluralistic character of modern societies, or by virtue of an escalating politicization of group identities from within (or, what is more likely, both), rights which in Hart’s terms could be described *neither* as special *nor* as fully general have become

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¹ H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955).

² *Id.* at 183.

³ *Id.* at 187-88.

mainstays of liberal democracies throughout the world.⁴ In the United States, in particular, we have recognized, among others, rights to affirmative action, rights based on particularized economic status, rights granted exclusively to members of native tribes, rights against discrimination on the basis of some group-differentiated characteristic (e.g., disability), and rights to religious conduct exemptions from generally applicable laws. Each of these rights is accorded to individuals not on the basis of special transactions, nor simply in virtue of the rights-bearers' common humanity; rather, each of these rights is accorded to individuals in virtue of their particular membership in some social group.

Though many, if not all, of these group-differentiated rights remain highly controversial, there is little question that they have become prominent features of our jural landscape. And as an expansive array of social groups continue to remonstrate for official recognition and accommodation, more such rights surely will follow. In his new book, *Culture and Equality: An Egalitarian Critique of Multiculturalism*, Brian Barry laments in particular those group-differentiated rights that ground their differentiation on the basis of cultural attachments, including religious practices.⁵ In an often refreshing response to the scores of books and articles from theorists of the politics of difference, the politics of recognition and especially multiculturalism that virtually sprouted during the previous decade,⁶ Barry defends his own brand of universalistic citizenship, carefully cultivated in his two previous and highly significant books on liberal justice, *Theories of Justice*⁷ and *Justice as Impartiality*,⁸ and here extended to contend with some of the most divisive issues of the moment. "The core of this conception of citizenship," writes Barry, "already

⁴ For discussions of *collective rights*, see generally WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); VERNON VAN DYKE, *HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION* (1985); *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995). For discussions of *collective aspects of rights*, see generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* 207 (1986); D.N. MacCormick, *Rights in Legislation*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART* 189, 204 (P.M.S. Hacker & J. Raz eds., 1977); Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 *WAKE FOREST L. REV.* 409 (1999).

⁵ BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001).

⁶ See, e.g., R.D. GRILLO, *PLURALISM AND THE POLITICS OF DIFFERENCE: STATE, CULTURE, AND ETHNICITY IN COMPARATIVE PERSPECTIVE* (1998); KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 4; NOMOS 39: *ETHNICITY AND GROUP RIGHTS* (Ian Shapiro & Will Kymlicka eds., 1997); BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* (2000); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990); Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994).

⁷ BRIAN BARRY, *THEORIES OF JUSTICE* (1989).

⁸ BRIAN BARRY, *JUSTICE AS IMPARTIALITY* (1995).

worked out in the eighteenth century, is that there should be only one status of citizen (no estates or castes), so that everybody enjoys the same legal and political rights."⁹ Rights accorded on the basis of cultural group membership contradict these egalitarian liberal norms, ignore enlightenment virtues and the lessons painfully there learned and, as such, risk a reprise of the sort of sectarian conflict that characterized pre-liberal eras.¹⁰ Cultural rights, and the multiculturalists who propound them, are thus, Barry argues, self-defeating.

Where many theorists of difference may indeed have misguidedly abandoned liberalism on the march to justify multicultural political programs, Barry, it seems, has rather adamantly remained tethered to an exceedingly procedural and so unduly thin conception of liberalism. Barry is correct to criticize certain difference theorists for some of the more extreme and illiberal elements of their political agenda, but many of the proposals offered by multiculturalists would find, and indeed have found, a congenial home in a less impoverished conception of liberalism.¹¹ In certain respects, the comments that follow will merely quibble with Barry's otherwise quite sensible and penetrating rejoinder to illiberal multicultural policy proposals and the theories that are said to underlie them. In other respects, this critique will run more deeply. But it is only an insignificant book that fails to generate substantial criticism. And *Culture and Equality*, assuredly, is not an insignificant work.

In Part II, I outline the major strands of Barry's conception of liberal justice, and the sense in which he relates that universalistic conception to multicultural claims. In Part III, I take up Barry's treatment of the concept of group rights, particularly his critique of religious conduct exemptions, and the distinctions he then attempts to draw between cultural and non-cultural group-differentiated rights. Ultimately, I suggest that Barry's theory would impose too substantial (and too illiberal!) a loss on individual associative freedom and on the capacity of persons for self-invention. I conclude in Part IV by drawing from Barry's overly restrictive analysis of cultural rights, and from the uncompromising cultural claims propounded by his multiculturalist targets, to the need for a more just, and more liberal, mediating theory of membership.

⁹ BARRY, *supra* note 5, at 7.

¹⁰ See *id.* at 20-21 (discussing religious conflict in the 16th and 17th centuries).

¹¹ I have in mind here voices as distinct as those of Joseph Raz, see *Multiculturalism: A Liberal Perspective*, in *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 170-91 (1994); George Kateb, see *The Value of Association*, in *FREEDOM OF ASSOCIATION* 35-63 (Amy Gutmann ed., 1998); and Will Kymlicka, see *MULTICULTURAL CITIZENSHIP*, *supra* note 4.

II. JUSTICE AND DIFFERENCE

A. *Universalistic Liberalism*

Brian Barry has contributed a great deal to our knowledge of justice.¹² His conception of justice as defined by that set of principles capable of earning the universal assent of reasonable persons is derived in significant form from Rawls, though he has parted company both with the later Rawls and with Rawls's most famous methodological invention, the Original Position.¹³ I trust that the outlines of Rawls's approach are sufficiently familiar that I need not expound upon them at any great length here. Suffice it to say that in an effort to arrive at principles the fairness of which reasonably can be endorsed by all, Rawls posits a hypothetical situation in which a collection of persons, ignorant of their own particular characteristics, attachments and conceptions of in what a valuable life would consist, collectively arrive at general prescriptions for a just society.¹⁴ The genius of Rawls's device is, of course, that, ignorant of their own identities, the persons in the original position cannot pursue their particular ends but will instead have a strong incentive to consider the plight of every person, since they might in fact be any person.

One of the virtues of *Culture and Equality*, then, is Barry's defense of Rawls's theory against the oft-repeated charge that Rawls is unconcerned with difference.¹⁵ Barry shows, to the contrary, that "Rawls builds his entire structure around the assumption that the main business of a theory of justice is to deal with difference in a manner that can be shown to be fair."¹⁶ Ignorant of any aspect of their own lives, Rawls's hypothetical citizens are indeed forced to consider other ways of life. Of course, Rawls remains open to the charge that his theory is unsuccessful in this regard. While Rawls might not have overlooked the existence of difference in designing his schema for the derivation of just principles, that is a long way from establishing that Rawls's theory really is capable of accounting for fundamental differences in outlook and conceptions of morality among distinct groups of persons. Indeed, Barry's own critique of Rawls, most strongly put in his *Justice as Impartiality*, recognizes that while the principles derived through Rawls's apparatus might command universal assent behind a "veil of ignorance," once that veil is lifted, and the participants again

¹² See *supra* notes 9 and 10.

¹³ See BARRY, *supra* note 5, at 16 (noting that Barry's egalitarian liberalism was influenced by and related to Rawls's theory of justice); *id.* at 331 n.27 (stating disagreement with Rawls's writings since 1975); BARRY, *supra* note 8, at 57-61 (criticizing Rawls's Original Position).

¹⁴ JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971) ("The Veil of Ignorance").

¹⁵ See, e.g., YOUNG, *supra* note 6, at 104.

¹⁶ BARRY, *supra* note 5, at 69.

become aware of their particular statuses, it becomes perfectly rational for individuals to disavow their prior assent.¹⁷ Thus, argues Barry, while Rawls clearly is concerned with difference, his theory nevertheless fails ultimately to take differences among persons seriously.¹⁸

Like Rawls, however, Barry is most fundamentally interested in deriving principles of justice that will allow persons with highly divergent interests, attitudes and conceptions of the good to live together amicably—and amicably not simply because a peaceable existence is forced upon them, but because everyone will be capable of recognizing that whatever disputes do arise will be adjudicated according to principles that all can appreciate as fair.¹⁹ But unlike Rawls's strategy of hypothetical self-ignorance, Barry attempts to deal with the inevitable persistence of conflicting conceptions of the good by inquiring what it is that even persons highly aware of their own strong differences might agree upon as a fair way of conducting public life.²⁰ To take one example that becomes particularly prominent in *Culture and Equality*, it will surely be the case that among different religious groups there will be many different modes of expressing one's faith. An Orthodox Jew will want to observe the dietary laws of *kashrut*, a Sikh will seek freedom to wear an appropriate head covering, a Rastafarian might request accommodation of the ritual smoking of marijuana, and so on.²¹ Any claim by any particular group that their mode of religious practice is uniquely good, and, as such, should be protected to the exclusion of all or even any of the others, is obviously unlikely to command universal assent.²² What is required, then, says Barry, is a move among all groups to a higher level of abstraction.²³ We must seek a principle that no member of any particular religious group, including that group composed of persons who wish for themselves to remain free of religious doctrine, could reasonably reject.²⁴

The first step in locating such a principle is recognizing the central role that religious belief may play in persons' lives. As Barry sug-

¹⁷ BARRY, *supra* note 8, at 59.

¹⁸ *Id.*

¹⁹ See BARRY, *supra* note 5, at 122; BARRY, *supra* note 8, at 77.

²⁰ See BARRY, *supra* note 5, at 122 ("I suggest simply that liberal principles are the fairest way of adjudicating the disputes that inevitably arise as a result of conflicting interests and incompatible beliefs about the social conditions of the good life."); BARRY, *supra* note 8, at 67.

²¹ These and other religious claims are treated throughout *Culture and Equality*. See, e.g., BARRY, *supra* note 5, at 40-50 (discussing Jewish dietary and Sikh head covering observances); *id.* at 39-40 (discussing Rastafarians' ritual use of marijuana).

²² See BARRY, *supra* note 8, at 82.

²³ *Id.* at 84.

²⁴ *Id.* at 67. In this sense, Barry's theory of justice is derivative of Thomas Scanlon's reconstruction of Rawls's contractualist ideas. See Thomas Scanlon, *Contractualism and Utilitarianism*, in UTILITARIANISM AND BEYOND 103 (Amartya Sen & Bernard Williams eds., 1982).

gests, "From the point of view of virtually any conception of the good, the possibility of practicing the form of religious worship in which one believes (or practicing none if one's beliefs lead in that direction) will be regarded as an important component of the good life."²⁵ Given this critical commonality among persons, the second step then involves deriving a principle with respect to freedom of religious worship that is able to elicit general consent. Neither eating only foods prepared in a certain fashion, nor the wearing of certain clothing, nor the universal absence of any of these religious requirements, can elicit such consent. Rather, it is only the more general prescription, the *equal freedom of all* to practice, or, as the case may be, not practice their religion, that cannot reasonably be rejected. "If freedom to worship in the way you think right is of great importance to your own ability to live what you regard as a good life, then you are asked to accept that it is important to others too."²⁶

Given the extent to which he acknowledges the critical importance of religious freedom to human well-being in *Justice as Impartiality*, Barry's sweeping rejection in *Culture and Equality* of religious conduct exemptions from generally applicable laws might strike readers of both books as incongruous. On the one hand, Barry in *Justice as Impartiality* argued quite strenuously that "religious belief . . . is at the core of self-identity, and [that] if its expression is denied it leaves a gap in life that cannot be filled in any alternative way."²⁷ And yet, on the other hand, much of *Culture and Equality* is dedicated specifically to rejecting claims of religious groups for public accommodation of their religious practices, at least where those practices are contrary to generally applicable law.²⁸ Indeed, the argument here is not simply that claims for religious conduct exemptions often constitute bad policy decisions (though that argument is nearly ever-present as well). Rather, Barry argues in *Culture and Equality* that the accommodation of religious practice is simply not a concern from the perspective of liberal justice, *at all*.²⁹ Thus, where a particular religious practice—say, the ritual ingestion of peyote³⁰—has been prohibited generally, Barry would deny even that an exemption from the more general law *might be* required as a matter of justice. And he would do

²⁵ BARRY, *supra* note 8, at 82.

²⁶ *Id.* at 84.

²⁷ *Id.*

²⁸ See BARRY, *supra* note 7, at 19-62, 155-93.

²⁹ *Id.* at 33 ("But I shall reject the characteristic case made by the supporters of multiculturalism, that a correct analysis would show exemptions for cultural minorities to be required in a great many cases by egalitarian liberal justice.")

³⁰ See discussion of *Employment Division v. Smith*, 494 U.S. 872 (1990), in BARRY, *supra* note 5, at 169-73, 183-87. See also *infra* notes 85-93 and accompanying text.

so despite his previous recognition of the “gap in life” this denial would cause at the very “core of self-identity.”³¹

How is it that Barry can both affirm the critical importance for human life of religious exercise, and yet deny that public accommodation of religious practice is a concern of liberal justice? The answer lies, it would seem, in the extreme stress that Barry’s theory of justice places on the universalistic treatment of difference. Recall that, as derived by Barry, the basic prescription regarding religious freedom capable of commanding universal assent, and so of constituting a principle of liberal justice, is the equal freedom of all to practice or not to practice their religion.³² A policy that would afford a special exemption to any particular religious group, according to Barry’s argument, would not be affording equal freedom to all, but rather would be treating one group more favorably than the rest.³³ Thus, the move asserted by Barry from a lower to a higher level of generality—in this case, from a group-specific claim of free religious practice to the more general claim of equal religious freedom for all—results also in a requirement that, as a matter of justice, different groups must face uniform laws.

But what sort of liberalism is it that excludes from consideration a matter that cuts to the very core of individual well-being? It is, as Barry has readily admitted, a theory of “strictly limited ambitions.”³⁴ And so what then becomes of those many questions that are not susceptible to analysis strictly on the basis of substantive principles that can command universal (reasonable) assent? In that broad range of substantive issues, where individuals reasonably will disagree regarding morally charged outcomes, Barry asserts that resort must be had to fair decision procedures. And in what will these procedures consist? Fair decision procedures are those that accord to each citizen an equal right to participate in democratic politics.³⁵

Notice, then, just how far we have come from Barry’s initial affirmation of religious freedom. Freedom to worship (or not to worship) according to the tenets of one’s faith is of great, and even self-defining, importance to all persons. Yet, because the value of any particular religious practice is incapable of garnering universal assent, liberal justice must remain remote from the claim of any given group to the free practice of their religion. Instead, the practitioners’ claim, which in all likelihood will be brought by a minority religious group, must be decided according to majority will. Barry’s con-

³¹ See *supra* note 29 and accompanying text.

³² See *supra* notes 27-28 and accompanying text.

³³ See BARRY, *supra* note 5, at 34; BARRY, *supra* note 8, at 164.

³⁴ BARRY, *supra* note 8, at 113.

³⁵ See BARRY, *supra* note 5, at 79.

ception of liberal justice is thus open not only to charge that it is radically underdeterminative on the great mass of issues affecting social life, but that on each of those issues it very well likely sacrifices individual freedom to majority will.

B. *Against the Politics of Difference*

In Barry's defense, the motivation behind his exceedingly thin, procedurally-oriented brand of liberalism is manifestly not to injure minority religious and cultural groups, but to moderate the sort of social conflict that did in fact injure minority religious and cultural groups in the pre-liberal past. "In fact," as he indicates in *Culture and Equality*, Barry's favored universalistic "model of citizenship was developed in response to the wars of religion that made much of Europe a living hell in the sixteenth and seventeenth centuries. If it could bring those conflicts to an end—and on the whole it did—it is not at all apparent why it should not be up to the task of coping with religious and cultural differences now."³⁶ The relegation of religious and cultural group difference to private life, and with it, the acute depoliticization of difference, is conceived of by Barry as the only way to ensure the continued existence of a public climate in which minority groups can endure.³⁷

"In contrast," Barry claims, "the 'politics of difference' is a formula for manufacturing conflict, because it rewards the groups that can most effectively mobilize to make claims on the polity . . ."³⁸ And here Barry may have a point, at least with respect to some of the more illiberal claims made by difference theorists. Take for example the rather extreme charge, asserted by certain of those who press for a politics of difference, that a lack of group proportionality in positions of high social status *automatically* entails injustice.³⁹ Now we need to be careful about what specifically this claim entails. This claim does not assert that group disproportionality in positions of high status might be an *indication* of discrimination and injustice. That claim Barry's liberalism clearly can accommodate.⁴⁰ This claim also does not assert merely that a program of affirmative action is required as a matter of justice. Again, Barry concedes the likelihood, and the legitimacy, of this prospect as well (while citing, on the other hand, Iris Marion Young's assertion that even "'strong affirmative action' pro-

³⁶ *Id.* at 21.

³⁷ *Id.* at 32.

³⁸ *Id.* at 21.

³⁹ See, e.g., YOUNG, *supra* note 6, at 29.

⁴⁰ See BARRY, *supra* note 5, at 93 (arguing that the relative lack of women in "top corporate jobs" may be an indication of the existence of discrimination, but does not itself constitute discrimination).

grammes" would provide an insufficient remedy).⁴¹ Rather, difference theorists, following Young, press a conception of social justice commensurate only with a strict equality of outcomes, *regardless of the cause* for the inequality.⁴² The question arises, though, whether different outcomes across cultural groups might be the result of cultural norms themselves, and, if so, whether this—without more—can reasonably be stated as an occasion of injustice.

In his critique of Young's demand for the imposition of strictly equal success rates across groups, Barry observes that there likely will be cultural group-based affinities that do not coincide with conventional conceptions of what constitutes a successful career or life-plan.⁴³ To appreciate Barry's point, imagine, for instance, that a given individual's culture places great value in the intimate relationship that is said to exist between human beings and the land. It is not unimaginable, then, that a greater than representative proportion of persons from this particular cultural group might become involved in careers tied to the land, say as park rangers, landscape architects, environmental consultants, etc. What then is the appropriate response to the significantly smaller relative proportion of persons from this cultural group in, say, the medical profession? A disproportionately low number of persons from a particular group might be an indication of discrimination, and to the extent it is discrimination on the basis of cultural group membership that is causing the imbalance, then, Barry claims, in accordance with liberal justice, the law should provide a remedy. Further, we may for a number of reasons decide that a program of affirmative action is required, perhaps on the basis of past discrimination or because it would be beneficial for members of this cultural group to see doctors within their cultural communities. To the extent that the imbalance in the medical profession is due to a lack of educational opportunities or other resources in the given community necessary to qualify for entrance, public policies should be addressed to remove these impediments. Finally, we might press for even more fundamental economic reforms, such that the lack of proportionality between professions will not result in highly disproportionate rates of income. All of this is potentially consistent with Barry's conception of justice.⁴⁴ "The egalitarian liberal position," says Barry, "is that justice requires equal rights and opportunities but

⁴¹ *See id.* at 13, 94.

⁴² *See* YOUNG, *supra* note 6, at 29.

⁴³ Barry, for instance, points to the disproportionately high number of Sikhs in Britain who cluster in the construction industry. *See* BARRY, *supra* note 5, at 98.

⁴⁴ *See id.* at 90-98 (arguing that justice requires equal opportunity, not equal outcome), 108 ("[T]here is nothing in the general conception of liberalism that commits it to underwriting whatever economic inequalities a society may attach to different occupational positions.").

not necessarily equal outcomes defined over groups."⁴⁵ What is beyond the scope of liberal justice, however, is that which the aspirations of difference theorists like Young would apparently require: the imposition of "an identical distribution of achievement-motivations within each group."⁴⁶

A second strikingly illiberal plank in the recent multiculturalist agenda that Barry takes special issue with in *Culture and Equality* involves testing the limits of freedom of speech against cultural group-based sensitivities. This issue arose in the last decade particularly in light of the uproar caused by the publication of Salman Rushdie's novel, *The Satanic Verses*.⁴⁷ Bhikhu Parekh has argued that the right to freedom of speech has been justified only in light of the personal interests of intellectual elites (i.e., the writers) themselves, and that free speech must instead be "balanced against . . . [the] self-respect and dignity of individuals and groups."⁴⁸ A related argument, identified here by Barry, maintains that because religious beliefs "are constitutive of persons, 'to undermine and despise their beliefs is simultaneously to undermine and despise their selves. Freedom of speech should be devoted to, and also limited by, the promotion of mutual understanding between different communities of believers.'"⁴⁹ With respect to both of these claims, however, we can readily concede that an individual's membership in a particular religious or cultural group may constitute a critical aspect of that individual member's identity, while at the same time remaining extremely anxious over the extraordinary constraints on speech contemplated by these arguments. If countenanced, the group dignity argument could, in effect, provide a rationale for the curtailment of any speech critical of any religious or cultural practice. In response, Barry defends a broad right to freedom of speech specifically on the basis that criticism of group-oriented beliefs and practices is itself valuable. "The case against all this," he writes, "is that a society owes its members the opportunity—whether they choose to avail themselves of it or not—of changing

⁴⁵ *Id.* at 92.

⁴⁶ *Id.* at 95.

⁴⁷ See SALMAN RUSHDIE, *THE SATANIC VERSES* (1989). For discussions of the political theoretical issues raised by the Rushdie affair, see especially the three volumes of papers delivered at seminars before the British Commission for Racial Equality. BRITAIN: A PLURAL SOCIETY (Bhikhu Parekh ed., 1990); FREE SPEECH (Bhikhu Parekh ed., 1990); LAW, BLASPHEMY AND THE MULTI-FAITH SOCIETY (Bhikhu Parekh ed., 1990). For a useful critical review of these works, see Peter Jones, *Rushdie, Race and Religion*, 38 POL. STUD. 687 (1990).

⁴⁸ PAREKH, *supra* note 6, at 320. This argument is treated by BARRY, *supra* note 5, at 30.

⁴⁹ BARRY, *supra* note 5, at 30 (quoting Jones, *supra* note 47, at 689). Note, however, that Jones was merely describing, rather than pressing, the argument advanced by Susan Mendus in *The Tigers of Wrath and the Horses of Instruction*. See Mendus, *The Tigers of Wrath and the Horses of Instruction*, in FREE SPEECH, *supra* note 47, at 3-17.

their minds in matters of religious belief, and that this entails more than the absence of legal sanctions against apostasy."⁵⁰

Barry's defense of liberal justice is thus, at times, edifying, and his reply to liberalism's more extreme multicultural critics is often largely persuasive. The essential question we are left with, however, is who will defend liberal justice against Barry's own procedural liberalism?

III. LIBERAL JUSTICE AND CULTURAL IDENTITY

A. *Rights and Groups*

To begin to appreciate the loss imposed by Barry's universalistic conception of liberalism, we need to consider more closely the intricate relationship that exists between rights and groups. Rights are often afforded to individuals on the basis of group membership. At the outset, to determine whether a given individual can be said to possess a right, we must first consult the investitive criteria indicated by the right itself.⁵¹ For example, for all of the rights granted under the U.S. Constitution, the investitive criterion is either that of citizenship or personhood. So, depending upon the right at issue, one must either be a "citizen" (e.g., the right to vote or hold certain offices) or a constitutional "person" (e.g., the rights to freedom of speech, due process, equal protection, etc.) to exercise constitutional rights.⁵² For common law rights-claims, investitive criteria typically develop over the course of a long series of particular cases, and generally require for their discernment analogical reference from the private arrangements and circumstances that characterize the present case to those that characterized previous such cases.⁵³ For legislative rights-claims, the investitive criteria are explicit from the outset, though interpretive ambiguities often force a more casuistic approach.⁵⁴ But in each

⁵⁰ BARRY, *supra* note 5, at 30.

⁵¹ See MacCormick, *supra* note 4, at 204.

⁵² See U.S. CONST. art. II, § 1, cl. 4 (eligibility for office of President limited to citizens); U.S. CONST. amend. XIV (equal protection and due process afforded to persons); U.S. CONST. amend. XV (right to vote limited to citizens). Though First Amendment freedoms are not afforded explicitly to persons, we naturally infer that result. U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech"). All of the following categories of human beings have been deemed, at one time or another, to consist of non-persons for legal purposes: slaves, prisoners, sailors, lepers, excommunicates, Jews, Quakers, the terminally ill, the mentally disabled, children, persons born outside of wedlock, and aliens. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* 127 (1990); see also *infra* note 72 and accompanying text (discussing the *Dred Scott* case).

⁵³ For a discussion of the role of analogy in legal reasoning, see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 62-100 (1996).

⁵⁴ See, e.g., LON L. FULLER, *THE ANATOMY OF THE LAW* 126 (Penguin Books 1971) (1968) (comparing the processes of legislation and adjudication); H.L.A. HART, *THE CONCEPT OF LAW* 127-28 (2d ed. 1994) (noting presence of "open texture" in legislation).

of these situations, indeed in any situation in which a right is afforded, it is afforded not merely to a given individual but to that full set of individuals who match the appropriate investitive criteria.⁵⁵ Indeed, a different result would violate the very concept of law as a system of general rules.⁵⁶ Surely, however, that the rule of law mandates the formal categorization of all rights-bearers into groups need not mean that all (or any) rights are “group rights.”⁵⁷ Yet when the investitive criteria indicated by a right happen to coincide with membership in a particular cultural group, it has become common, particularly among theorists of difference and multiculturalism, to speak of such cultural rights as group rights.⁵⁸

In *Culture and Equality*, Barry takes strong exception to this tendency. “Cultures are simply not the kind of entity to which rights can properly be ascribed. Communities defined by some shared cultural characteristic (for example, a language) may under some circumstances have valid claims, but the claims then arise from the legitimate interests of the members of the group.”⁵⁹ For Barry, then, there can be “no question of ‘group rights’” until there is in fact some “corporate entity that receives special treatment.”⁶⁰ Thus, efforts to describe religious conduct exemptions—for example, exemptions granted to Sikhs so that they may wear turbans rather than crash helmets while riding motorcycles—as “group rights” are misguided.⁶¹ This is so because it is not the group itself but each Sikh individually who exercises the exemption. Similarly, although a preferential admissions program may be predicated upon the asserted interests of an entire ethnic, racial or other-defined group—whether on the assumption that certain communities are being underserved or role models are needed or even that the preference system will improve the status of members of the social group more generally—the program itself still merely confers benefits on individuals rather than on any group as such.⁶² Hence, claims Barry, it is meaningless to talk of these rights, which are admittedly conferred on the basis of group membership, as group rights.⁶³

⁵⁵ See MacCormick, *supra* note 4, at 204.

⁵⁶ On the generality of law, see LON L. FULLER, *THE MORALITY OF LAW* 46-49 (rev. ed. 1969).

⁵⁷ See Mitnick, *supra* note 4 (in virtue of formal justice, rights sort individuals into groups).

⁵⁸ See, e.g., *THE RIGHTS OF MINORITY CULTURES*, *supra* note 4.

⁵⁹ BARRY, *supra* note 5, at 67.

⁶⁰ *Id.* at 113.

⁶¹ *Id.* at 112.

⁶² *Id.* at 113.

⁶³ For an argument conceiving of rights in collective terms, see KYMLICKA, *MULTICULTURAL CITIZENSHIP*, *supra* note 4. For an argument against the characterization of even group-held rights as “group rights,” see Jeremy Waldron, *Can Communal Goods Be Human Rights?*, in *LIBERAL RIGHTS* 339 (1993).

While it seems wise to reserve the concept of a group right for those rights which can only logically be pressed by groups *qua* groups, the relationship between rights and group difference is considerably more subtle and complex than Barry has indicated. We observed above the sense in which rights, in virtue of their generality, inherently sort persons into sets of rights-bearers.⁶⁴ What I would like to suggest now is that, under the right conditions, rights will constitute not merely *sets* of unattached rights-bearers but also *social groups* from which individual rights-bearers derive aspects of their identities.⁶⁵

Recall first that the scope of any set engendered by the official recognition of a right is, in a formal sense, directly contingent on the investitive criteria indicated by the right itself.⁶⁶ Consider, then, investitive criteria that straightforwardly protect the interests only of a particular *class of persons*. For example, consider again the constitutional right to vote, which is afforded in the United States only to "citizens."⁶⁷ Though we would not characterize the right to vote as a "group right," it nevertheless constitutes perhaps the most fundamental social group in any democratic society, that is, the citizenry. Further, insofar as citizenship denotes full membership in a democracy, individual rights-bearers will derive a critical aspect of their identities from the social group described by the right itself. An individual is likely to conceive of herself, and, indeed, to be conceived of by society, differently in virtue of her being a rights-bearer.⁶⁸ The same might be said of any right that accords benefits solely to the members of a particular social group. Thus, welfare rights, rights to affirmative action, rights granted exclusively to laborers, to Native Americans, to the disabled, to religious practitioners in the form of conduct exemptions, all may be said to constitute aspects of their bearers' identities.⁶⁹ Similarly, whenever a class of persons is *excluded* from a given set of rights-bearers on the basis of some ascribed characteristic, that exclusion, consistent with legal generality, will result in the construction of

⁶⁴ See *supra* notes 53-57 and accompanying text.

⁶⁵ I discuss the relational and constitutive aspects of rights in greater detail in Eric J. Mitnick, *Constitutive Rights*, 20 OXFORD J. LEGAL STUD. 185 (2000). On the concept of the social group more generally, see LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* (1987); J.C. TURNER ET AL., *REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY* (1987); YOUNG, *supra* note 6, at 43-44; K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in *RETHINKING MULTICULTURALISM*, *supra* note 6, at 150-52. Barry criticizes Young's definition of what constitutes a social group for its reliance on an overly broad conception of culture. See BARRY, *supra* note 5, at 96.

⁶⁶ See MacCormick, *supra* note 4, at 204.

⁶⁷ See U.S. CONST. amend. XV.

⁶⁸ For discussions of the impact of social perceptions on self-understanding, see STEVEN LUKES, *POWER: A RADICAL VIEW* (1974); Taylor, *supra* note 6, at 25.

⁶⁹ See Mitnick, *supra* note 65, at 197-200.

a social group.⁷⁰ History, unfortunately, is rife with examples of such ascriptive exclusion.⁷¹ The *Dred Scott* case is but perhaps the most egregious of numerous examples wherein a category of persons, in this case persons (slave or free) of African descent, was defined for jural purposes to consist of “non-citizens,” or in Chief Justice Taney’s words, “a subordinate and inferior class of beings.”⁷²

Of course, none of this is to say that every right, simply in virtue of its generality, will constitute a meaningful social group. For most rights, the sets engendered by rights will consist merely of aggregates of individual rights-bearers. An individual vindicated in a garden variety breach of contract claim, for example, is unlikely to derive any meaningful aspect of her social identity from her inclusion in a class of like rights-bearers. However, in the context with which Barry is most intimately concerned—the context of religious and cultural freedoms—even straightforward “individual rights” will constitute social groups and play an integral role in defining self-meanings. This constitutive aspect of rights is, in itself, normatively ambiguous. It remains to be seen whether, and when, there might be liberal virtue in the legal construction of social groups and human identity. Barry’s extensive treatment of religious freedom offers one opportunity for such reflection.

B. *Free Exercise of Religion*

As we have noted, generally applicable laws, at times, conflict with religious obligations. When this occurs, religious practitioners are forced to choose between following the dictates of the law or the dictates of their conscience. If, in a particular case, religious obligation is deemed by an individual practitioner to supersede her legal obligation, and she is then prosecuted or sued for violating the law, the question arises whether, in virtue of the First Amendment’s free exercise of religion clause, the government must grant the religious practitioner a privilege to act as she did, or an exemption from the generally applicable law.⁷³ The high-water mark for judicial protection of religious liberty in the form of religious conduct exemptions occurred in *Wisconsin v. Yoder*, a 1972 decision in which the Court overturned the convictions of Amish parents prosecuted for refusing to send their children to school beyond the eighth grade, as required

⁷⁰ *Id.* at 192, 194-96.

⁷¹ See MINOW, *supra* note 52; ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

⁷² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1856).

⁷³ See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion]”).

by a state compulsory attendance law.⁷⁴ In *Yoder*, and indeed in virtually all such exemption cases for roughly the three decades preceding the 1990s, the Court interpreted the free exercise clause as prescribing that a balance be struck between an individual's right freely to practice her religion and the state's interest in restricting that practice.⁷⁵ On the basis of such a balancing approach, the Court in *Yoder* accepted the argument made by the Amish parents that sending their children to school beyond the eighth grade was contrary to their way of life, and that this way of life was itself integrally related to Amish religious belief. Despite recognizing the state's important general interest in educating its citizenry, the Court concluded that this interest was insufficiently compelling to overcome the Amish interest in religious freedom. The Amish were thus granted an exemption from the generally applicable compulsory school attendance law.⁷⁶

Legal commentators concerned about the relationship between Amish religious practices and contrary state laws rarely consider relevant source material beyond *Yoder* itself, and perhaps one or two other moderately prominent cases.⁷⁷ In strong contrast, the section of *Culture and Equality* concerning free exercise claims on the part of the Amish is enlightening specifically because of the depth of the author's treatment.⁷⁸ After surveying the history of the Amish community in the United States, and in particular the unique nature of their faith, Barry portrays in great detail what can only be described as a vast and highly energetic Amish political machine. Given the degree to which the Amish religion and mode of existence is characterized by a stance of withdrawal from public life, the size and scope of this Amish litigation and lobbying program will surprise most readers. "The Amish account for a quite large proportion of all the religiously based exemptions to generally applicable laws that are to be found in the United States The Amish have prevailed at all levels of government. They have been particularly successful with State legisla-

⁷⁴ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁷⁵ See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (balancing test resulted in no exemption being granted from military policy prohibiting the wearing of religious symbols while on duty); *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) (balancing test resulted in exemption being granted from unemployment compensation law that required applicants to be available to work on Saturdays in contravention of religious beliefs). But see *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-51 (1987) (prison regulation in contravention of religious obligation not subject to balancing test, but upheld where reasonably related to a legitimate penological interest).

⁷⁶ *Yoder*, 406 U.S. at 234.

⁷⁷ See, e.g., *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990) (balancing test applied, on basis of Minnesota Constitution, to claims by Amish that state law requiring display of reflective triangle on the back of slow moving vehicles contravened religious beliefs), treated in BARRY, *supra* note 5, at 184-87.

⁷⁸ See BARRY, *supra* note 5, at 176-93.

tures . . . have also won concessions from administrative agencies . . . [and] have created a central body, the National Steering Committee” to coordinate the group’s activities.⁷⁹ Further, all of these efforts “take[] place against a generally well-disposed public opinion brought about by skillful propaganda, normally sympathetic media coverage and the desire of the public to delude themselves about the true character of the Amish.”⁸⁰ Such public delusions include, in particular, the notions that Amish farming practices are environmentally sound (which they allegedly are not) and that the Amish lifestyle is one of asceticism, which, again, Barry suggests is demonstrably false.⁸¹

As interesting as the material that Barry brings to bear on Amish political practices may be, it, of course, does nothing to diminish the relative legitimacy of the claims of the Amish to religious freedom, or of the balancing test employed by the Court in *Yoder* to resolve such claims. Further, while more telling criticisms of the result in *Yoder* might have focused on the Court’s failure fully to consider the interests of the Amish children in receiving a secondary education, or the interests of a democratic state in educating potential political participants, these interests are susceptible to, rather than neglected by, analysis pursuant to a balancing approach.⁸² In the well-known 1990 case of *Employment Division v. Smith*, however, the Supreme Court, in an opinion authored by Justice Scalia, disapproved of the balancing test for free exercise claims, and with it the prospect of judicially mandated religious conduct exemptions from generally applicable laws.⁸³ After *Smith*, a statute would only be deemed violative of the Free Exercise Clause if the statute specifically discriminated against a particular religion or against all religions generally.⁸⁴ General laws that merely have the effect of burdening religious practice would present no constitutional difficulty.

While the overwhelming majority of legal commentators have criticized the *Smith* decision,⁸⁵ and legislation attempting to reinstate

⁷⁹ *Id.* at 179-80.

⁸⁰ *Id.* at 180-81.

⁸¹ *Id.* at 181.

⁸² See Kent Greenawalt, *Freedom of Association and Religious Association*, in FREEDOM OF ASSOCIATION, *supra* note 11, at 124.

⁸³ 494 U.S. 872 (1990).

⁸⁴ For an example of such a case, see *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (holding that city ordinance designed solely to suppress particular religious sect’s practice of animal sacrifice violated the Free Exercise clause).

⁸⁵ According to one study, “[o]f the sixteen law review articles and notes written on the case, all but one condemned the result.” James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 (1992). For arguments critical of *Smith*, see Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1 (1990); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*,

the pre-*Smith* balancing test has been passed by nearly unanimous margins in both houses of Congress (only to be rebuffed by the Court),⁸⁶ Professor Barry finds in Justice Scalia's reasoning an approach quite congenial to his own.⁸⁷ Both Scalia's and Barry's interpretations of the Free Exercise Clause emphasize the universalistic legal treatment of individuals over particularized claims to religious freedom.⁸⁸ Further, both encourage resort on the part of burdened religious practitioners to legislatively, as opposed to judicially, crafted remedies.⁸⁹ An initial problem with this approach, of course, is that it effectively reduces the Free Exercise Clause to a gloss on the Equal Protection and Due Process Clauses, since those clauses already protect against overt discrimination.⁹⁰ A more practical problem is that, since the vast majority of religious practitioners who run afoul of generally applicable laws are members of minority, and in many cases, truly fringe, religious groups, the true prospect for effective political remedies will prove quite limited.⁹¹ Nevertheless, in the face of

57 U. CHI. L. REV. 1109 (1990). For arguments supporting *Smith*, see William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117 (1993).

⁸⁶ See Religious Freedom Restoration Act, 42 U.S.C. 2000bb to 2000bb-4 (1994). The Act was ruled an unconstitutional exertion of legislative power under Section 5 of the Fourteenth Amendment in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁸⁷ See BARRY, *supra* note 5, at 169-73.

⁸⁸ See *Smith*, 494 U.S. at 885 ("To make an individual's obligation to obey . . . [generally applicable] 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" (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879))); BARRY, *supra* note 5, at 171 ("This is broadly in line with the position that I took in chapter 2 to the effect that justice (in the form of equal treatment) and freedom of religion do not require exemptions from generally applicable laws simply on the basis of their having a differential effect on people according to their beliefs, norms, compulsions or preferences.")

⁸⁹ See *Smith*, 494 U.S. at 890 ("a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation"); BARRY, *supra* note 5, at 171 ("a legislature might quite properly decide to make an exemption").

⁹⁰ See U.S. CONST. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV ("nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws . . ."). See also Larry Alexander, *Good God, Garvey! The Inevitability and Impossibility of a Religious Justification of Free Exercise Exemptions*, 47 DRAKE L. REV. 35, 35 (1998) ("[T]he heart of the Free Exercise Clause is the right to judicially-mandated exemptions from general laws for those whose religion mandates conduct contrary to such laws. And *Employment Division v. Smith* cut the heart out of the Free Exercise Clause."); *The Supreme Court, 1989 Term: Leading Cases: I. Constitutional Law; C. Free Exercise of Religion*, 104 HARV. L. REV. 198, 205 (1990) ("Interpreted strongly, this conclusion reduces the free exercise clause to a virtual nullity"); cf. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 567 (1993) (Souter, J., concurring) ("hybrid exception would probably be so vast as to swallow the *Smith* rule . . .").

⁹¹ Writing for the majority in *Smith*, Justice Scalia explicitly acknowledges this prospect. *Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged

non-universal assent on reasonably contestable issues, the sacrifice of individual freedom to majoritarian decision procedures is precisely what Barry's universalistic conception of liberal justice prescribes.⁹²

At the same time that Barry maintains that claims for religious conduct exemptions cannot be justified on the basis of principles of liberal justice, he is also compelled to acknowledge that a given statute might "bear[] particularly harshly on some people, [and that] that is at the very least a reason for examining it to see if it might be modified so as to accommodate those who are affected by it in some special way."⁹³ In such an event, though an exemption will not be required as a matter of justice, Barry suggests that an exemption might be justifiable on the basis of prudence or generosity.⁹⁴ For example, Barry actually endorses a current exemption from legal regulations governing the construction industry that permits members of the Sikh religious sect to continue to wear turbans rather than hard hats on work sites in Great Britain.⁹⁵ In the absence of the exemption, Sikhs would be forced to choose between continuing to observe their religious obligations and continuing to maintain their livelihood. But Barry's purpose in describing the hard hat exemption is not to propose it as a generalizable model for the alleviation of special hardship, but rather to suggest the remarkable rarity of justifiable conduct exemptions. Indeed, this is the *only* individualized exemption that gains Barry's favor in *Culture and Equality*, and it does so only because nearly half of all male Sikhs living in Great Britain are employed in the construction trade.⁹⁶

Barry articulates his rationale for the presumed rarity of justifiable religious conduct exemptions (again, justifiable on the ground of prudence or generosity rather than justice), and more generally the impropriety of the "Rule-and-Exemption Approach" itself,⁹⁷ on the basis of what he terms a "pincer movement."⁹⁸ It will almost invariably be the case, Barry argues, either: (1) that the concern that justifies a general law is sufficiently imperative to overcome any claim to an exemption; or (2) that the interest that justifies affording the exemp-

in . . ."). Barry suggests, however, that at least well-organized religious groups will be successful in the political arena. See BARRY, *supra* note 5, at 39 ("Any open political system . . . is inevitably subject to lobbying by minority groups with a special interest in some aspect of public policy. It very often happens that there is no similarly well-organized group on the other side.").

⁹² See *supra* note 34.

⁹³ BARRY, *supra* note 5, at 38-39.

⁹⁴ *Id.* at 39.

⁹⁵ *Id.* at 171.

⁹⁶ *Id.* Barry also acknowledges the justifiability of an exemption from laws governing employment discrimination to enable religious *groups* to employ only members of their religion as leaders. *Id.* at 167-68.

⁹⁷ For a discussion of the rule and exemption approach, see *id.* at 40-50.

⁹⁸ *Id.* at 167.

tion is of sufficient weight to overcome the case for having the law at all.⁹⁹ Thus, either there will be a strong argument from social utility which justifies the law as applied to all, or there will be a strong libertarian argument in favor of, in effect, extending the exemption to the point where it swallows the rule.

Barry has anticipated the strongest argument that can be made against the first prong of his pincer movement, the argument from religious freedom, but his response is less than satisfying. We are asked to consider, for example, generally applicable regulations on the slaughtering of animals that contradict religious dictates on the subject. In a majority of western countries, exemptions from such regulations have been provided to accommodate, in particular, Jewish and Muslim dietary restrictions.¹⁰⁰ According to Barry, however, "an appeal to religious liberty provides only spurious support for this and other similar exemptions, because the law does not restrict religious liberty, only the ability to eat meat."¹⁰¹ Thus, on Barry's reckoning, the claim for the religious dietary conduct exemption is not even "about religious freedom," and as such there is no contrary interest to be balanced, because Jews and Muslims can simply choose to be vegetarians.¹⁰² But this is a bit like saying that a law generally censoring criticism of the President would not raise First Amendment concerns because the press could simply choose to write about someone else,¹⁰³ or that a policy restricting employment in the legal profession, in the absence of some verifiable business necessity, to persons who had not yet become eligible for Social Security benefits would not evoke age discrimination concerns because such persons could simply choose to become, say, caterers.¹⁰⁴

⁹⁹ *Id.* at 39, 167.

¹⁰⁰ The only exceptions are Norway, Sweden and Switzerland. *See id.* at 40-41.

¹⁰¹ *Id.* at 44.

¹⁰² *Id.* at 45.

¹⁰³ In his opinion in *Smith*, Scalia suggests that "we have held that generally applicable laws unconcerned with regulating speech that have the effect of interfering with speech do not thereby become subject to compelling-interest analysis . . ." *Smith*, 494 U.S. 872, 886 n.3 (emphasis in original). But the case he cites for that proposition, *Citizen Publishing Co. v. United States*, arose as a result of the application of a generally applicable antitrust law. 394 U.S. 131 (1969) (holding compelling interest analysis inapplicable). While an antitrust law might indeed be "unconcerned with regulating speech," *Smith*, 494 U.S. 872, 886 n.3, a law censoring political criticism, such as the one indicated in the text above, clearly could not. Indeed, as Michael McConnell has suggested, "exceptions from generally applicable laws are an established part of the protections for free speech and press under the First Amendment. Indeed, the very core of the free press clause—the freedom from prior restraints—can be seen as an exemption from a form of regulation that can be applied to virtually every other commercial business." McConnell, *supra* note 85, at 1138.

¹⁰⁴ Of course, constitutional equal protection analysis does not subject either laws that overtly discriminate on the basis of age, *see, e.g., Vance v. Bradley*, 440 U.S. 93 (1979) (retirement classification tested by general equal protection standards), or, more generally, laws that disproportionately disadvantage even a protected class, *see Smith*, 494 U.S. at 872, 886 n.3 ("[R]ace-neutral

The veracity of the first prong of Barry's pincer argument is contingent upon his conception of religious liberty as encompassing only the overt denial of some opportunity to a religious group, as, for example, would be the case were a law to specify simply that "Jews may not eat meat."¹⁰⁵ This position is consistent with Scalia's reasoning in *Smith*, but reflects an unduly constricted conception of religious freedom. A religious person who is prevented from eating meat in virtue of a generally applicable law is so precluded only upon the disharmonious confluence of religious and legal obligations. It makes little sense to claim, as does Barry, that it is only an individual's religious beliefs that constrain her actions. Where an individual must forego an opportunity, otherwise open to all, in virtue of the combination of a general law that conflicts with her religious beliefs, then that is precisely what religious freedom must be "about."¹⁰⁶ Of course, this is not to say that religious conduct exemptions must be forthcoming in all or even many cases.¹⁰⁷ But it is to say that, if it is to mean anything at all, free exercise of religion must entail more than the mere absence in general legislation of overt discrimination. It must entail an assurance that the restriction imposed on individual liberty is justified by the governmental interest asserted.¹⁰⁸

The second prong of Barry's pincer argument is, at first glance, more compelling. Often an exemption justified on the basis of religious freedom might indeed be justified on the basis of liberty, conceived of more generally. There is, however, an important prudential constraint on acknowledging such an extension. While Barry's generalized hostility to judicially crafted conduct exemptions eliminates the need for him to consider this constraint, it nonetheless presents a critical obstacle to his pincer argument once adjudicative remedies are countenanced. In its more general form, the prudential objection derives most fundamentally from the casuistry that characterizes

laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause . . ."), to compelling interest scrutiny. Instead, the analogy is to the Age Discrimination in Employment Act, 29 U.S.C. § 621 (2001), which does restrict facially neutral policies that have a disproportionate impact on individuals on the basis of age to those required by business necessity.

¹⁰⁵ See BARRY, *supra* note 5, at 45 (contrasting a law specifically forbidding Sikhs to ride motorcycles with a law requiring helmets for all motorcycle riders).

¹⁰⁶ See *id.*

¹⁰⁷ During the three decades immediately preceding *Smith* in which the Supreme Court invoked the compelling interest analysis, the Court actually ruled in favor of persons seeking religious conduct exemptions in only a handful of cases. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1377 (6th ed. 2000).

¹⁰⁸ For arguments along these lines, see Greenawalt, *supra* note 82, at 123-27; McConnell, *supra* note 85.

the development of the common, and also constitutional, law.¹⁰⁹ As Lon Fuller wrote, "Adjudicative law emerges from the decision of actual controversies; it does not lay down rules in advance for the decision of cases, but waits for controversies to be brought before the court for decision."¹¹⁰ Thus, even were we to agree that the interest that justifies a particular religious conduct exemption would also justify overruling the law applied generally, the legitimacy of the law itself is normally not the case presented to the court for decision. More particularly, judicial resolution of free exercise claims are subject to the now well-recognized duty to avoid, where possible, decisions of constitutional questions.¹¹¹ As Justice Brandeis noted in his concurring opinion in *Ashwander v. Tennessee Valley Authority*: "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all of the constitutional questions pressed upon it for decision."¹¹² Included among these rules, the Court is "never to anticipate a question of constitutional law in advance of the necessity of deciding it; . . . [nor] to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."¹¹³ Hence, where the first prong of Barry's pincer argument is reliant upon an unduly narrow conception of religious freedom, the second falters for its breadth on the "passive virtues" of constitutional decisionmaking.¹¹⁴ Justifiable religious conduct exemptions will both be more common than Barry is prepared to allow and remain dependent on religious group membership.

C. *Universalism and Association*

Interestingly, Barry is not hostile to all group-differentiated rights. In fact, Barry is quick throughout *Culture and Equality* to defend rights that attach on the basis of disability, economic status or racial classifi-

¹⁰⁹ See, e.g., SUNSTEIN, *supra* note 53, at 192 ("constitutional law . . . results largely from casuistical judgments").

¹¹⁰ FULLER, *supra* note 56, at 126.

¹¹¹ See NOWAK & ROTUNDA, *supra* note 107, at 106-07; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 327 (3d ed. 2000).

¹¹² 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

¹¹³ *Liverpool, N.Y. & Philadelphia Steamship Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring) ("Courts do not review issues, especially constitutional issues, until they have to"). Of course, that this is a fundamental duty does not mean that it has always been complied with. See TRIBE, *supra* note 111.

¹¹⁴ On the passive virtues, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (2d ed. 1986); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

cation.¹¹⁵ It is only rights that attach on the basis of cultural membership that give Barry pause. What justifies this different treatment? According to Barry, it is only because disability, economic and affirmative action rights are *universalistic* and *temporary* that special treatment for these categories of persons is justified.¹¹⁶ In contrast, since cultural rights are particularistic and permanent these cannot be countenanced by liberal justice.

But are these characterizations fair? In what sense may disability and economic rights be considered mere stop-gaps? At least as presently conceptualized, such rights would seem highly unlikely to, as Barry maintains, "make the need for that special treatment disappear as rapidly as possible."¹¹⁷ Rights accorded on the basis of disability or economic status surely are designed to remedy disadvantage, but, at least without radical reconceptualization, they are as surely incapable of eradicating the need for economic assistance or social accommodation of disability. And while particular preferential programs may indeed be designed to lead to their own termination, there is nothing transitory about the need for affirmative governmental action. Moreover, we might question whether it is really fair to characterize, as Barry does, cultural rights as permanent? Members of a particular religious or cultural group are only likely to assert claims for exemptions or self-determination so long as there are in place generally applicable laws that frustrate their aspirations. A view that conceives of religious and cultural group claims to special treatment as permanent does so only by assuming contrary status quo majoritarian positions as an appropriate baseline.¹¹⁸ Even putting this to one side, however, Barry's concentration on the temporal characteristics of any of these various group-differentiated rights seems misplaced for another reason. It is not the relative *duration* of need that is critical to liberal justice but *need* itself.

Likewise, Barry's characterization of non-cultural group-differentiated rights as universalistic, while deeming cultural rights as particularistic, seems flawed. In what sense are economic, disability and affirmative action rights universalistic? Notice that Barry does not claim that such rights are "universal," because, of course, each of

¹¹⁵ See BARRY, *supra* note 5, at 12-13, 114.

¹¹⁶ See *id.* at 12-13 ("[S]pecial treatment for members of disadvantaged groups is justifiable only for as long as the inequality persists. We may say, therefore, that the objective of special treatment for members of disadvantaged groups is to make the need for that special treatment disappear as rapidly as possible It is instructive to contrast this with the case made by multiculturalists for granting special rights to groups defined by their distinctive cultural attributes. These special rights will, according to their advocates, be needed permanently").

¹¹⁷ *Id.* at 13.

¹¹⁸ Cf. CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (criticizing the assumption that the status quo is a neutral position in constitutional interpretation).

these rights remains dependent on a particular classification; i.e., disability, economic status, or racial or ethnic group attachments. In characterizing these non-cultural rights as “universalistic,” then, Barry’s point seems to be that, though these rights are afforded only to particular classes of persons, they nonetheless provide universally desirable benefits: “the beneficiaries are assumed to be people who want the same things as the rest of the population and simply lack the resources that would enable them to enjoy more of those things.”¹¹⁹ But notice how the universalistic nature of these desires depends in part upon the level of abstraction at which they are conceptualized. For instance, if we conceive of the desire of wheelchair-bound persons for unimpeded entry to a municipal building as a general claim for free accessibility, then the claim does seem universalistic. It is fair to assume that most people value accessibility. However, if we conceptualize the claim at a more narrow degree of abstraction—as a specific claim, say, for a ramp—then the claim loses its universalistic flavor. For we do not all strongly value the construction of ramps; indeed, one can imagine an (admittedly callous but not wholly unreasonable) objection on aesthetic grounds. To be clear, my point is not that we should conceptualize the claims of the disabled this narrowly, only that the universalistic character of the claim is more contingent than Barry lets on.

Now consider, at the other extreme, Barry’s conceptualization of religious conduct exemptions in *Culture and Equality*. In characterizing claims for religious exemptions as particularistic—for example, as a highly particularized claim to wear a yarmulke or a turban¹²⁰—Barry has assumed a relatively lower level of abstraction. If, instead, as with the non-cultural group claims above, he had conceptualized religious conduct exemptions as general claims to act freely, then such claims could lay claim to being “universalistic” as well.¹²¹ So what is it that justifies this more specific conceptualization for cultural practices, but the more general conceptualization for non-cultural aims? At least as between cultural and non-cultural group-differentiated rights, the forced move to a higher level of abstraction seems to be justified

¹¹⁹ BARRY, *supra* note 5, at 116; *see also id.* at 12 (“[D]isadvantage’ is defined in universal terms—as the lack of things (resources and opportunities) whose possession would generally be agreed to be advantageous . . .”).

¹²⁰ *See id.* at 33. Further, Barry’s claim that wearing a yarmulke is merely a traditional custom that gets “packaged” as a religious obligation in order to take advantage of the constitutional guarantee of freedom of religion is, at best, “misleading.” Letter from Rabbi Jeremy Kalmanofsky, Assistant Dean, Jewish Theological Seminary, to the author (July 5, 2001) (on file with author).

¹²¹ Indeed, Barry notes the potentially universalistic character of claims to religious liberty as the basis for the libertarian segment of his pincer argument, *see supra* notes 97-98 and accompanying text, but then seemingly denies that same potentiality when distinguishing cultural from non-cultural group-differentiated rights.

by nothing more than Barry's own perception of the rationality of particular positions. There is, indeed, nothing inherently more "universalistic" about the group-differentiated rights of disability, economic status and affirmative action of which Barry approves than there is about the cultural rights which so strongly draw his ire.

In addition to distinguishing between non-cultural and cultural group-differentiated rights on the basis of the universal desirability of the benefits received, Barry also claims a critical distinction exists between non-cultural and cultural rights-claimants on the basis of the capacity of the claimants themselves to enjoy the benefits secured by such rights. In the absence of these rights, members of groups differentiated according to disability, economic need or racial or ethnic subjugation would "simply lack the resources" to take advantage of a free social life.¹²² On the other hand, Barry maintains that cultural rights-claimants do not lack the capacity to enjoy the benefits afforded by the rights they seek. Rather, the benefits are denied them on the basis of their own religiously or culturally based *preferences*.¹²³ Again, though, we need to be careful to discern precisely what it is that Barry is claiming here. Barry is not claiming that religious belief and cultural allegiance are merely matters of *choice*.¹²⁴ He does not, therefore, make the mistake of presuming that persons are wholly free to choose their own attachments and commitments. Barry does, however, equate *beliefs* with preferences for purposes of discerning the justifiability of cultural rights, and he does so specifically in light of the common distinction beliefs and preferences share as against choices.

Barry's argument is that since both beliefs and preferences (his example is a preference for vanilla ice cream) are "almost impossible to change," then "beliefs and preferences are in the same boat" vis-à-vis rights-claims.¹²⁵ Insofar as we would not afford a group-differentiated right merely on the basis that the members of a particular group "have a preference for vanilla over strawberry ice cream,"¹²⁶ we should also not afford a group-differentiated right on the basis of religious belief or cultural practice. Instead, when laws of general applicability place persons at a disadvantage in virtue of their religiously or culturally-based attachments, we are to view the disadvantage merely as a morally unregrettable "side-effect" of the law, no different, as a matter of justice, from, for example, the "much more severe impact [that laws against sexual violence have] on those who

¹²² BARRY, *supra* note 5, at 116.

¹²³ *Id.* at 32-36.

¹²⁴ *Id.* at 35.

¹²⁵ *Id.* at 36.

¹²⁶ *Id.*

justice.¹³³ And were a particularly strongly held or highly unique personal preference to constitute an aspect of an individual's identity, that would not represent an argument against affording expansive religious and cultural freedoms. Indeed, in such a case the law arguably should seek, again constrained by an appropriate balancing test, a just accommodation of the preference.¹³⁴

There is a final leg to Barry's universalist attack on cultural rights. He argues that one mark in favor of non-cultural group-differentiated rights is their assimilationist effect on otherwise socially marginalized individuals. "If such policies succeed," Barry writes, "they will tend to decrease social isolation and enable their beneficiaries to make the transition all the way into the mainstream society."¹³⁵ This is a valid claim; the inclusionary influence of disability, economic and affirmative action rights is indeed conducive to liberal virtue. Barry is also correct to note that this "assimilationist virtuous circle is in sharp contrast with the rationale of the kind of group-based policies advocated by the theorists of multiculturalism."¹³⁶ The rights-claims asserted by religious and cultural group members are claims not to inclusion but to self-exclusion. Where Barry makes a wrong turn, however, is in assuming that the non-assimilationist, self-exclusionary nature of cultural rights is contrary to liberal values.

Barry does recognize that an essential relationship exists between group attachments and the capacity of human beings for living a good life. He appreciates "that much of every normal individual's well-being derives from membership in associations and communities."¹³⁷ But from this recognition, Barry draws only the important, but also very limited, conclusion that groups, as corporate entities, should be afforded rights of self-government. Thus, so long as membership in a given association remains voluntary, the internal policies

¹³³ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) (discussing familial and closely associated bonds: "[c]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."); *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) (suggesting that "individuals define themselves" through freely chosen relationships).

¹³⁴ Such a view would be broadly consistent with Mill's harm principle. See JOHN STUART MILL, *ON LIBERTY* 68 (Penguin Books 1985) (1859) ("the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection . . . the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"); see also GEORGE KATEB, *THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE* 13 (1992) ("Rights-based individualism has a prima facie commitment to the greatest possible amount of such legally allowed 'self-regarding' activity . . .").

¹³⁵ BARRY, *supra* note 5, at 116.

¹³⁶ *Id.*

¹³⁷ *Id.* at 117.

are strongly attracted to rape and paedophilia.”¹²⁷ Indeed, according to Barry, the costs imposed on members of religious and cultural groups result not from the generally applicable laws that impinge upon their practices but from the practitioners’ own “expensive tastes.”¹²⁸ As such, general laws that have a differential impact on persons in virtue of their religious beliefs or cultural practices are, as a matter of justice, no more a cause of concern than are, say, general traffic laws that have a differential impact on persons in light of their preference for fast cars.¹²⁹

It should be obvious by now that this is all just a bit too facile. The commonality that beliefs and preferences share in contradistinction with choices demonstrates no more (and no less) than that neither beliefs nor preferences are wholly subject to free will. But this relatively slim concurrence provides no traction on the serious issues presented by the claims of religious and cultural practitioners. The positive legal argument for the differential treatment of beliefs and preferences is that we do not, as a general matter, privilege personal preference in the form of constitutional rights, whereas the Constitution does privilege religious and associational freedom.¹³⁰ Indeed, the Supreme Court in *Wisconsin v. Yoder* noted this distinction when it suggested that “the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group and intimately related to daily living.”¹³¹

From a normative perspective, too, beliefs are critically distinguishable from preferences. Religious beliefs and cultural commitments constitute aspects of our selves in a far deeper sense than do most personal preferences. An individual’s preference for a particular flavor of ice cream is unlikely to constitute a meaningful aspect of that individual’s identity, whereas that same individual’s attachment to her fellow Christians or to her tribe is indeed likely to play a central role in her self-definition.¹³² Affording individuals the maximum degree of freedom to construct their own identities, in the absence of a compelling contrary rationale, is a crucial commitment of liberal

¹²⁷ *Id.* at 25, 34.

¹²⁸ *Id.* at 40.

¹²⁹ *See id.* at 34.

¹³⁰ An expansive view of constitutional freedom might indeed encompass personal preferences, say within the substantive due process doctrine. But in that event, too, preferences obviously would not provide the analogy Barry seeks.

¹³¹ *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

¹³² I do not mean to suggest that there is not a personal dimension to individual identity, only that social categories like religion or disability are more critical markers for how an individual is perceived, both by herself and by society. For a discussion of the collective and personal dimensions of identity, see Appiah, *supra* note 65, at 151. For discussions of the impact of social perceptions on self-understanding, see sources cited *supra* note 68.

of that association may, consistent with liberal justice, be either or both illiberal or undemocratic.¹³⁸ But associational liberty entails more than freedom collectively to construct group governance or membership policies. For all his concentration on group associational rights, Barry fails to acknowledge the critical relationship that exists between group association and *individual* freedom. Freedom of association is, as George Kateb has written, "integral to a free human life, to being a free person. Picking one's company is part of living as one likes; living as one likes (provided one does not injure the vital claims of others) is what being free means."¹³⁹ Indeed, we have already noticed the strong sense in which associative ties contribute to the constitution of individual identity. It is not far to see, then, the sense in which cultural rights are essential to liberal self-definition.

IV. CONCLUSION: LIBERALISM AND MEMBERSHIP

Human identity is deeply rooted in social relationships. As Hannah Arendt wrote: "The moment we want to say *who* somebody is, our very vocabulary leads us astray into saying *what* he is; we get entangled in a description of qualities he necessarily shares with others like him . . . his specific uniqueness escapes us."¹⁴⁰ Indeed, we are born immediately into attachments. Our families, our communities, our religions, our nations inform our sense of who we are.¹⁴¹ That individuals are, in part, constituted by social forces, however, does not eliminate the possibility of self-invention, or the possibility of being an autonomous self.¹⁴² But autonomy has preconditions. A defining aspect of liberalism is that individuals should be free, in virtue of their own successive choices, to chart their own life-courses.¹⁴³ Included among the choices that individuals must make are which cultural attachments they will maintain, sever and newly establish.¹⁴⁴ The

¹³⁸ See *id.* at 146-62 (outlining a theory of group rights and applying it to rights of free association).

¹³⁹ Kateb, *supra* note 11, at 36.

¹⁴⁰ HANNAH ARENDT, *THE HUMAN CONDITION* 181 (1958).

¹⁴¹ For discussions of the relevance of encumbered identities and liberal justice to political theory and public policy, see MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 11-13 (1996); see generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998).

¹⁴² See RAZ, *supra* note 4, at 155-56, 369-73 ("To be sure our well-being is not served by projects we are coerced into unless we come willingly to embrace them.")

¹⁴³ At least insofar as their actions fall short of harming others in relevant ways. For the classic statement of this principle, see MILL, *supra* note 134.

¹⁴⁴ Of course, we can never really know which, if any, of our attachments truly result from free will. But that this is not wholly subject to choice, does not mean that it is never or to no extent subject to choice. George Kateb has suggested that "[t]he mere fact that we are not born as adults makes the subject [of free will] elusive, probably forever." KATEB, *supra* note 134, at 18. With Sidgwick, I note only that: "The difficulties connected with this question have been

free maintenance, severance and establishment of cultural attachments by individuals, however, is not achievable in the absence of cultural rights. Cultural rights constitute the social groups from which individual members derive aspects of their identities.¹⁴⁵ Social differentiation is inherent in the very structure of this form of right, for cultural rights are afforded only to a sub-group of individuals. In the absence of this associational freedom—this liberal right of self-exclusion—an aspect of the identities of the rights-claimants would be preempted. Cultural rights are (some of) the instruments of liberal self-definition. An expansive conception of cultural rights is thus among the preconditions for self-invention.

While, as Barry claims, classifying persons according to group characteristics risks the grave error of essentialism—or the error of reducing the conception of any individual member's identity to a single characteristic—merely recognizing that group affiliation plays an integral role in the process of self-definition is a far cry from treating the group trait as essential.¹⁴⁶ We can appreciate the liberal virtue of associative identity without detracting from the proper vision of individuality as replete with additive, fragmented and even contradictory attachments and concerns.¹⁴⁷ Yet the preconditions of liberal self-invention run counter to the sort of radically universalistic theory that Barry posits in *Culture and Equality*. In unduly restricting cultural attachments and practices, Barry's proposals reflect an illiberal theory of membership that obstructs rather than fosters self-definition.

Of course, one of the marks of an important book is its capacity to provoke further ideas. In this sense, then, Barry's latest book is significant not just in virtue of the gulf it fills in the multicultural discussions of the last few years, but also in virtue of the debates it is sure to provoke in the next few.

proved by long dialectical experience to be so great, that I am anxious to confine them within as strict limits as I can, and keep as much of my subject as possible free from their perturbing influence." HENRY SIDGWICK, *THE METHOD OF ETHICS* 57 (7th ed. 1981).

¹⁴⁵ See Mitnick, *supra* note 65 (proposing that a pure "constitutive right . . . inherently differentiates among persons and so directly constitutes aspects of human identity").

¹⁴⁶ See BARRY, *supra* note 5, at 11 (comparing the essentialism of multiculturalism to that of the counter-Enlightenment).

¹⁴⁷ See *Social Theory and the Politics of Identity*, in *SOCIAL THEORY AND THE POLITICS OF IDENTITY* 9, 27-29 (Craig Calhoun ed., 1994).