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Regrouping in Defence of Minority Rights: Kymlicka's Multicultural Citizenship

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Regrouping in Defence of Minority Rights: Kymlicka's Multicultural Citizenship

Abstract

This article outlines and critically examines Will Kymlicka's reconstructed defence of minority rights. Although various doubts are cast on Kymlicka's own thesis, it is argued that there are alternative strategies—strategies that Kymlicka too hastily dismisses—available to defenders of (collective) minority rights. Further, any vindication of minority rights makes urgent the separate question of what (if any) institutional expression they should receive. One important question overlooked by Kymlicka is whether, contrary to widespread assumptions, minority rights are in fact appropriate candidates for constitutional entrenchment. Some of the relevant considerations raised by this issue are discussed in the final section of the article.

REGROUPING IN DEFENCE OF MINORITY RIGHTS: KYMLICKA'S *MULTICULTURAL CITIZENSHIP*[©]

BY LEIGHTON McDONALD*

This article outlines and critically examines Will Kymlicka's reconstructed defence of minority rights. Although various doubts are cast on Kymlicka's own thesis, it is argued that there are alternative strategies—strategies that Kymlicka too hastily dismisses—available to defenders of (collective) minority rights. Further, any vindication of minority rights makes urgent the separate question of what (if any) institutional expression they should receive. One important question overlooked by Kymlicka is whether, contrary to widespread assumptions, minority rights are in fact appropriate candidates for constitutional entrenchment. Some of the relevant considerations raised by this issue are discussed in the final section of the article.

Cet article décrit et examine dans une perspective critique la défense reconstruite de Will Kymlicka des droits des minorités. Bien qu'il élève des doutes sur la thèse même de Kymlicka, l'article affirme qu'il y a des stratégies alternatives (des stratégies que Kymlicka rejète trop précipitamment) qui sont disponibles pour ceux qui défendent les droits collectifs des minorités. De plus, chaque défense des droits des minorités soulève une question distincte quant à l'expression institutionnelle que ces droits devraient recevoir (s'ils devraient en recevoir même une). La thèse de Kymlicka ne soulève pas la question importante de savoir si, contrairement aux suppositions très répandues, les droits des minorités sont vraiment des candidats bien choisis pour le retranchement constitutionnel. Quelques considérations pertinentes qui sont soulevées par ce sujet sont examinées dans la dernière partie de l'article.

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I. INTRODUCTION

In *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Will Kymlicka defends what he describes as an “impeccably liberal”¹ system of cultural minority rights. Kymlicka’s new book weaves together many of the threads he has been developing since the publication of his influential *Liberalism, Community and Culture*,² resulting in a more comprehensive response to the “challenge of multiculturalism.”³ Although Kymlicka ranges over many of the central theoretical and practical problems which vex liberal democracies (e.g., political representation and the basis of the liberal democratic commitment itself), this article focuses on his reconstructed defence of minority rights.

Notwithstanding that Kymlicka uses the word “citizenship” in his title, readers should not expect to find an analysis of how that concept has come into the political lexicon, or a comprehensively worked out “theory of citizenship.” Rather, he is concerned with a specific question which any general or comprehensive theory of citizenship must address, namely, on what terms citizens are incorporated into a multicultural republic. Michael Walzer defines a citizen as “a member of a political community, entitled to whatever prerogatives and encumbered with whatever responsibilities are attached to membership.”⁴ This suggests that, at a minimum, any theory of citizenship must provide an account not only of the rights and civic obligations of citizens, but also of who citizens are and on what basis they are to be incorporated into the political community. In his defence of minority rights, Kymlicka argues that there are sound principles of justice which require that the rights of citizenship be dependent on cultural group membership; that is, members of certain groups can only be justly incorporated into the political community if “group-differentiated rights, powers, status or immunities, beyond the common rights of citizenship” are accepted.⁵

¹ W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) at 153 [hereinafter *Multicultural Citizenship*].

² W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) [hereinafter *Liberalism, Community and Culture*].

³ A. Gutmann, “The Challenge of Multiculturalism in Political Ethics” (1993) 22 *Phil. & Pub. Affairs* 170.

⁴ “Citizenship” in T. Ball, J. Farr & R.C. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989) 211.

⁵ *Multicultural Citizenship*, *supra* note 1 at 206.

Kymlicka's book is internationalist in outlook and aims to elucidate fundamental principles of justice. Moreover, these principles are thought to provide tools with which liberal constitutionalism can formulate just and workable solutions to racial, ethnic, and cultural conflict, which many theorists have identified as among the most urgent problems currently faced.⁶ In examining Kymlicka's arguments, I attempt to show that various important distinctions he employs have enriched our understanding of these problems. Although Kymlicka does strengthen and clarify his preferred justification of minority rights, I argue that, on the central issue of identifying the link between individual autonomy and the value of one's own culture, his arguments are not entirely convincing. There are, however, alternative strategies available to defenders of minority rights, and any vindication of minority rights inevitably encounters the questions of whether and how they should be given institutional expression. Unfortunately, Kymlicka does not adequately recognize or address the complex issues of institutional design which his arguments raise. Admittedly, there are two separate issues involved here, and Kymlicka is under no obligation to deal with them both. But the question of what institutional protection should be given to minority rights is too often ignored.⁷ Thus, although this article concentrates on Kymlicka's defence of minority rights, I also discuss some of the considerations which are relevant in determining whether it is appropriate to entrench minority rights constitutionally, a question which any defence of minority rights makes urgent.

⁶ In *Multicultural Citizenship*, *supra* note 1 at 1, Kymlicka notes that "[s]ince the end of the Cold War, ethno-cultural conflicts have become the most common source of political violence in the world, and they show no sign of abating."

⁷ An example can be drawn from the constitutional politics of Australia. Although the current debate over whether the country should become a Republic has focused on the identity, selection process, and role of Australia's head of state, the debates over constitutional reform have, at times, been broadened to include both the issues of a constitutional settlement with the Aboriginal peoples of Australia, and whether or not a constitutionally entrenched statement of citizens' rights would be desirable. Little attention, however, has been given to the issue of whether the constitutional entrenchment of Aboriginal rights—as "collective" or "minority" rights—is subject to the same considerations concerning the inclusion of individual rights in Australia's Constitution.

II. UNDERSTANDING MULTICULTURALISM

In *Multicultural Citizenship*, Kymlicka staunchly adheres to his long-standing claim that cultural membership must be brought within the locus of liberal justice. But what is a culture, and how are we to understand multiculturalism? Like most interesting notions in political theory, culture can be understood in multifarious ways. For Kymlicka, the central concept in the definition of culture is “a nation,” that is, “a historical community, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and culture.”⁸ Thus, a state is “multicultural if its members either belong to different nations (a multination state), or have emigrated from different nations (a polyethnic state), and if this fact is an important aspect of personal identity and political life.”⁹ Sometimes multiculturalism is used as a rubric for the discussion of all historically disadvantaged social groups. While Kymlicka is acutely aware of the injustices endured by women, gays, the disabled, and the poor—to name a few—he sees them as raising distinctive issues as they occur within an individual’s “own national society or ethnic group.”¹⁰ Although Kymlicka is entitled to limit the scope of his study, I argue below that, in some cases, such as that of religious minorities, the issues involved have not been adequately distinguished from those that arise with respect to national minorities.

Multiculturalism is therefore defined in an ethno-national sense, characterized by “national minorities” and “ethnic groups.”¹¹ National minorities arise from the voluntary or involuntary incorporation of an entire nation, whereas ethnic minorities arise from individual and familial immigration from different nations. As the *mode of incorporation* has a profound influence in shaping the institutions, identity, and aspirations of a cultural minority, any response to the politics of multiculturalism must begin by considering which legitimate claims can be made in these “normal” cases of cultural diversity. Thus, Kymlicka avoids the implausible conclusion that all cultural minorities should be accorded the same treatment, and convincingly argues (against Michael Walzer and Nathan Glazer) that what is appropriate

⁸ *Supra* note 1 at 11.

⁹ *Ibid.* at 18.

¹⁰ *Ibid.* at 19.

¹¹ *Ibid.* at 10.

for ethnic groups is not necessarily appropriate for national minorities.¹² Thus, for example, if one considers Australian Aboriginal and Torres Strait Islander communities to be national minorities, Kymlicka's distinction provides a theoretical basis for treating these groups differently from other ethnic (immigrant) minorities—a result which accords with the outlook of the Aboriginal Provisional Government and the policy statements of the recently defeated Labor government.¹³ He also argues that, while thinking about national minorities and ethnic groups may help to structure our thinking in relation to groups which do not fall neatly into either camp (e.g., African-Americans and refugees), these cases must also be considered on their own merits. But while Kymlicka is at pains to emphasize that there are no “magic formulas”¹⁴ to resolve all cultural conflicts, the reasons are more historical than theoretical: “[t]he hard cases which exist today have often arisen as a result of past injustices and inconsistencies.”¹⁵

On Kymlicka's understanding, then, “the myth of a culturally homogenous state”¹⁶ accepted by most liberal theorists is not sustainable;¹⁷ most polities around the globe are multinational,

¹² In *Liberalism, Community and Culture*, *supra* note 2, Kymlicka's equivocal use of Aboriginal communities as the focus of his argument encouraged confusion as to its scope; it was never clear whether the argument was thought to apply to them alone, or whether these communities were used to illustrate a more general argument. Any argument establishing that all minority groups are entitled, as a matter of justice, to the self-government rights and protections of the same type that have sometimes (though rarely) been extended to Aboriginal communities is clearly absurd, and many commentators have thought that to impute this to Kymlicka would be to complete the *reductio*. See, for example, J.R. Danley, “Liberalism, Aboriginal Rights and Cultural Minorities” (1991) 20 *Phil. & Pub. Affairs* 169 at 176.

¹³ H. Reynolds, “Ethnicity, Nation and State in Contemporary Australia” (1994) 48 *Austl. J. Int'l. Aff.* at 281, describes the positions taken by the two major political parties with respect to Australia's indigenous peoples thus:

The Liberal-National Party Coalition regard them as social groups distinguished by significant disadvantages which should be remedied with well targetted programmes. The Australian Labor Party goes further—they regard them as ethnic minorities which have a special place in multicultural Australia and which should be allowed a significant measure of self-management as recognition of their unique position as the indigenous people of Australia.

Of course, the fact that there are relevant differences between national minorities and ethnic minorities does not by itself establish the extent to which these groups are to be treated differently.

¹⁴ *Multicultural Citizenship*, *supra* note 1 at 1.

¹⁵ *Ibid.* at 25.

¹⁶ *Ibid.* at 9.

¹⁷ For an early indictment of the assumption of cultural and ethnic homogeneity in liberal theory, see V. van Dyke, “The Individual, the State, and Ethnic Communities in Political Theory” (1977) 29 *World Pol.* 343. Although van Dyke's own defence of cultural-group rights, at 369, does

polyethnic, or both. Has this erroneous assumption, however, distorted liberal practice? Does the existence of multiculturalism have implications for the rights of citizenship? The received wisdom of contemporary liberalism “insists that the liberal commitment to individual liberty precludes the acceptance of collective rights, and that the liberal commitment to universal (colour-blind) rights precludes the acceptance of group-specific rights.”¹⁸ Kymlicka argues that this policy of “benign neglect,” of attempting a “strict separation of state and ethnicity” along the lines of the separation of religion and ethnicity, is deeply mistaken.¹⁹ Indeed, the central argument of the book is that a proactive stance with respect to cultural membership *must* be taken. In practical terms, this will invariably mean that at least some minority rights, beyond the common rights of citizenship, are appropriate in most countries.

III. JUSTIFYING MINORITY RIGHTS

A. *The Rights of National Minorities*

Although Kymlicka argues that national minorities and ethnic groups both make legitimate claims for minority rights, his most interesting line of argument relates to national minorities. The central justification proceeds in two stages. First, he argues that individual autonomy “is dependent on the presence of a societal culture, defined by language and history, and that most people have a very strong bond to their own culture.”²⁰ The second stage of the argument holds that liberal justice “is not only consistent with, but even requires, a concern with cultural membership.”²¹ Minority rights can thus be justified

not progress beyond a claim that because these groups need certain rights they should receive them, Kymlicka’s more sophisticated argument is clearly adumbrated:

[I]t is ... unjust to individuals to say that those who belong to dominant groups can enjoy the attendant advantages and satisfactions, whereas those who belong to nondominant and minority groups must either abandon their culture or accept second-class status. It is not enough for political theorists to contemplate simply the individual and society, or relationships between man and the state. It is time for them to contemplate mankind in its great variety.”

¹⁸ *Multicultural Citizenship*, *supra* note 1 at 68.

¹⁹ *Ibid.* at 107-08.

²⁰ *Ibid.* at 8.

²¹ *Ibid.* at 7-8.

insofar as they ensure that the (collective) good of cultural membership is *equally* protected for the members of cultural minorities and majorities alike.²² Without such rights, minority members do not have “the same opportunity to live and work in their own culture as members of the majority;” and this is unfair according to Rawlsian or Dworkinian egalitarian liberalism, “which emphasizes the importance of rectifying unchosen inequalities.”²³ This argument is structurally unchanged from that presented in *Liberalism, Community and Culture*,²⁴ but *Multicultural Citizenship* does introduce new distinctions, clarifications, and refinements into its substance.²⁵ Indeed, many of the latter’s crucial passages read like “a reply to critics.” Kymlicka’s claim that the protection of societal cultures is important for *individual* autonomy remains crucial to his enterprise because, without it, there is no good capable of being abstracted from particularistic cultures that can, in turn, be protected equitably. While Kymlicka considerably strengthens this thesis against some of the trenchant criticisms to which it has been subjected, I doubt whether all his critics will be satisfied.

Before taking up the first stage of the defence of minority rights for national minorities, it is important to note a significant terminological shift. In *Liberalism, Community and Culture*, the importance of cultural membership was ascribed to a “cultural community” or “cultural structure.” In *Multicultural Citizenship*, the focus changes to “societal cultures.” This terminological shift probably reflects a reluctance on Kymlicka’s behalf to persist in the vagaries of the language of “community,” but it also has a deeper significance. The care Kymlicka takes to define multiculturalism in ethno-national terms takes on added meaning since “just as societal cultures are almost invariably national cultures, so nations are almost invariably societal cultures.”²⁶ Thus, the type of culture Kymlicka considers “particularly relevant to

²² As explained in Part IV, below, Kymlicka does not emphasize the collective nature of the good of cultural membership.

²³ *Multicultural Citizenship*, *supra* note 1 at 109.

²⁴ Kymlicka also examines those arguments from historical agreements and cultural diversity that might play a role in justifying minority rights, but both are thought to be of secondary importance.

²⁵ Compare *Liberalism, Community and Culture*, *supra* note 2 at 4:

[M]y defence of minority rights will involve two steps: firstly, an argument about the kind of good that cultural membership is, its relationship to individual freedom, and hence its proper status in liberal theory; and secondly, an account of the ways in which members of a minority culture can be disadvantaged with respect to the good of cultural membership.

²⁶ *Multicultural Citizenship*, *supra* note 1 at 80.

individual freedom”²⁷ dovetails with the cultural unit underlying the challenge of multiculturalism. Understanding the notion of “societal culture” is therefore of critical importance.

For Kymlicka, a societal culture is “a culture which provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.”²⁸ Like nations, societal cultures are typically territorially based and grounded on a common language. Societal cultures thus provide “the everyday vocabulary of social life” which, in the modern world, means they “must be institutionally embodied—in schools, media, economy, government, etc.”²⁹ In essence, then, the societal culture is one that can, in a modern sense, be lived *within* not in the sense that it is wholly independent, but because it provides a full range of *options* for a fulfilling human life.

As Kymlicka recognizes, his understanding of culture is stipulative, and because the concept is essentially contested, it is no criticism to replace it with an alternative stipulative account. However, culture is plainly an “essentially fluid and organic phenomenon, the product of the conscious and unconscious activities of many people on many levels,” and it might therefore be better understood in terms of a spectrum.³⁰ It is true that national or societal cultures are likely to be at the comprehensive end of this spectrum (with sports or corporate cultures, for example, at the other), but it is interesting to ask whether Kymlicka’s conflation of culture with “a nation” tendentially excludes other social groups that can also play very significant roles in structuring and shaping individual lives—notwithstanding that they are not completely institutionally embodied. In *Liberalism, Community and Culture*, Kymlicka argued that the importance of cultural communities rests upon the fact that it is within these communities that “individuals form and revise their aims and ambitions.”³¹ Now, ethnic groups and national minorities *are* groups within which people make important life choices; there are, however, many smaller communities, such as religious groups and lifestyle sub-cultures that, in at least some instances, are of greater value to the formation of meaningful individual goals. Thus, the

²⁷ *Ibid.* at 75.

²⁸ *Ibid.* at 76.

²⁹ *Ibid.*

³⁰ See D.G. Réaume, “Justice Between Cultures: Autonomy and the Protection of Cultural Affiliation” (1995) 29 U.B.C. L. Rev. 117 at 120.

³¹ *Supra* note 2 at 135.

reasons for valuing societal cultures may also apply to other cultural groups, and the complex question of whether or not there is value in these sub-national groups which might also justify special rights should not be settled by definitional fiat.³²

With that clarification, we can return to the first limb of Kymlicka's defence of minority rights for national groups, which attempts to flesh out the link between individual freedom and membership in a societal culture. Proceeding from the insight that multinational polities contain multiple societal cultures, Kymlicka argues that, as a rule, immigrants enlarge and enrich the dominant culture, whereas national minorities seek to preserve their distinctive societal cultures, which "were already embodied in a full set of social practices and institutions, encompassing all aspects of social life."³³ Although Kymlicka thinks national minorities and ethnic groups both have legitimate claims for minority rights, only the former has a claim of justice to maintain their *own* societal culture.

But why are societal cultures so important to individual freedom? Here, Kymlicka's argument is a condensed version of his relevant discussion in *Liberalism, Community and Culture*. Liberalism promotes individual autonomy by enabling individuals, not only to choose their own conception of the "good life," but also to revise those choices if and when they deem it necessary to do so.³⁴ Crucially, then, our societal cultures not only provide us with options to choose from, but also make these options meaningful to us. Individual action can only be rendered vivid through the shared vocabularies of language and history. Thus, without membership in a societal culture we are without the precondition for making "intelligent judgements about how to lead our lives."³⁵ And, insofar as group-differentiated rights promote access to a societal culture, they will "have a legitimate role to play in a liberal theory of justice."³⁶ That is, access to a societal culture is a Rawlsian "primary good"—a "good which people need, regardless of their

³² To be fair, it should be noted that Kymlicka does not explicitly rule out alternative justifications for minority rights, although, as we shall see below, he does believe that the issue of "collective rights" is a side-issue in the debate over multiculturalism.

³³ *Multicultural Citizenship*, *supra* note 1 at 29.

³⁴ *Ibid.* at 80.

³⁵ *Ibid.* at 83. Compare *Liberalism, Community and Culture*, *supra* note 2 at 190, where it is argued that cultural membership is a necessary condition for meaningful individual choice "because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value."

³⁶ *Multicultural Citizenship*, *supra* note 1 at 84.

particular chosen way of life, since it provides the context within which they make those particular choices.”³⁷

Many critics have been quick to point out that people often successfully move between societal cultures, and that this “cosmopolitan alternative” undercuts any claim that people *need* access to their *own* societal culture.³⁸ Kymlicka rightly notes that this objection is often overstated and argues that not all that is due to a person by right must be secured. More specifically, a right may be waived, and truly voluntary immigration is one way of relinquishing a specific right to live in one’s own societal culture. On Kymlicka’s version of Rawlsian liberalism this seems substantially correct. The important point about the designation of any good as a “primary good” is that it is reasonable for people to want it no matter what else they want—and this is always a matter for argument.³⁹

Kymlicka canvasses a variety of plausible explanations as to why access to one’s *own* societal culture is something “that people cannot reasonably be *expected* to go without ... even if a few people voluntarily choose to do so.”⁴⁰ In the final analysis, however, his claim that “most people, most of the time, have a deep bond to their own culture” is empirical in nature.⁴¹ Yet, his claim might be thought to be a weak argument that *justifies* a reasonable expectation by merely noting that most people hold to that expectation. It may be true that people are deeply attached to their nations, but this may be a universal fault; we do not normally shape public policy to encourage human shortcomings.⁴²

Kymlicka’s argument must be that the empirical bond to one’s nation is a fundamental fact of human consciousness,⁴³ capable of

³⁷ *Ibid.* at 214. In *Liberalism, Community and Culture*, *supra* note 2 at 192, Kymlicka defended this claim by arguing that a context of choice was “a precondition of self-respect, of the sense that one’s ends are worth pursuing.” For J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 440, self-respect is “the most important primary good” because “[w]ithout it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them.” Compare J. Tomasi, “Kymlicka, Liberalism, and Respect for Cultural Minorities” (1995) 105 *Ethics* 580.

³⁸ See J. Waldron, “Minority Cultures and the Cosmopolitan Alternative” (1992) 25 *U. Mich. J.L. Ref.* 751.

³⁹ See Rawls, *supra* note 37 at 62.

⁴⁰ *Multicultural Citizenship*, *supra* note 1 at 86 [emphasis in original].

⁴¹ *Ibid.*

⁴² Compare, in an entirely different context, S.M. Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989) at 39.

⁴³ In *Multicultural Citizenship*, *supra* note 1 at 90, he writes that the “causes of this attachment lie deep in the human condition.”

explanation but not justification.⁴⁴ It is a fact, therefore, rich with normative implications. But is Kymlicka right to believe that there is no reason to regret this? Defenders of nationalism are probably correct to insist that national attachments do not *necessarily* lead to xenophobia and chauvinism.⁴⁵ However, in an age where national sovereignty—the erstwhile “emblem” of national freedom⁴⁶—means less and less, are not particularistic attachments to nations inappropriately parochial? This is a serious question, but I think that it would be overstating the case to claim that the world’s increasing economic and political interdependence makes national sentiment dysfunctional, not least because “citizen-of-the-world” is still more a mantle of privilege than a lived identity for most of humanity. Furthermore, most serious defenders of national self-determination do not insist on separate statehood for all nations.⁴⁷ However, the thought that “nation” is no longer an appropriate or useful social construct also raises the question of whether it is, itself, a biased concept. Benedict Anderson has evocatively argued that nations are imagined communities—“cultural artefacts of a particular kind.”⁴⁸ Of course, all communities not premised on face-to-face contact exist only through collective acts of imagination. However, if national culture (which, for Kymlicka, is a society sharing a history, language, and culture that is institutionally complete) is thought to be the *paradigmatic* unit in the recognition of cultural difference, it may be cause for concern that this concept of culture was “invented” in nineteenth century Europe and its colonies.⁴⁹ Kymlicka recognizes that the idea of a societal/national culture is a modern one; the worry here, however, is that not all relevant cultures are modern in this sense—nor do they necessarily desire to embark on a process of modernization, eagerly embracing the public institutions akin to those which characterize Western nations. Clearly, some indigenous cultures provide meaningful ways of life for their members while simultaneously resisting (or accommodating in a manner *they* select)

⁴⁴ See J. Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986) at 288-89.

⁴⁵ See, for example, Y. Tamir, *Liberal Nationalism* (Princeton, N.J.: Princeton University Press, 1993).

⁴⁶ See B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 1991) at 7.

⁴⁷ See S.J. Anaya, “The Capacity of International Law to Advance Ethnic or Nationality Rights Claims” (1990) 75 *Iowa L. Rev.* 837; and S.J. Anaya, “A Contemporary Definition of the International Norm of Self-Determination” (1993) 3 *Transnational L. & Contemp. Probs.* 131.

⁴⁸ Anderson, *supra* note 46 at 4.

⁴⁹ *Ibid.*

modern institutions such as schools, the media, and government—and it might seem rather Eurocentric to expect them to capitulate.

My point here is not that the defence of minority rights must be premised upon the continuation of traditional ways of life; nor do I accept the factual claim that indigenous peoples never want to modernize. Indeed, whenever indigenous rights are in issue, the inescapable exposure of indigenous peoples to Western society inevitably and profoundly modifies their own societies. To assume that rights are only due to those indigenous peoples who maintain “authentic” ways of life is, thus, in practically all situations, to deny they can be justified at all.⁵⁰ Yet, defending the rights of indigenous peoples on the basis of their status as nations may seem implausible if one has already defined nations in a way which, at least in some instances, ostensibly excludes them if they are not institutionally embodied in the modern sense to which Kymlicka refers.

Thus, while the distinction which Kymlicka draws between national minorities and ethnic groups holds considerable intuitive appeal, the reason for this may have more to do with legitimate expectations or cultural autonomy than affinity between these groups and the modern notion of nationhood.⁵¹ It should be emphasized, however, that Kymlicka’s discussion of the differences between immigrants and indigenous cultures does raise many considerations too often ignored by both supporters and detractors of “multiculturalism.”

Perhaps a more troubling objection to Kymlicka’s argument is the assumption that all national cultures are capable of sustaining individual autonomy. Kymlicka does not see any reason to regret the deep-seated bond people have with their nations because this bond cannot, of itself, promote a politics of the “common good” because such a politics only makes sense at the sub-national level. What it does establish is the appropriate political unit from which a liberal politics can proceed. However, many national groups, far from facilitating the individual agency venerated by liberal theory, act positively to prevent, and sometimes to crush, its exercise. Kymlicka argues that the correct response is “not to dissolve non-liberal nations, but rather to seek to

⁵⁰ Letter of W. Kymlicka to L. McDonald.

⁵¹ Given the rhetorical power of national self-determination, it is understandable that indigenous groups identify their own communities as national ones, and this may be an effective strategy through which some injustices towards these groups can be rectified. My worry here is (a) that some indigenous groups may be denied rights of self-determination if they are required to fit themselves within inappropriate Western categories, and (b) that if cultural rights are justified on the basis of the role they play in structuring our lives and making them meaningful, then the category of “national cultures” is, at least intuitively, under-inclusive.

liberalise them.”⁵² He rightly notes that Western theorists too often forget the West’s own historical development (and, I would add, current practices) when it is assumed that other cultures are inherently illiberal and incapable of change. But examples of illiberal cultures do exist, and an important question is whether or not what makes them distinctive could, in all cases, withstand the process of liberalization. If some cultures are incapable of supporting individual autonomy, then we are owed an explanation of how the good of cultural membership, understood as a prerequisite of individual autonomy, can conceivably be distributed to such cultures.

In *Liberalism, Community and Culture*, Kymlicka expended considerable energy distinguishing the *existence* of a culture from its *character* at a given moment to establish that a context of *choice* is inherent to all cultures. Indeed, this distinction is crucial to the structure of his overall argument for minority rights, namely, that there is inequality with respect to a primary good associated with cultural membership. This argument logically requires an identifiable good that is capable of equitable distribution. It is, therefore, essential that we are told exactly what disadvantage is to be redressed. Culture, as a context of choice, as opposed to culture as a set of concrete practices, was intended to identify more precisely what cultural good was worthy of protection. However, as Denise Réaume has demonstrated, the effect of this distinction is to abstract the value of culture from the concrete practices of a particular cultural community.⁵³ Now, in cases where a national culture is defined by a linguistic, ethnic, or some objective characteristic, it is easy enough to imagine that liberalization will not dissolve the culture, and Kymlicka is right to note this. However, many national cultures are structured on religious doctrine and, in some cases, that doctrine is simply inconsistent with the liberal commitment to individual autonomy.⁵⁴ And for such cultures, liberalism may prove too strong a solvent, as there may not be an objective or core character—a context of choice—which remains constant. Thus, Kymlicka’s view that national identity paradigmatically “does not rest on shared values,”⁵⁵ amounts to little more than a claim that non-liberal nations may not, after all, be nations. As he states, “[t]he national culture provides a

⁵² *Multicultural Citizenship*, *supra* note 1 at 94.

⁵³ Réaume, *supra* note 30 at 126-30.

⁵⁴ L. Green, “Internal Minorities and Their Rights” in J. Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994) 100 at 115.

⁵⁵ *Multicultural Citizenship*, *supra* note 1 at 92.

meaningful context of choice for people, without limiting their ability to question and revise particular values or beliefs.”⁵⁶

Given the importance of the distinction between the existence and character of a culture to Kymlicka’s argument,⁵⁷ it is surprising that, in *Multicultural Citizenship*, Kymlicka mentions it only in passing, and even then to make a different point. In the modern world we have access to cultural meanings from various sources, and some theorists have questioned whether it is sensible to talk of individuated cultures at all. Kymlicka insists that, while cultures should be receptive to outside influence and that cultural identity is dynamic, the incorporation of the cultural materials of other nations should take place through the choices of the members of national minorities themselves. While it is appropriate that cultures change in accordance with their members’ choices, “decisions made by people outside the culture” can threaten the survival of a culture itself.⁵⁸ Thus, changes to a culture which originate from its own members can alter its character but cannot threaten its existence or survival. This thesis, however, seems to be more about the source of legitimate cultural change (or perhaps the value of cultural autonomy or self-government) than the specific value of cultural belonging in which all individuals have an interest. Thus, on the central question of why *particular* cultures are important, Kymlicka remains ambiguous.

Thus, Kymlicka believes that various “self-government rights” that delegate powers to minority groups, for example, federal arrangements, language rights, and some forms of indigenous land rights, are legitimate in that they redress inequalities in the distribution of “the good of cultural membership.”⁵⁹ The reason is to be found in the second limb of Kymlicka’s argument mentioned above. Because cultural membership is a good that people cannot reasonably be expected to do without, it must be protected for members of majority and minority cultures equally.⁶⁰ Of course, at some point, demands for more rights and resources will constitute attempts to dominate other nations which cannot be condoned. Yet there is no way to avoid addressing the issue of inequality between national groups: “[t]he state unavoidably promotes

⁵⁶ *Ibid.* at 92-93.

⁵⁷ See especially Tomasi, *supra* note 37; and Réaume, *supra* note 30.

⁵⁸ *Multicultural Citizenship*, *supra* note 1 at 105.

⁵⁹ *Ibid.* at 113.

⁶⁰ Kymlicka’s argument that access to societal culture is a Rawlsian “primary good” was outlined in Part III(A), above.

certain cultural identities, and thereby disadvantages others.”⁶¹ Viewed in this way, the rights exercised by members of the majority culture to speak their own language in courts and other public institutions is not the result of a neutral government policy but of a positive exercise of a collective right—a right that is denied to national minorities.

B. *The Rights of Ethnic Minorities*

According to Kymlicka, ethnic groups also have a legitimate claim to minority rights. More specifically, they have a claim to “polyethnic rights,” which ensure that they are incorporated into the dominant culture on fair terms, enabling ethnic groups and religious minorities “to express their cultural particularity and pride.”⁶² Not only should common rights of citizenship be more strictly enforced to eliminate all forms of discrimination and prejudice, but some group-specific rights should also be justified. The impossibility of a neutral cultural policy means that legislation, such as that establishing public holidays or government uniforms, should not discriminate against particular ethnic groups. Examples of polyethnic rights include the exemption of Jews from Sunday-closing legislation and the rights of Muslim girls to wear the *chador* in schools. But such polyethnic rights can arguably be contained within an individual right to equality—at least on one understanding of that difficult concept. Indeed, modern equality jurisprudence is attuned to what is termed “impact” or “adverse effect” discrimination, and courts are increasingly willing to impugn laws as discriminatory if the impact falls more harshly on adherents of a particular creed or religion, notwithstanding that the law is ostensibly neutral on its face. As Aristotle taught, equality is neither sameness nor difference; it is both, and there is no way to avoid looking at *all* the relevant contextual considerations.

It may be that equality rights are, in part, grounded by important collective interests. However, so long as the interest at stake is seen to be a wholly individual one, there is no need to step beyond the common rights of citizenship to non-discrimination. And while this understanding might be appropriate where members of cultural groups are denied their equal share of material goods, or positions of privilege,

⁶¹ *Multicultural Citizenship*, *supra* note 1 at 108.

⁶² *Ibid.* at 31.

or power in the wider society,⁶³ it is unclear whether rights to participate in a secure culture of one's own could be justified on this basis. Certainly, Kymlicka is insufficiently clear in establishing whose or what type of interests ground group-specific rights for ethnic groups. No doubt part of the difficulty here is Kymlicka's belief that the notion of *collective* interest is unhelpful in the debate over multiculturalism. This issue can be clarified by examining his understanding of individualism and collective rights.

IV. MORAL INDIVIDUALISM AND COLLECTIVE RIGHTS

In maintaining that his is a *liberal* theory of minority rights, Kymlicka is unambiguous in his commitment to "moral individualism"—the belief that what matters most from the moral point of view is the individual person. However, it should be emphasized that Kymlicka does not accept "ontological individualism," a version of individualism often associated with liberalism. Ontological individualists insist that human beings exhaust our understanding of social reality. Yet, the acceptance of either of these positions in no way entails the other; they are, at least for anyone who accepts that there is a sensible distinction between facts and values, logically independent doctrines.⁶⁴ Thus Kymlicka is entitled to accept one version of individualism while rejecting others. As Allen Buchanan notes, "[l]iberalism in its most plausible forms need not deny that groups or collectivities exist, nor need it maintain that they partake of a lesser degree of reality than individuals, nor need it assert even that all of the properties of groups can be reduced to properties of the individuals that compose them."⁶⁵

At one level, moral individualism is little more than the acceptance of the view that our evaluative judgments are ultimately based upon what contributes to the quality of human life. As such, this position is not a complete moral theory in itself, but is "a necessary

⁶³ Compare I.M. Young, *Justice and the Politics of Difference* (Princeton, N.J.: Princeton University Press, 1990) at 193-98.

⁶⁴ See L. Green, *The Authority of the State* (Oxford: Clarendon, 1988) at 192-93. Although it might be thought to be implausible to separate completely evaluative terms from descriptive meanings as "non-cognitivists" seek to do, it does seem clear that value terms cannot be defined wholly by factual statements: see P. Foot, "Moral Beliefs" (1958-59) 59 *Proc. of Aristotelean Soc.* 83.

⁶⁵ A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Québec* (Boulder, Col.: Westview, 1991) at 8.

condition for the acceptability of moral theories.”⁶⁶ Thus, perhaps what makes Kymlicka’s defence of minority rights distinctively liberal is that they are endorsed only “in so far as they are consistent with respect for the freedom or autonomy of individuals.”⁶⁷ It is therefore fortuitous that most claims for group-differentiated rights are for “external protections” (against the larger society), as opposed to “internal restrictions” (which might undermine the basic civil and political liberties of group members). Employing this distinction, Kymlicka argues that it is a misunderstanding to assume that individual and minority rights will inevitably conflict; “there is,” he writes, “no necessary conflict between external protections and the individual rights of group members.”⁶⁸ Furthermore, the issue is not, as he believes the debate over “collective rights” unhelpfully suggests, whether collective interests are reducible to individual interests.⁶⁹

Kymlicka is probably wise to avoid the issue of whether collectivities have interests which are of ultimate value, since it is difficult even to imagine how any group could be shown to be of *ultimate* moral value. In essence, being of ultimate value means that one’s value is not derivative. Thus, it is open to a defender of minority rights to recognize that cultures are valuable in an intrinsic though derivative way, without assigning them ultimate moral value.⁷⁰ Moreover, as a practical matter, venturing down a path that accepts that groups do have ultimate moral value, “may mire us in the swamps of ontology and mereology.”⁷¹ However, a number of theorists have recently identified another sense in which collective interests may be understood, namely, “interests of individuals that have a collective aspect.”⁷² Many public goods in the economist’s sense—goods that are inexcludable and non-rival in consumption—remain capable of *individualized* consumption. However,

⁶⁶ Raz, *supra* note 44 at 194.

⁶⁷ *Multicultural Citizenship*, *supra* note 1 at 75.

⁶⁸ *Ibid.* at 38.

⁶⁹ *Ibid.* at 47.

⁷⁰ Goods are of intrinsic value when the value is constitutive of, not merely instrumental to, a valuable form of life, whereas ultimate values explain the judgment that a form of life is valuable. See generally, Raz, *supra* note 44 at 177-78 and 199-201. The possibility that cultures are valuable in an intrinsic, though derivative, way is regularly overlooked by critics of collective minority rights. See, for example, C. Kukathas, “Against the Communitarian Republic” (1996) 68 *Austl. Q.* 67; and C. Kukathas “Are There Any Cultural Rights” (1992) 20 *Pol. Theory* 105.

⁷¹ L. Green, “Two Views of Collective Rights” (1991) 4 *Can. J. Law & Jur.* 315 at 324 [hereinafter “Two Views”].

⁷² See, for example, *ibid.* at 321.

some public goods (which Green terms "shared goods") are also distinguished by a deeper level of publicity; "their collective production or enjoyment is part of what constitutes their value."⁷³ If one adopts the view that rights are justified on the basis of particular interests providing a sufficient reason to hold others duty-bound,⁷⁴ this approach opens up a number of promising argumentative strategies for the defence of minority or, more generally, collective rights. It becomes possible to distinguish collective rights from individual rights, not simply by asking who exercises them, but by understanding that the interests which ground the rights are in some significant respect *not* individualizable and thus reducible to individual interests.

Indeed, most of the central minority rights Kymlicka defends, such as language and self-government rights, protect interests that cannot be enjoyed by isolated individuals because they require collective production to make them meaningful. The value of the right to one's own language or to self-government cannot be fully understood by a simple aggregation of the interests of individuals as individuals; that is, their full value to an individual is "unintelligible apart from their reference to the enjoyment of others."⁷⁵ As Denise Réaume notes with respect to language rights, "[n]ot only do use, maintenance, and development of a language make up a collective enterprise, but their value lies in the process of creating and recreating language rather than any end product that might be said to be useful to individuals as individuals."⁷⁶ Understanding and interpreting such rights requires an appreciation of what interest is at stake and why it is important. For example, any right to a fair share of government funding for cultural activities is most plausibly justified on the basis of a collective interest in a shared good, whose value requires collective participation. Furthermore, where the value of an individual's interest in a collective good is at least partly constituted by joint production, there are obvious reasons why participation should not be compelled such that internal restrictions are unlikely to be justified. Thus, rights to collective goods

⁷³ Green, *supra* note 54 at 103.

⁷⁴ For a discussion of the so-called interest theory of rights, see Raz, *supra* note 44, c. 7.

⁷⁵ J. Waldron, "Can Communal Goods Be Human Rights?" [hereinafter "Communal Goods"] in J. Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) 339 at 355 [hereinafter *Liberal Rights*]. One need not deny that individuals have interests in what Green calls "shared goods": *supra* note 73 and accompanying text. The important point is that such interests are insufficient to ground rights, that is, to hold others duty-bound.

⁷⁶ D.G. Réaume, "The Group Right to Linguistic Security: Whose Right, What Duties?" in Baker, ed., *supra* note 54, 118 at 127.

would appropriately focus on external protections and, although an alternative approach to "collective rights" cannot be fully elaborated here, Kymlicka too hastily ignores the notion of collective interest altogether.⁷⁷ In short, minority rights might be based on the identification of a collective interest shared by a cultural group,⁷⁸ and Kymlicka's quick dismissal of the term "collective right" functions to exclude alternative ways of defending minority rights. Anyone familiar with Kymlicka's writings will know that one of his major projects is to respond to claims that liberalism is too individualistic. However, whereas his defence of minority rights is based on an individual's interest in belonging to a societal culture, a defence based on the importance of collective goods directly acknowledges those aspects of culture whose *intrinsic* value cannot be captured by individual interests considered severally, and may thus be a more useful antidote to the charge that liberalism is overly individualistic.⁷⁹

Notwithstanding that some interesting possibilities are ignored, Kymlicka does powerfully challenge the simplistic view that collective and individual rights cannot coexist without undermining each other.⁸⁰

⁷⁷ For the outlines of an approach to collective rights based on the importance of collective interests, see "Two Views," *supra* note 71; D.G. Réaume, "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1; and "Communal Goods," *supra* note 75. It might be objected that this approach to collective rights is not limited to minority collective rights because the majority have equally important collective interests. However, whatever else can be said about rights grounded in particular collective interests of the majority, these interests do not themselves face the threat of majoritarian override. For example, history has shown that, whereas the majority's interest in linguistic security can be left to take care of itself, the linguistic security of minority language users is under constant pressures. Of course, this observation does not mean that majorities may not also have rights based on the importance of collective enterprise. But the need for a particular right to be protected is of central importance to any debate over what (if any) institutional protection it should receive.

⁷⁸ For an interesting beginning based on a collective good of "cultural autonomy," see Réaume, *supra* note 30.

⁷⁹ Too often people erroneously assume that individual rights promote individualism and that collective rights promote collectivism. This is a gross simplification. Not only can individual rights be exercised non-egoistically, but they may also facilitate collective attachments and enterprise. (That the development of liberalism was forged through the historical exigencies of religious (group) conflict is thus more instructive than ironic.) Furthermore, it is also possible that the exercise of rights by some collective agents might promote egoism and conflict—risks commonly associated with individual rights. The point is that, like most concepts in political theory, both collective and individual rights are open to abuse. See generally, "Two Views," *supra* note 71.

⁸⁰ On the prevalence of this view in Canadian constitutional thought, see A. Eisenberg, "The Politics of Individual and Group Difference in Canadian Jurisprudence" (1994) 27 Can. J. Pol. Sc. 3. For a recent assertion of the "pervasive irreconcilability" of collective and individual rights, see A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 47.

Conflict between collective and individual rights is possible, but it is not, as Kymlicka usefully shows, inevitable. Here, however, we are in relatively familiar territory because individual rights commonly conflict with one another, and there is no reason to think that general strategies developed to deal with these conflicts cannot be extended to cases where individual and collective rights do conflict. In dealing with these issues, Kymlicka's distinction between external protections and internal restrictions significantly enriches our vocabulary. But it remains unclear whether his attempt to pin down, once and for all, the value of community—to identify an individualizable good of cultural membership—is successful. Perhaps Kymlicka's inability to do so stems from an inappropriately individualistic outlook: cultures can neither be consumed nor produced by lone individuals, and thus cannot be fully understood by reference to wholly individuated interests.

V. MINORITY RIGHTS AS CONSTITUTIONAL RIGHTS?

The focus of Kymlicka's book is the articulation of principles of justice that should be applied to inter-cultural conflict. He would agree, however, that "a moral framework without an appropriate institutional embodiment is merely a moral vision; and vision, though necessary for right action, is far from sufficient."⁸¹ In such circumstances, questions of institutional design become urgent. Kymlicka openly acknowledges that there are many grey areas and indeterminacies at various stages throughout his argument and believes that these should be resolved *politically*. In an insightful chapter on political representation, he argues that, although there is little that can be said in the abstract, group representation is neither inherently illiberal nor undemocratic and may be a useful mechanism to redress injustice towards minority groups. The drawbacks of group representation are well known,⁸² and there is no democratic way to decide which groups deserve guaranteed representation that does not presuppose that which it seeks to resolve. Perhaps the only way to begin to overcome the problem of the under-representation of disadvantaged groups in our institutions *and* the theoretical and practical objections to group representation is to seriously consider proportional representation where group representation is not predetermined but is, at least partially,

⁸¹ Buchanan, *supra* note 65 at 127.

⁸² See A. Phillips, "Democracy and Difference: Some Problems for Feminist Theory" (1992) 63 Pol. Q. 79.

self-determining.⁸³ Kymlicka's main point seems to be that if historical exclusion from representative bodies seems unlikely to be redressed by less formal mechanisms, such as the internal procedures of political parties, then the only practical and symbolic way to include some groups in the polity may be through group representation. For example, denied self-determination *and* inclusion within Australian democracy, Australia's indigenous peoples, whose interests have historically been systematically abused, would, on Kymlicka's criteria, have a strong case to make for guaranteed political representation. However, if Australian Aboriginal self-government were to be promoted, the case for guaranteed representation on "*federal* bodies which legislate in areas of purely federal jurisdiction from which they are [or would be] exempted" must be weakened.⁸⁴

Unfortunately, Kymlicka's discussion of how minority rights should gain concrete political resolution does not address all of the complex institutional issues that arise. At one stage, he notes that self-government rights are permanent, and that this is "one reason why national minorities seek to have them entrenched in the constitution."⁸⁵ But the issue of what (if any) rights should appear in a constitution is hotly contested. Philosophers sometimes assume that the acceptance of a moral right entails a commitment to a particular legal or constitutional expression of it; however, the move from moral to legal or constitutional rights requires separate argument.⁸⁶ Indeed, the issue of constitutional rights is too often approached as if the choice of which rights should be entrenched is self-evident. This is no longer a credible position—Thomas Jefferson and the United States' Declaration of Independence notwithstanding. It is true, however, that collective minority rights challenge the view, deeply ingrained in the liberal psyche, that the appropriate focus for constitutional law is the relationship between government and individual citizens. Moreover, where collective rights are included in constitutional documents they are often thought to be cause for constitutional embarrassment. For instance, although the Canadian Constitution is routinely thought to recognize some collective

⁸³ See generally A. Lijphart, "Self-Determination Versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems" in D. Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Quebec: Yvon Bais, 1991) 153.

⁸⁴ *Multicultural Citizenship*, *supra* note 1 at 46 [emphasis in original].

⁸⁵ *Ibid.* at 30.

⁸⁶ The institutionalization of any right inevitably brings new costs and risks, and is always mediated by an authoritative intervention which inevitably "puts a distance between the right and the interest it serves": see Raz, *supra* note 44 at 261-62.

rights (most notably language and Aboriginal rights), there are various indications that these are interpreted on sufferance; that is, they are recognized, perhaps, as a necessary evil given the grubby world of *Realpolitik*, or the dark history of injustice towards indigenous peoples who were, before conquest, self-governing communities. Even the Supreme Court of Canada has argued that the collective language rights provisions contained in the *Canadian Charter of Rights and Freedoms*⁸⁷—in contradistinction to individual rights, which are “seminal in nature because they are rooted in principle”—rest only upon “political compromise” and, as such, should be approached with interpretive restraint.⁸⁸ Kymlicka’s argument for minority rights means that such conclusions can no longer be assumed; there is, therefore, an interesting, though often overlooked, question as to whether collective rights are appropriate candidates for constitutional entrenchment.

The objection to the constitutionalization of *any* rights is an important threshold question to a debate about entrenching *collective* rights. Most of the controversy in this area has focused on the democratic legitimacy of judicial review, and the arguments are well known. Although there are many interesting aspects of this debate, I want to suggest that the issue of democratic legitimacy should be treated cautiously because its overemphasis can have debilitating ramifications for the more specific question of whether or not collective rights should be constitutionally entrenched. One of the problems in this area is that the American experience is too readily adopted as a natural frame of reference. Since Alexander Bickel posed his “counter-majoritarian difficulty”—the proposition that judicial review “thwarts the will of representatives of the actual people of the here and now [and] exercises control, not [o]n behalf of the prevailing majority, but against it”⁸⁹—American constitutionalism has sought to reconcile, once and for all, the supposed disjunction between democracy and entrenched constitutional rights by articulating the “true” meaning of democracy. But the entrenchment of rights through a bill of rights, coupled with American-style judicial review, is just one option among many.

⁸⁷ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁸⁸ *Ass'n of Parents for Fairness in Education, Grand Falls District 50 Branch v. Société des Acadiens du Nouveau-Brunswick Inc.*, [1986] 1 S.C.R. 549 at 578, Beetz J. For criticism of this distinction, see L. Green & D.G. Réaume, “Second-Class Rights? Principle and Compromise in the Charter” (1990) 13 *Dalhousie L.J.* 564.

⁸⁹ *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) at 16-17.

Constitutional entrenchment, as I understand it, is the erection of constitutional barriers to ordinary legislative choices.⁹⁰ And while the notion of entrenchment raises some fascinating jurisprudential puzzles, at its base, it simply serves to constrain the governing abilities of majorities. That is, entrenchment binds and guides ordinary law-making by virtue of being beyond amendment itself, through the processes of ordinary legislative change, be it through institutional arrangements, substantive legislative prohibitions, or substantive legislative duties.

Judicial review is, therefore, not a corollary of constitutional entrenchment, though in many circumstances it may be thought to be the only effective, and most practical, constraint available.⁹¹ While entrenched constitutional rights will involve something more than directives urging the legislature to exercise appropriate self-restraint, this does not logically require American-style judicial review where, short of formal constitutional amendment, the court's view will prevail over the legislature's. Two alternatives present themselves. First, the court itself might be reconstituted, just as its traditional methods might be rethought. Indeed, there is no reason why a standing constitutional convention, a specialized constitutional court, or even some type of senate committee (assuming it could maintain a requisite degree of independence from legislative majorities) could not be given the task of reviewing legislation for constitutionality. It is beyond the scope of this article to debate the pros and cons of these arrangements, but it is important to remember that they exist. Second, the centrality assumed by the American experience of judicial review in debates over constitutional rights obscures the flexibility within the notion of entrenchment itself. For example, entrenchment could be coupled with sunset clauses, activated by contingent future events such as reaffirmation via a referendum. More straightforwardly, court decisions may be circumvented through special procedures that fall short of the actual requirements for constitutional amendment. One significant option is a legislative override akin to section 33 of the *Charter*. In short, there is no reason that a single constitution cannot incorporate various *degrees* of entrenchment,⁹² and it is worth remembering that arguments about the democratic credentials of entrenching rights will have different

⁹⁰ The restricted choice may be to carry out a duty requiring a "positive" act, as well as the more familiar case of prohibitions on choosing to legislate in certain areas.

⁹¹ See J. Elster, "Introduction" in J. Elster & R. Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988) 1 at 4.

⁹² It is probably best, however, for such constitutional creativity to be practised with the overall integrity or coherence of the constitution in mind.

justificatory burdens depending on the institutional form that entrenchment may take.⁹³

It is also worth noting that there is a sense in which the democratic objection is part of a larger critique whereby any constraints on majoritarian institutions are seen as subverting democracy. There is something odd about this line of argument because, when its wider implications are spelled out, it not only questions the legitimacy of judicial review, but also brings into doubt the possibility of democratic governance itself. The point is that, no matter how popular rule is established, it must be done through the use of rules—rules that establish what is to count as the “will of the majority.” As Montesquieu well recognized, “[i]n a democracy it is crucial to have rules determining how the right to vote is to be given, who is to exercise this power, who is to receive it, and what matters are to be decided by vote.”⁹⁴ The majority cannot, logically speaking, decide how it is itself to be constituted. To say this does not commit us to judicial review or constitutional rights, but it does mean that debates over the democratic legitimacy of any institution cannot be resolved merely by invoking the will of the people. Nor can we simply expound the meaning of the word “democracy,” as if etymological discoveries or semantic considerations can tell us how to live. In the end, there is no substitute for substantive arguments about how the values underlying our commitment to democracy are likely to be best furthered in a particular society with its particular histories and cultures.

Defenders of constitutional rights are often concerned to show that judicial review is, after all, democratic, and critics expend their energies arguing that judicial review is inherently undemocratic. While there is much to be learned from these encounters, they do not seem to confront the real issue: whether rights-based judicial review will, in a given polity, improve the *overall* functioning of democracy. And it is doubtful that this question can be answered by examining the meaning of democracy at an abstract philosophical level. Consider, for instance, a recent argument made by Jeremy Waldron in the course of a general denunciation of rights-based judicial review.⁹⁵ Beginning from the

⁹³ I am not suggesting that alternative institutional arrangements to American-style judicial review can eliminate the counter-majoritarian difficulty.

⁹⁴ M. Richter, ed., *The Political Theory of Montesquieu* (Cambridge: Cambridge University Press, 1977) at 178-79, quoted in L. Green, Book Review, “Law’s Rule” (1986) 24 *Osgoode Hall L.J.* 1023 at 1041 [hereinafter “Law’s Rule”].

⁹⁵ J. Waldron, “A Right-Based Critique of Constitutional Rights” (1993) 13 *Oxford J. Legal Stud.* 18.

plausible premise that judicial review cannot guarantee that courts will arrive at the “correct” decision about constitutionally entrenched rights, Waldron argues that judicial review is a procedurally defined institution designed to answer a question of legitimacy (*i.e.*, how are decisions about rights to be taken?). Once judicial review has been defined in these terms, it is a short step to compare this procedure for settling disputes over rights with other procedures: “*whatever you say* about your favourite democratic procedures, decision-making on matters of high importance by a small elite that disempowers the people or their elected and accountable representatives is going to score lower than decision-making by the people or their elected and accountable representatives.”⁹⁶ This type of analysis is reminiscent of John Hart Ely’s comment that “we may grant until we’re blue in the face that legislatures aren’t wholly democratic, but that isn’t going to make courts more democratic than legislatures.”⁹⁷ Unfortunately, however, Waldron’s claim is based on the same mistake underlying Ely’s: it draws an irrelevant comparison between courts and legislatures, whereas the important comparison is between legislatures coupled with judicial review and legislatures alone.⁹⁸

Once the simplistic comparison between the judiciary alone and the legislature alone disintegrates, there does not seem to be any plausible justification for failing to undertake a concrete analysis of how democratic values might best be served. This would involve a contextual analysis of the actual functioning of democracy and an assessment of how judicial review would affect democratic principles (which themselves must be defended) given that context. In short, to decide how best to promote democracy, one must examine considerations of why popular rule is legitimate and desirable; whether or not judicial review is good or bad, democratic or undemocratic, can only be assessed

⁹⁶ *Ibid.* at 45. Waldron uses the fact that the United States Supreme Court itself employs a majoritarian procedure to great rhetorical advantage. However, although judicial review does use a majoritarian procedure to settle differences of opinion, it must be acknowledged that it is majoritarianism of a different sort than that which operates in the elected branches of government. Courts are constrained, *inter alia*, by precedent, judicial traditions, the need to publish reasons, and the process of litigation itself. Perhaps these are all loose constraints, but they are different constraints to those facing legislatures. If these differences do not make judicial review qualitatively different to legislation, this must be demonstrated.

⁹⁷ J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980) at 67.

⁹⁸ Green makes this point in relation to Ely’s argument: see “Law’s Rule,” *supra* note 94 at 1040.

through its likely impact (which may not always be known with certainty) on the values and principles that animate democracy itself.

In summary, it is unlikely that there is an *a priori* way to establish whether judicial review is democratically legitimate.⁹⁹ But what does this mean in relation to minority rights? It may be that a particular theory of constitutional rights is strictly related to particular individual rights and that the justificatory strategy cannot sensibly be extended to minority rights. However, if it is correct that, in the end, any proposal to entrench rights constitutionally relies on an analysis of the historical and cultural circumstances of a country, then a case for the constitutionalization of at least some minority rights might be made. Where collective minority rights are in question, the historical conditions and experiences of those minorities may include systematic majoritarian oversight and oppression. This is a particularly powerful consideration militating in favour of constitutionally entrenching those rights. And in some such cases entrenchment may, to be effective, require judicial review. To illustrate, after looking at the historical record in Australia, it might be thought more important to give Aboriginal rights constitutional protection than rights such as freedom of speech or the right to vote. The reason for this is not that Aboriginal rights are necessarily more important or that they should necessarily win out in any conflict with civil and political rights. Rather, their constitutional protection is a response to a legislative record of systematic abuse and an informed gamble that they can be better protected through a constitutional provision.¹⁰⁰ Secondly, where minority rights deal with self-government,

⁹⁹ As R. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989) at 192, notes:

In the absence of a universally best solution [to protecting fundamental rights], specific solutions need to be adapted to the historical conditions and experiences, political culture, and concrete political institutions of a particular country Obviously, then, to make a reasonable decision about the trade-offs [between accepting or rejecting judicial review] requires not only an empirical assessment of the probable consequences of alternative processes in the concrete setting of a particular country, but also a judgment about the relative weight to assign to the democratic process in comparison with other values.

¹⁰⁰ It might be thought that minority groups involved in collective enterprises aimed at securing important shared goods are particularly well adapted to protecting their own rights through coalition-building and interest-group politics. However, although such minority groups may have advantages *vis-à-vis* other more dispersed minorities, they may also continue to face disadvantages in majoritarian politics on account of the same reasons that facilitate any political mobilization that they are able to achieve. The reason for this is that they are likely to remain "safe targets" and "easily targeted": see N.K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (Chicago: University of Chicago Press, 1994) at 223-26. More specifically, not only are majoritarian denials of minority rights able to be well directed, but such action is unlikely to

federal arrangements, or establish the basis on which a national minority is to be included within a society, they do not face any of the familiar democratic objections to constitutionalization because they concern the appropriate units for democratic governance itself. This is probably why Kymlicka mentions the permanence of self-government rights as a reason minorities characteristically press for them to be included in a constitution. There are, no doubt, other normative and institutional considerations to be addressed when evaluating the question of whether minority rights are suitable candidates for inclusion in a constitution. Two conclusions, however, seem clear. First, it is unlikely that minority rights can be excluded from constitutional law on grounds of democratic illegitimacy alone. Second, defenders of minority rights need to examine more carefully the complex questions of institutional design which their arguments raise.

If minority rights become constitutional rights, then the possibility that they will conflict with individual rights is increased. And if individual rights and collective rights are both included in constitutional law, how should these conflicts be resolved? As already discussed, Kymlicka supports minority rights only to the extent that they do not demand "internal restrictions" or set up a system enabling one group to exploit another. In theory this means that minority rights are justified only insofar as minorities accept the principles of liberal autonomy and toleration, which, for Kymlicka, are "two sides of the same coin."¹⁰¹ Taking issue with the "political liberalism" in Rawls's recent work, Kymlicka argues persuasively that what "distinguishes liberal tolerance is precisely its commitment to autonomy—that is, the idea that individuals should be free to assess and potentially revise their existing ends."¹⁰² I cannot here enter the debate over political liberalism, but it does seem misguided to believe, with Rawls, that liberalism can be neutral among all cultural groups in any society. In fact, while political liberalism changes the justificatory strategy, it continues to enforce individual rights.¹⁰³ This, of course, means that the

backfire as members of the majority are unlikely to become involuntarily minority members where that minority is distinguished by the pursuit of a collective enterprise.

¹⁰¹ *Multicultural Citizenship*, *supra* note 1 at 158. Conflicts among individual and collective rights are therefore to be resolved through an analysis of their "internal relation"—a technique that can also be used to deal with conflicts between individual rights. See generally J. Waldron, "Rights in Conflict" in *Liberal Rights*, *supra* note 75, 203.

¹⁰² *Multicultural Citizenship*, *supra* note 1 at 158.

¹⁰³ *Ibid.* at 163-64. In the context of civic education, A. Gutmann has argued that "political liberalism need not, and often does not accommodate more social diversity ... than comprehensive liberalism": "Civic Education and Social Diversity" (1995) 105 *Ethics* 557.

practices of some national minorities which threaten individual rights cannot be accommodated within liberalism. What then is to be done? Here Kymlicka takes an approach that sees illiberal national minorities as being analogous with illiberal states. Any intervention to enforce individual rights will be problematic because it is unclear "what third party (if any) has the authority to intervene in order to force the government to respect those rights."¹⁰⁴ The issue is thus one of legitimacy not justification and, in the cases of foreign states *and* national minorities, "there is little scope for legitimate coercive interference." Relations between national minorities and majorities "should be determined by peaceful negotiation, not force."¹⁰⁵

Much of what Kymlicka says here is persuasive. However, it is worth noting that the analogy he draws between national minorities and foreign countries is not exact because, in the case of national minorities within a larger polity, it is much harder to distinguish clearly two separate jurisdictions. Simply put, members of national minorities have dual citizenship; if membership in a national minority is at least partly ascriptive (*i.e.*, unchosen), then, in granting self-government, the likelihood of internal restrictions is an important moral consideration which must be addressed by the wider society. This is not necessarily a sufficient argument to deny self-determination for national minorities, but it does mean that we need to examine their members' exit rights more closely. And it is worth noting that, if a right to exit a group is to be more than a theoretical possibility, the respect that such a right necessarily affords individual autonomy might, in some cases, threaten the collective right of a minority to adopt its own cultural practices. Thus, at least in cases where the jurisdiction of a national minority is unclear, Kymlicka may be committed to more interference than he admits and, therefore, the problem of conflict requires a more detailed treatment. However, although it is unlikely that Kymlicka can evade the possibility that collective rights will conflict with individual rights, the distinction he draws between "external protections" and "internal restrictions" does, as I noted above, show usefully that collective rights neither always, nor necessarily, conflict with individual rights.

Whatever one makes of Kymlicka's actual arguments for cultural justice, *Multicultural Citizenship* raises many challenging and important questions. The book is meticulously researched and written with Kymlicka's characteristic insight and conviction. The problems are of

¹⁰⁴ *Multicultural Citizenship*, *supra* note 1 at 165.

¹⁰⁵ *Ibid.* at 167.

immense practical significance; indeed, it may be the immensity and difficulty of the problems posed by inter-cultural conflict that have induced many prominent theorists simply to assume them away. Kymlicka is to be commended for placing the value of culture and the rights of minorities firmly on the philosophical and legal agenda for theorists of all persuasions.

