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Identity and Political Theory

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Identity politics is the politics in which people engage when they mobilize on the basis of, and when they define their experiences, their political problems, and their aims in terms of the good of identity-groups. Historically, identity politics grew out of the experience of identity-based oppression: the experience of inequalities in resources and opportunities that people encountered *as members of particular identity groups*. According to the Combahee River Collective, the black feminist lesbian organization that published the famous Combahee River Collective Statement in the late 1970s, “focusing upon our own oppression is embodied in the concept of identity politics. We believe that the most profound and potentially most radical politics come directly out of our own identity. . .”¹ Identity politics is conceptually distinct, then, from a liberal politics organized on the basis of individual interests and preferences.

When political theory treats identity politics, it focuses specifically on *analytic*, *normative* and *political* questions, asking how the state should treat identity groups and/or the claims that people advance in their name. Although the impetus for the political

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1. *Combahee River Collective Statement*, in *FEMINISM IN OUR TIME: THE ESSENTIAL WRITINGS, WORLD WAR II TO THE PRESENT* 175, 180 (Miriam Schneir ed.).

theory debate on identity was the rise of the so-called new social movements of the late twentieth century, the focus of the key thinkers who launched the debate was “cultural minorities,” that is, groups that demand from the majority society what Charles Taylor, following Hegel, termed “recognition.”² Taylor’s thinking about cultural minorities informed his *strong multiculturalist* claim that states should recognize (some) identity-groups, by granting them special rights, privileges, and legal exemptions, with a view to enabling collective goals—for example, preserving the integrity of minority linguistic communities.³ We treat this argument in Part I of our Article. We then move to the *liberal multiculturalist* position, which stresses the importance of recognition for promoting individual freedom and autonomy (Part II), and the *Foucaultian* view, which underscores that identities can limit freedom, and hence that nontrivial political dangers can attend state recognition (Part III).

In the second half of our Article, after assessing the strong multiculturalist, the liberal multiculturalist, and the Foucaultian views (Part IV) we advance an argument against the framing of the identity politics debate in terms of state recognition. States never merely recognize identities, our claim is. Instead, they play a critical role in helping produce and reproduce them, shaping the ways people identify, and the ways they organize and act politically (Part V). The question for political theory, then, is not *whether* states should intervene in identity-constitution, but *how*. States should intervene in identity-construction in democracy-promoting ways, our argument is: specifically, in ways that promote nondomination, by enabling those persons who are affected by identitarian norms, practices, and boundaries to participate effectively in making and re-making them.

I. BEYOND TOLERATION: THE CASE FOR RECOGNIZING IDENTITY

For more than three centuries, the standard liberal answer to questions of identity and difference was *toleration*. To tolerate is “to allow to exist or to be done or practiced without authoritative

2. CHARLES TAYLOR, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25, 25–36 (Amy Gutman ed., 1994); see also *infra* Part I.

3. See, e.g., Taylor, *supra* note 2, at 58–59.

interference or molestation.”⁴ Liberal philosophers from John Locke to J.S. Mill to John Rawls made the case that political communities should tolerate (some set, or some range, of) minority actions and beliefs.⁵ States should delineate clearly a bounded political sphere, by this view, and should refrain from interfering in social practices outside that sphere—practices that include, typically, religious practices, and more generally those shaped by controversial moral and social systems of belief and value. Toleration, by the liberal view, protects the rights of individuals and promotes peaceful coexistence across identitarian divides.⁶

Toward the close of the twentieth century, however, political theorizing about identity and difference took an important turn, as some thinkers began to grapple with claims advanced by nationalists, by feminists, and by participants in the so-called “new social movements.” In his seminal essay, “The Politics of Recognition,” the philosopher Charles Taylor made the case that, very often, liberal toleration is not enough.⁷ Some cultural minorities, Taylor argues,

4. OXFORD ENGLISH DICTIONARY (2d ed. 1991).

5. See generally JOHN LOCKE, A LETTER CONCERNING TOLERATION (James H. Tully ed., Hackett Publishing Co. 1983) (1689); JOHN STUART MILL, ON LIBERTY (Henry Regnery Co. 1955) (1859); JOHN RAWLS, *Justice as Fairness: Political not Metaphysical*, in COLLECTED PAPERS 388 (1999); JOHN RAWLS, POLITICAL LIBERALISM 47–88 (1993).

6. There is an extensive literature on liberal theories of toleration. See, e.g., Ingrid Creppell, *Locke on Toleration: The Transformation of Constraint*, 24 POL. THEORY 200 (1996); David Heyd, *Introduction to TOLERATION: AN ELUSIVE VIRTUE* 3 (David Heyd ed., 1996); Will Kymlicka, *Two Models of Pluralism and Tolerance*, 13 ANALYSE & KRITIK 33–56 (1992); Andrew R. Murphy, *Tolerance, Toleration, and the Liberal Tradition*, 29 POLITY 593 (1997); Samuel Scheffler, *The Appeal of Political Liberalism*, 105 ETHICS 4 (1994); Bernard Williams, *Toleration: An Impossible Virtue?*, in TOLERATION: AN ELUSIVE VIRTUE, *supra* at 18. Several authors have also provided important critiques of toleration as an answer to problems of identity and difference. See, e.g., Wendy Brown, *Reflections on Tolerance in the Age of Identity*, in DEMOCRACY AND VISION: SHELDON WOLIN AND THE VICISSITUDES OF THE POLITICAL (Aryeh Botwinick & William E. Connolly eds., 2001); Kristie M. McClure, *Difference, Diversity, and the Limits of Toleration*, 18 POL. THEORY 361 (1990).

7. Taylor, *supra* note 2. The importance of Taylor’s essay for the identity politics debate in political theory cannot be overstated. Still, it is worth noting that the ideas developed there have a rich history, reaching back at least as far as Hegel and Herder. *Id.* at 26, 30 (mentioning Hegel’s master and slave dialect as an example of philosophy paving the way for recognition today and Herder as influential to the ideal of authenticity). In addition, the contours of Taylor’s view can be seen in Isaiah Berlin’s famous 1958 lecture, *Two Concepts of Liberty*. According to Berlin (who was Taylor’s mentor), “I am what I am as a result of social forces . . . some, perhaps all, of my ideas about myself, in particular my sense of my own moral and social identity, are intelligible only in terms of the social network in which I am . . . an element.”

demand more than noninterference; they demand the affirmative acknowledgment—in his terms, the *recognition*—of their constitutive identities.⁸ This demand, by Taylor's account, is based on the distinctly modern thesis that people's well-being is bound up with the formation and maintenance of authentic identities.⁹ Because people forge their understandings of who they are “dialogically,” that is, because they learn their identities through interactions and exchanges with others, “a person or group of people can suffer real damage, real distortion, if the people or society around them mirror[s] back to them a confining or demeaning or contemptible picture of themselves.”¹⁰ Not just interference, but also *misrecognition* can be a nontrivial harm.

In “The Politics of Recognition,” Taylor moved from this insight to make the case for the accommodation of cultural minorities, such as aboriginal peoples or national minorities like the Canadian Quebecois, by dominant and/or majority communities.¹¹ He made the case, in particular, for the granting of special rights, and/or special privileges or exemptions, designed to promote, not individual freedom, so much as collective ends.¹² Doing so, his claim was, can be crucial to advancing people's well-being, if it protects a collective identity they experience as deeply constitutive of their personal identities.

The principal example Taylor used was that of the proposed Meech amendment to the Canadian Charter of Rights in 1987.¹³ His focus was the “distinct society” clause, which, had the amendment passed, would have permitted the province of Quebec to restrict some of the individual freedoms granted by the Charter to all Canadian

Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 155 (1969) (Isaiah Berlin ed., 1969). Individual status, Berlin argues, is deeply imbricated with social relationships, and in particular with the status of the groups to which individuals belong. *Id.* at 154–62.

8. *See* Taylor, *supra* note 2.

9. *See id.* at 28–32.

10. *Id.* at 25.

11. *See id.* at 51–61.

12. *See id.*

13. *Id.* at 52–53. *See* CANADA, STRENGTHENING THE CANADIAN FEDERATION: THE CONSTITUTION AMENDMENT (1987) (containing the Meech Lake Accord); *see also* 1987 Constitutional Accord (June 3, 1987), *available at* <http://www.solon.org/Constitutions/Canada/English/Proposals/MeechLake.html>.

citizens.¹⁴ These included, for French-speaking parents in Quebec, the freedom to educate children in English language schools. They included, for some business owners, the freedom to conduct their businesses and to print commercial signage in the English language. This case was useful for purposes of Taylor's argument, since it pitted against one another two types of freedoms he claimed moderns might, in principle, value: the freedom of the individual to choose her ends and her actions (to choose whether to educate her child in the language of her minority cultural community, for example, or alternatively in the dominant language of her political society) against the freedom of the collectivity to preserve its traditions and practices (Quebecois linguistic practices, in this instance).

By the conventional view, Taylor argued, granting individuals equal respect requires treating them equally: defining rights uniformly, in other words, and thus enabling each person to choose her aims as well as her actions.¹⁵ But if an important part of "who I am" as an individual is "who we are"—how I identify socially—then my well-being depends, in part, on collective goods. Some of the ends most crucial to my personal well-being are ends I can realize only together with others. The integrity of my culture, the survival of the community that helps define my sense of who I am, affects my well-being more powerfully than does my freedom to make some of the choices assigned by many liberal accounts to the protected private sphere.

This is the principal philosophical claim Taylor advanced in "The Politics of Recognition." To address the normative-political question at the heart of the debate he helped launch—the question of how states should treat identity groups and the claims advanced in their name—Taylor made two key distinctions. He distinguished, first, between equal *dignity* and equal *recognition*, where equal dignity is a product of the "difference blind" treatment exemplified by the politics of rights, and equal recognition is a product of equal respect for group identities, or at least the *presumption* (prior to cross-cultural dialogue and evaluation) that all groups deserve equal

14. Taylor, *supra* note 2, at 52; see also CANADA, STRENGTHENING THE CANADIAN FEDERATION: THE CONSTITUTION AMENDMENT, *supra* note 13.

15. Taylor, *supra* note 2.

respect.¹⁶ He distinguished, second, between what he called “fundamental” rights—“rights to life, liberty, due process, free speech, free practice of religion, and so on” and less basic liberties: liberties that, even if of value, he argued, states sometimes should trade or limit in the interest of promoting equal respect.¹⁷ States should grant their citizens equal respect, in other words, and doing so can require restricting their liberties differentially. In the Quebecois case, Taylor suggested, Canada should have enabled Quebecois national survival, even at the expense of individual freedom of educational choice and the freedom to pursue commercial success by conducting business in English.

This position—call it the *strong multiculturalist* position—posed an important challenge for liberal theories of toleration. Other strong multiculturalists follow Taylor closely. Bikhu Parekh, to cite one prominent example, makes the case that, although liberal political societies should not accommodate *all* minority group practices, they cannot determine in the abstract, as a matter of principle, which should be permitted and which should not. Instead, states should make that determination via an “open-minded intercommunal dialogue aimed at evolving a reasonable consensus.”¹⁸

Liberal understandings of rights and justice, the claim is, are culturally particularistic. It is wrong-headed to assume they are universalistic. Although a given liberal society’s values might, in principle, converge upon “the right values” (if such values, in fact, exist), the dangers that follow from coercive state imposition of falsely universalized norms outweigh those that follow from state accommodation of practices not justified by liberal principles. Thus, according to Parekh, moral truths (if they exist) are more likely to be discovered if “other points of view enjoy sufficient cultural self-

16. *See id.* at 61–73. For a helpful discussion on various multiculturalists’ formulations of equality and inequality, see TARIQ MODOOD, *MULTICULTURALISM* 51–58 (2007).

17. Taylor, *supra* note 2, at 59.

18. Bhikhu Parekh, *Minority Practices and Principles of Toleration*, 30 *INT’L MIGRATION REV.* 251, 261–62 (1996) [hereinafter Parekh, *Minority Practices*]; *see also* BHIKHU PAREKH, *A NEW POLITICS OF IDENTITY: POLITICAL PRINCIPLES FOR AN INTERDEPENDENT WORLD* 89–95 (2008); BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* (2000).

confidence, political power, and opportunity to enter into a serious dialogue with the liberal West.”¹⁹

II. CULTURE AND THE INDIVIDUAL: LIBERAL THEORIES OF RECOGNITION

Skepticism of liberalism’s neutrality is at the center of the strong multiculturalist view. An alternative approach to political theorizing about identity also takes as its starting point the Herderian insight about the importance to individuals of culture and community, but theorizes that importance in terms of promoting specifically *liberal* values. The philosopher most strongly associated with this second approach is Will Kymlicka, who, in his 1989 *Liberalism, Community, and Culture*, makes the case that liberal societies should recognize minority cultural groups, “not because they have some moral status of their own, but because it’s only through having a rich and secure cultural structure that people can become aware . . . of the options available to them, and intelligently examine their value.”²⁰

Kymlicka’s argument, first elaborated in this 1989 book and then developed in a series of later books and articles, is that the liberal tradition articulates two key preconditions for living a good life.²¹ The first, which tracks closely to Taylor’s claims about the importance of cultural survival and recognition, is that people be able to live their lives “from the inside”: to live, that is, in ways that accord with their most deeply held beliefs and their most cherished values.²² The second, however, is that people be able to *question* their

19. Parekh, *Minority Practices*, *supra* note 18, at 256. Here Parekh follows closely Mill’s argument in *On Liberty*. The principal difference between Mill’s view and Parekh’s is the unit of analysis: for Mill, the liberal society should tolerate diverse ways of life *for individuals*, while for Parekh, the liberal society should tolerate diverse ways of life *for cultural groups*.

20. WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* 165 (1989).

21. Kymlicka has authored several works besides *LIBERALISM, COMMUNITY, AND CULTURE* on identity politics and multiculturalism. *See generally* FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA (1998); MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995) [hereinafter KYMLICKA, MULTICULTURAL CITIZENSHIP]; MULTICULTURAL ODYSSEYS: NAVIGATING THE NEW INTERNATIONAL POLITICS OF DIVERSITY (2007); POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP (2001); *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883 (1989); *The Rights of Minority Cultures: a Reply to Kukathas*, 20 POL. THEORY 140–46 (1992).

22. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 21, at 81.

beliefs and their values, and to revise or even reject them if they decide to do so. This second capacity, Kymlicka emphasizes, requires both “awareness of different views about the good life, and also an ability to examine those views intelligently.”²³

To be aware of other ways of life and capable of critical reflection on one’s own, Kymlicka notes, people need educational opportunities.²⁴ They also need liberal freedoms, such as freedom of speech and association.²⁵ In addition, he underscores, they need what he calls a “societal culture”: a culture that provides for its members’ meaning “across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.”²⁶ An individual’s societal culture, the claim is, enables her not only to live “from the inside,” but also, because it makes choices meaningful for her, to live relatively autonomously.²⁷ To choose ends and actions, people need a vocabulary.²⁸ They need access to a “cultural narrative” with which to make sense of the range of choices they encounter. “Cultures are valuable not in and of themselves, but because it is only through having access to a societal culture that people have a range of meaningful options.”²⁹

Culture, Kymlicka claims, is a necessary precondition for liberal autonomy.³⁰ Because people can change societal cultures only at considerable cost, he argues, states should not compel them to do so as the price for living lives autonomously and “from the inside.”³¹ To the contrary, even liberal states, which aim to foster liberal values, often must accommodate and in other ways recognize minority

23. *Id.*

24. *See id.* at 81–82.

25. *See id.*

26. *Id.* at 76. Thus, Taylor’s examples of the Quebecois and aboriginal tribes are, in Kymlicka’s terminology, societal cultures. *Id.* at 79–80. Kymlicka’s claim that belonging to a societal culture is a precondition for living a good life has been subject to a range of persuasive critiques. *See, e.g.*, Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U. MICH. J.L. REFORM 751 (1992) (providing a cosmopolitan critique of this claim).

27. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 21, at 81–83.

28. *Id.* at 83.

29. *Id.*

30. *Id.* at 84.

31. *Id.* at 85.

cultures to ensure that individuals have the continued access to their societal cultures that they need in order to live autonomously.³²

This claim marks a significant departure from Taylor's argument. If Taylor sees the individual's freedom to choose as, at least at times, in conflict with the flourishing of the collectivities with which she identifies, Kymlicka conceives the flourishing of that collectivity as instrumental to promoting individual freedom and choice.³³ To the extent that, and *only* to the extent that it does, his claim is, there is a case to be made for state recognition of social groups. In particular, Kymlicka argues, there is a strong case to be made for granting what he calls "group-differentiated" rights when those rights promote equality between groups *without threatening the autonomy of group members*.³⁴ "External protections"—rights and exemptions that protect minority groups from the dominant society—very often, he suggests, meet this test.³⁵ By contrast, "internal restrictions"—rules that allow groups to place demands upon their members—are more likely to threaten individual autonomy.³⁶ By Kymlicka's view, "what distinguishes a *liberal* theory of minority rights is . . . that it accepts some external protections . . . but is very skeptical of internal restrictions."³⁷

32. *Id.* at 86.

33. Compare Taylor, *supra* note 2, at 60, with KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 21, at 83.

34. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 21, at 87.

35. *Id.* at 35–37.

36. *Id.*

37. *Id.* at 7. Kymlicka distinguishes not only between "internal restrictions" and "external protections," but also among three types of rights, which different types of minority cultural groups demand: self-government rights, polyethnic rights, and special representation rights. *Id.* at 6–7, 26–33. He discusses these in depth in chapter two of MULTICULTURAL CITIZENSHIP. Sketched broadly, his claim is that "national minorities"—territorially concentrated groups that have been coercively incorporated into a larger state—often demand, and often have a legitimate claim to, "various forms of autonomy or self-government to ensure their survival as distinct societies." *Id.* at 10. "Ethnic groups," by contrast, often seek to assimilate, rather than to maintain distinct societies, and often demand and have a legitimate claim to, "polyethnic rights" "to express their cultural particularity and pride without it hampering their success in the economic and political institutions of the dominant society." *Id.* at 10, 31. See generally JACOB T. LEVY, THE MULTICULTURALISM OF FEAR ch. 5 (2000) (containing helpful extension of Kymlicka's classification rights); JEFF SPINNER, THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY, AND NATIONALITY IN THE LIBERAL STATE ch. 2 (1994) (discussing race, ethnicity, and nationality: a typology of identity groups similar to Kymlicka's).

Following Kymlicka, other liberal theorists advance similar claims for state recognition of minority groups or cultures. Recognition, they argue, is necessary, at least in some cases, to promote autonomy and/or freedom. Joseph Raz, for instance, emphasizes that freedom, understood as meaningful choice within a rule-bound context, is dependent upon the social practices people create and re-create in groups.³⁸

But liberal thinkers are not undivided on the political-normative question of whether, and if so why and how, states should recognize minority cultures. Some advance arguments for promoting *the majority liberal culture*, on the grounds that “nation-building” is important for the maintenance of a liberal society. Common identity, their claim is, a sense of solidaristic belonging, and shared language and other practices and traditions are preconditions for successful and stable liberal democratic governance.³⁹

Even those who endorse the liberal multiculturalist position debate which liberal values are most central to the tradition and which are most important for states to promote. They debate, as well, how best to negotiate conflicts or trade-offs among liberal values. Thus for Chandran Kukathas, not autonomy, but *neutrality* and *freedom of association*, are the key values at stake.⁴⁰ Liberal states should remain as neutral as possible vis-à-vis minority cultures, his claim was, while protecting individual freedom of association.⁴¹ States should protect freedom of association, Kukathas underscores, even in those cases in which individuals choose to associate with illiberal groups.⁴² In his words, “No one should be forced to accept

38. Joseph Raz, *Multiculturalism: A Liberal Perspective*, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 170, 175–77 (1994). Raz underscores, as well (with Taylor), that people’s well-being depends upon the flourishing and affirmative recognition of their constitutive identities. *Id.*; see also Taylor, *supra* note 2, at 25–37. He also stresses that shared culture facilitates the formation of deep and lasting interpersonal relationships. Raz, *supra*, at 177.

39. “Liberal nationalists” do not necessarily support the protection of multiple identity groups within a liberal society. In other words, they are not necessarily multiculturalists. See DAVID MILLER, ON NATIONALITY (1995); see also YAEL TAMIR, LIBERAL NATIONALISM (3d prtg. 1995).

40. See Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992); see also CHANDRAN KUKATHAS, THE LIBERAL ARCHIPELAGO (2007).

41. Kukathas, *supra* note 40, at 127.

42. *Id.* at 127.

any particular ideal of the good life”—least of all through the actions of a liberal state.⁴³ Nor, he emphasizes, should liberal states compel minority groups to promote the autonomy of their members.⁴⁴

Kukathas’s argument has been influential. It has received considerable uptake within the political theory debate on identity politics. If liberal states only protect groups and enable group membership in those instances in which doing so promotes autonomy, his central insight is, but fail to do so in those instances in which it undermines autonomy, then they do not remain neutral among conceptions of the good.⁴⁵

At the same time, the claims staked out by Kukathas have been the target of much criticism. Kukathas overestimates the ease with which the members of identity groups can exit those groups, some argue.⁴⁶ In Anne Phillips’s words, identities cannot be “readily put on or taken off.”⁴⁷ They are often imposed by others, rather than voluntarily adopted.⁴⁸ What is more, even when identities are *not* imposed, “taking them off” almost always entails significant cost.⁴⁹ Some people lack desirable exit options.⁵⁰ Some lack the material resources that exit requires. Some simply cannot imagine exiting their identity group.⁵¹ Hence, Brian Barry’s claim that, if a liberal is “someone who holds that there are certain rights against oppression,

43. *Id.* at 108.

44. *Id.* at 122.

45. Commenting on this debate, William Galston distinguishes what he calls “reformation liberalism” (the liberalism of Kukathas), which concerns itself primarily with neutrality and toleration, from “enlightenment liberalism” (the liberalism of Kymlicka), which is concerned to promote a particular vision of the human good, typically autonomy. See William Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516–34 (1995); see also WILLIAM GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* 15–27 (2002).

46. See, e.g., ANNE PHILLIPS, *MULTICULTURALISM WITHOUT CULTURE* 138–50 (2007); Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 *POL. THEORY* 64 (2000).

47. PHILLIPS, *supra* note 46, at 133.

48. *Id.*

49. *Id.* at 144–49.

50. *Id.* at 140–41.

51. *Id.* at 148–50. Several other authors have written about the difficulties of exiting groups. See BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 150–54 (2001); Susan Moller Okin, “*Mistresses of Their Own Destiny*”: *Group Rights, Gender, and Realistic Rights of Exit*, 112 *ETHICS* 205–30 (2002); see also MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* ch. 2 (2000).

exploitation, and injury,” a near-neutral state of the sort Kukathas seems to envision is not, in fact, a liberal state.⁵² To the contrary, such a state undermines the very rights liberals cherish and protect.⁵³

Kukathas’s view is not the only liberal alternative to Kymlicka’s multiculturalism on offer. To cite just one more example, Jacob Levy, following Judith Shklar, has made the case for what he calls the “multiculturalism of fear”: a multiculturalism committed to “preventing political violence, cruelty, and institutional humiliation,” rather than to promoting autonomy or neutrality vis-à-vis particularistic conceptions of the good.⁵⁴ Working to avert the most profound injustices, Levy’s claim is, sometimes requires that states recognize identities and/or that they accommodate minority cultural practices.⁵⁵ Still, Levy sides with Kymlicka, against Taylor, in arguing that groups are not *entitled* to respect or recognition.⁵⁶ Instead, groups deserve state recognition only to the extent that it is necessary to prevent violence and other harms.⁵⁷

Notwithstanding real differences among them, liberal contributors to the political theory debate on identity politics agree with one another (and with strong multiculturalists) that promoting the well-being of individuals sometimes requires states to recognize group difference. At least in some cases, they agree, liberal states should accommodate minority cultures and other identity-groups. The challenge from the liberal perspective, however, is to balance the value to be gained from granting protections, rights, or exemptions to groups—whether in the name of autonomy, neutrality, or the prevention of violence—against the threat groups might pose to the rights, freedoms, and autonomy of their members. Not all of the

52. BARRY, *supra* note 51, at 132.

53. *See id.* at 131–46.

54. LEVY, *supra* note 37, at 16. Levy’s reference is to Judith Shklar’s influential essay “The Liberalism of Fear.” Judith Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 21–38 (Nancy Rosenblum ed., 1989).

55. *See* LEVY, *supra* note 37, at 17.

56. *Id.* at 31–33.

57. *Id.* at 14–15. Identities are not sources of value for individuals, by this view, so much as sources of potential hazards for the larger society. In Levy’s words, “The multiculturalism of fear . . . see[s] ethnic communities as morally important and distinctive, not because of what they provide for individuals, but because of what they risk doing to common social and political life.” *Id.* at 33.

collective aims of identity groups are worthy of accommodation, liberal theorists underscore. Instead, individual rights and freedoms are paramount. Collective ends, their claim is, although worthy of state support when such support is necessary to promote rights and freedoms, rarely, if ever, should override rights and freedoms altogether.

III. SUBJECTIFICATION: THE DARK SIDE OF IDENTITY

If liberal theorists develop their claims in response to Taylor's argument for the recognition of cultural minorities, those theorists typically labeled "poststructuralists" develop theirs often without engaging debates on multicultural accommodation. Not only for this reason, but also due to methodological and stylistic differences, it can be challenging to put this third group of theorists into dialogue with the first two. Still, we will try.

Stated crudely, political theorists like Wendy Brown⁵⁸ and William Connolly,⁵⁹ cultural theorists like Judith Butler,⁶⁰ and legal theorists like Richard Thompson Ford⁶¹ draw on Foucaultian insights about subjectification to highlight the *harms* identities produce.⁶² Collective identities, their claim is—not only those of cultural minorities, but also those of the racial, ethnic, gendered, sexual, and other groups that stand at the center of identity politics—exclude at their boundaries, and internally, they normalize. What is more, working together, the *universe* of recognized identities defines what counts as intelligible ways of living and being, thus rendering unintelligible those who fall within no identity-category. For people who conform, identities serve as mechanisms of power that constrain

58. See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995).

59. See WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* 1–15 (1991).

60. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 171–77 (1999).

61. See RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 1–21, 36–38 (2005).

62. For Foucault, "subjectification" signals a process by which a human being is made into, and actively participates in making herself into, a subject. See MICHEL FOUCAULT, *The Subject and Power: Afterward* to HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT BEYOND STRUCTURALISM AND HERMENEUTICS* 208 (2d ed. 1983).

freedom. For people who do not, they are mechanisms of power that legitimize violence and coercion.

Of those who contribute to this third line of political theorizing about identity, William Connolly is the most explicit about its ontological presuppositions. Against strong multiculturalists, who assume that recognizing authentic identities promotes well-being, and against liberal multiculturalists who assume that fostering practices of autonomy, or promoting state neutrality vis-à-vis conceptions of the good, does the same, Connolly makes the case for regarding *all* identitarian practices as “ambiguous goods.”⁶³ Humans need identity, he agrees with Taylor and other multiculturalists.⁶⁴ Yet it may be the case, he underscores, that they do not fit naturally and perfectly into *any* actual or, for that matter, any conceivable identity-category. If so, then every identity, every form of subjectivity—not excluding that of the modern, autonomous self—creates “others” whose exclusion and/or whose normalization it legitimizes. In Connolly’s words, “If humans are not predesigned, and if they therefore are ill suited to fit neatly into any particular social form, then any set of enabling commonalities is likely to contain corollary injuries, cruelties, subjugations, concealments, and restrictions. . . .”⁶⁵

Consider, again, Charles Taylor’s insight that, for moderns, “misrecognition” can be an important harm.⁶⁶ Connolly and other theorists in this third group might respond by arguing that pressure to conform to naturalized and other deeply entrenched identities constitutes a separate, and a no less significant, harm. Such pressure harms, first of all, people who do not perform their ascribed identities well: people who fail to conform to identitarian norms, and as a result, are excluded or marginalized or otherwise sanctioned. Richard Ford illustrates with the example of a “strong and assertive woman” who fails to perform well her gendered role on the dance floor.⁶⁷

She will be encouraged by dance instructors, parents, potential partners, and friends to conform to the female role: [to] learn to

63. CONNOLLY, *supra* note 59, at 98.

64. *See id.* at 87–92.

65. *Id.* at 93.

66. *See supra* notes 11–17 and accompanying text.

67. FORD, *supra* note 61, at 63.

accept the guidance of the male, [and to] develop grace at the expense of strength. If she does not conform, her friends will sanction her by telling her that she could get a date easily if she were a bit “nicer” or “more feminine.” Men will silently punish her by refusing to ask her to dance. If she wants to dance, she will conform.⁶⁸

Second, pressure to conform to collective identities harms those who *do* fit, theorists writing in this tradition emphasize—or rather, those who *seem*, based on their behavior and observable patterns of action, *as if* they fit. It harms those people, that is, who live their lives more or less as established identities prescribe. Imagine a woman who, unlike the woman in Ford’s example, performs her gender identity in an exemplary fashion. She exhibits “niceness” and grace and femininity. She fails to develop her strength, or at least she hides it. She is rarely, if ever assertive. This woman is not obviously better off, the claim is, than the woman who refuses her gendered role. Granted, the conforming behavior wins her social approbation, along with the rewards that accompany a good performance. But still, the cost is nontrivial. “Normalization”—discipline, that is (including self-discipline), which aims at conformity to social norms—is an important loss of freedom.⁶⁹ Conformity to collective identities damages that in the self that is resistant to definitions of “normal individuality” and/or “harmonious community.”⁷⁰

Third and finally, pressure to conform to collective identities harms those who do not fit identity categories at all. Judith Butler’s autobiographical illustration of this third point is worth quoting at length:

I grew up understanding something of the violence of gender norms: an uncle incarcerated for his anatomically anomalous body, deprived of family and friends, living out his days in an “institute” in the Kansas prairies; gay cousins forced to leave their homes because of their sexuality, real and imagined; my

68. *Id.*

69. See CONNOLLY, *supra* note 59, at 34–35.

70. *Id.* at 31.

own tempestuous coming out at the age of 16; and a subsequent adult landscape of lost jobs, lovers, and homes.⁷¹

Constructed norms defining the identities female/feminine and male/masculine fuel violence, not only to those who perform their identities poorly (and those who perform them well), but also to those—here gays, the intersexed—whom norms define *out of* constructed categories altogether.

Social actors construct identities, by this third view. The identities they construct never neatly fit the human beings they claim to describe. Still, people essentialize identity. They experience it as the root *cause* of traits, behaviors, dispositions, and desires: a deep truth about the self, rather than a set of norms and standards that might be otherwise. This essentialization depoliticizes identity. In Wendy Brown's words, "'differences' that are the effects of social power are neutralized through their articulation as attributes."⁷² Hence, on balance, state recognition of identities does not promote well-being and freedom. It does not prevent violence and cruelty. Instead, it exacerbates normalization and coercive subjectification. What is worse, recognition lends the authority of the state to those who police identity. According to Brown:

While the effort to replace liberalism's abstract formulation of equality with legal recognition of injurious social stratifications is understandable, what such arguments do not query is whether legal "protection" for a certain injury-forming identity discursively entrenches the injury-identity connection it denounces.⁷³

"Might such protection codify within the law," Brown asks, rhetorically, "the very powerlessness it aims to redress? Might it discursively collude with the conversion of attribute into identity, of a historical effect of power into a presumed cause of victimization?"⁷⁴ In "recognizing" identity, in fighting for identity's affirmative acknowledgment by agents of the state, the worry is we risk inviting

71. BUTLER, *supra* note 60, at xix.

72. BROWN, *supra* note 58, at 66.

73. *Id.* at 21.

74. *Id.*

the construction of a “plastic cage,” which “reproduces and further regulates” the very subjects it claims to protect, while remaining (unlike Weber’s “iron cage”) “quite transparent to the ordinary eye.”⁷⁵

Hence, the poststructuralist emphasis on what many argue is the politically urgent and potentially liberating task of *destabilizing* identities: drawing attention to their constructedness and fluidity, and opening up possibilities for new ways of living and being. Foucault urged not the recognition but the “refusal” of identity.⁷⁶ Many contributors to this third strand of theorizing about identity politics view his archaeological and genealogical methods as key means to that end.⁷⁷ Many advocate as well the promotion of agonistic engagement, or contestation, among constructed identities.⁷⁸ The value of new social movements, by their view, is less the securing of recognition for (authentic or autonomy-promoting) identities, than the unsettling of prevailing definitions of “who we are.”

IV. TAKING STOCK

In the years since Kymlicka and Taylor first elaborated their normative theories of the recognition of identity, and since Foucault and others developed accounts of identity as subjectification, critics have challenged each of these approaches. One important critique of strong multiculturalism emphasizes that recognition is always recognition of those who hold power within a particular group or

75. *Id.* at 28; see also MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 180–83 (Talcott Parsons trans., 2000) (1930).

76. See MICHEL FOUCAULT, *The Ethics of the Concern for Self as a Practice of Freedom*, in *ETHICS: SUBJECTIVITY AND TRUTH* 281 (Paul Rabinow ed., Robert Hurkey trans., 1997).

77. They urge, in other words, the analysis of how extant identities came to be, and also the structure of their conditions of possibility. See BROWN, *supra* note 58, at ch. 5; MICHEL FOUCAULT, *ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith, trans., 1972); Michel Foucault, *Nietzsche, Genealogy, History*, in *THE FOUCAULT READER* 76 (Paul Rabinow ed., 1984).

78. See, e.g., CONNOLLY, *supra* note 59, at 91; CHANTAL MOUFFE, *THE DEMOCRATIC PARADOX* (2000); James Tully, *The Agonic Freedom of Citizens*, 28 *ECON. & SOC'Y* 161 (1999); James Tully, *The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy*, 65 *MOD. L. REV.* 204 (2002); SHELDON WOLIN, *Fugitive Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 31 (Seyla Benhabib ed., 1996).

community. Rarely, if ever, is there a single, consensually agreed-upon understanding of *the* values or *the* traditions of a national minority or another marginalized group. Instead, there are typically multiple accounts—accounts that diverge from, and sometimes conflict with, one another. When political theorists overlook this internal diversity—when they fail to attend to the relations of power that structure minority groups—their recommendations can have perverse, if unintended, consequences. The politics of recognition, critics worry, can exacerbate the hierarchies internal to marginalized groups, rendering women, sexual minorities, and others who are subject to what Cathy Cohen has called “secondary marginalization” *more* vulnerable to the dominant members of their groups.⁷⁹

Liberal theorists of multicultural accommodation sometimes claim to circumvent this difficulty through their emphasis on the rights and freedoms of individuals.⁸⁰ But critics of the liberal multiculturalist approach stress that not all groups, and certainly not all “societal cultures,” enable autonomy. Many are patriarchal. Many are racist. Many are heterosexist and/or otherwise oppressive. Many, including many that are deeply constitutive of their members’ personal identities, make remarkably bad candidates for “contexts of choice.”

Ayelet Shachar illustrates with the case of the Santa Clara Pueblo Indians, who deny membership to children whose fathers are not tribal members, even if their mothers are, and even if they were raised on the reservation as full participants in tribal life.⁸¹ This exclusion from membership translates into exclusion from important tribal benefits and services, including medical care, schooling, and housing assistance. Still, Shachar notes, Kymlicka endorses the U.S. Supreme Court’s decision to refrain from striking down these tribal

79. That is, marginalization *within* a marginalized group. CATHY COHEN, THE BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS 27 (1999); *see also* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 2–3 (2001); K. Anthony Appiah, Identity, Authenticity, Survival: *Multicultural Societies and Social Reproduction*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 149 (Amy Gutmann ed., 1994); Susan Moller Okin, *Is Multiculturalism Bad For Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? (Josh Cohen et al. eds., 1999).

80. *See supra* notes 20–45 and accompanying text.

81. SHACHAR, *supra* note 79, at 18–20.

membership rules.⁸² This case, she argues, illustrates the limits of the distinction between protections and restrictions. Protecting minority groups from impositions by the dominant and/or the majority culture often enables those who have power within groups to impose restrictions upon weak and vulnerable group members.

Complaints have been leveled, as well, at the third, Foucaultian approach to theorizing identity. The most familiar is that it fails to distinguish better from worse forms of identification, and more generally to articulate a constructive (as opposed to a purely critical) normative vision.⁸³ Even if all identities subject, critics argue, all are not *reducible to* subjection. Nor are all identities equivalent in the ways in which, and the degrees to which, they subordinate. Gendered identities in patriarchal societal cultures, for example, are not equivalent to the identities subjects form as members of feminist, gay rights, and other progressive social groups.⁸⁴ Critics claim the refusal to spell out normative criteria for distinguishing the former from the latter renders the Foucaultian approach of limited value. Martha Nussbaum, for instance, in her vitriolic critique of Judith Butler, avers: “It is one thing to say that we should be humble about our universal norms, and willing to learn from the experience of oppressed people. It is quite another thing to say we don’t need any norms at all.”⁸⁵

These critiques point to important weaknesses in each of the approaches surveyed above. Because they have been advanced persuasively by others, however, we will not rehearse them here. Instead, we want to highlight what strike us as two broad points of agreement among the approaches: agreement about the benefits of collective identification and about its burdens. Keeping these in sight—and keeping in mind the critiques of the strong

82. *Id.* at 31; see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 21, at 165; SHACHAR, *supra* note 79, at 31.

83. See, e.g., Nancy Fraser, *Foucault on Modern Power: Empirical Insights and Normative Confusions*, 3 PRAXIS INT’L 272 (1981); Michael Walzer, *The Politics of Michel Foucault*, 30 DISSENT 481 (1983).

84. See, e.g., AMY ALLEN, THE POLITICS OF OUR SELVES: POWER, AUTONOMY, AND GENDER IN CONTEMPORARY CRITICAL THEORY chs. 2–3 (2008) (containing a largely sympathetic critique of Foucault).

85. Martha C. Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 1999, at 37, 42.

multiculturalist, the liberal multiculturalist, and the Foucaultian positions—in our concluding Parts, we want to sketch an alternative. A *constructivist* and *democratic* approach, our claim is, can attend to the practices and relationships of oppression that were the point of departure for identity politics. It can attend to relations of power, not only among but also within groups, and it can do so while specifically addressing the normative-political question of the role the state should play in identity politics.

A. *Identity's Benefits*

As emphasized by Taylor, because a nontrivial part of what people experience as their good is *collective* in constitution, individuals can suffer real harm from threats to the flourishing or survival of the collectivities with which they identify.⁸⁶ People can be significantly harmed by the loss of social networks and of the relationships and solidarities they forge through shared practices, shared struggles, and other shared experiences. People can be harmed, not only by threats to groups that constitute “cultural minorities,” but also by threats to identity-groups constructed through acts of oppression. Consider the experience of black Americans displaced by Urban Renewal, an experience the clinical psychologist Mindy Thompson Fullilove analogizes to “root shock.”⁸⁷ Although the black ghetto was forged through acts of public and private coercion, Fullilove’s claim is, its destruction occasioned a traumatic reaction due to the loss of what she calls an “emotional ecosystem.”⁸⁸ Clearly, one need not think blacks should be denied the freedom to exit majority-black communities, with a view to promoting the survival of something called “black culture,” in order to appreciate the very real damage done by the U.S. state policy of “slum clearance.”⁸⁹

86. See *supra* notes 12–15 and accompanying text.

87. See MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (2004).

88. *Id.* at 11–17.

89. Many criticized urban renewal policy at an early stage. See, e.g., JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, 39 *COMMENTARY* 29 (1965).

Liberal theorists of recognition agree. They emphasize that, given that people value connection to others through identity, and given that nontrivial costs attend to surrendering those connections, it is unjust for members of dominant groups to compel minorities to bear that cost. One need not essentialize identity—one need not assume identity to be fixed and unchanging—to appreciate the injustice of requiring some to disavow their collective identifications and their solidaristic attachments to particular others as the price for full membership in their political societies.⁹⁰

Even Foucaultians accept this claim—or at least some accept it, up to a point. Identity is an *ambiguous* good, William Connolly argues.⁹¹ Still, it is an ambiguous *good*. Identity is instrumental to a politics that presses for the inclusion of the excluded, as well as to a social life that meets people’s felt need for solidaristic relationships and particularistic attachments. For these reasons, it is often crucial for the marginalized to gain recognition for their delegitimized identities. Judith Butler, for instance, suggests this is the case for sexual minorities; that “gaining recognition for [their] status. . . [is] a necessity for survival.”⁹²

B. Identity’s Burdens

Still, because identities constrain freedom—because they define “others” whose exclusion they can promote and at the same time legitimize—“the mobilization of identity categories for the purposes of politicization always remains threatened by the prospect of identity becoming an instrument of the power one opposes.”⁹³ Hence the Foucaultian emphasis on genealogizing and more generally on “refusing” identity, rather than urging states to recognize it via group rights, accommodations for minority cultures, or “external” protections. As our discussion in Part III suggests, the Foucaultian focus is the *cost* of identification: its burdens, more so than its benefits.

90. See *supra* notes 94–97 and accompanying text.

91. See CONNOLLY, *supra* note 59.

92. BUTLER, *supra* note 70, at xxvi.

93. *Id.*

What is worth underscoring, however, is that neither strong multiculturalists nor liberal theorists of recognition quarrel with the claim that, very often, collective identities have costs. To the contrary, both sets of theorists acknowledge that groups exclude, and that groups often limit the freedom of members. Both acknowledge that some forms of recognition, because they give those who are dominant *within* groups power over those who are subordinate, can promote coercion and enable the restriction of freedom. It is this worry that drives Taylor's insistence that states protect minority group members' "fundamental rights," such as their rights to *habeas corpus*.⁹⁴ It is this worry that informs Kymlicka's claim that states should only rarely allow "internal restrictions" by groups.⁹⁵ Practices of restricting religious freedom, or of discriminating against female group members, Kymlicka writes, "are inconsistent with any system of minority rights that appeals to individual freedom or personal autonomy."⁹⁶ They "cannot be justified or defended," he continues, "within a liberal conception of minority rights."⁹⁷

The principal differences between the multiculturalist and the Foucaultian positions are, first, their emphases—multiculturalists stress the benefits of identification, Foucaultians the burdens—and, second, their assumptions about the likely effects of state recognition. Multiculturalists underscore that well-being is closely bound up with a sense of collective belonging. The costs of identity, they suggest, are well worth the goods identity provides. As long as "fundamental rights" are protected, as long as protections are "external," rather than restrictions on important rights and freedoms, people gain more than they lose when states recognize identity-constituting collectivities. The Foucaultian claim, by contrast, is that identity's substantial harms outweigh its benefits. Even those identities which liberals view as *entirely* beneficial—namely, the identities of autonomous, rational modern selves—subject, and they discipline human beings. Because people never perfectly fit any identity-category, and because efforts to make them fit are a kind of violence, state recognition, even when

94. See *supra* notes 12–15 and accompanying text.

95. See *supra* notes 36–37 and accompanying text.

96. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 21, at 153.

97. *Id.*

it promotes solidaristic feelings of trust and belonging, always also fosters exclusion and nontrivial forms of unfreedom.

V. IDENTITY-CONSTRUCTION AND THE STATE

One might assume, based on the above, that the debate on identity politics in political theory has come to an impasse. Most theorists—from the strong multiculturalist to the Foucaultian—agree identities can enable collective mobilization, foster solidarity, and promote other important political goods. At the same time, most agree they can fuel aggression toward their “others” and severely constrain freedom. One might therefore conclude that the question “How should states treat identity?” turns wholly on the empirical matter of whether the benefits of recognition in a given instance outweigh its harms; that there is no work to be done at the level of theory, in other words, that the normative-political question of the proper state response to identity politics can be answered only through case-by-case cost-benefit analyses.

This is not our view. Political theory, we want to suggest in the final sections of this Article, can and should continue to contribute to work on the role of the state in identity politics. Indeed, some of the most important work on this topic in recent years has been by theorists who are beginning to shift the terms of the debate.⁹⁸ To frame identity politics’ normative-political problem in terms of state “recognition”—in terms of its benefits *or* its burdens—is a mistake, their claim is. Although Taylor’s work in the early 1990s performed the critically important task of drawing attention to the limits of toleration and initiating a conversation about other state responses to identity politics, his language—indeed, the very logic of—“recognition” misleads. The term “recognition,” along with much of the debate about identity that has been conducted using that term, implies, erroneously, that states merely *react to*—that they “acknowledge the existence or truth of” (or, alternatively, *refuse to*

98. These theorists comprise not a fourth group or category, so much as a set that cuts across the divisions sketched above. See generally COURTNEY JUNG, THE MORAL FORCE OF INDIGENOUS POLITICS: CRITICAL LIBERALISM AND THE ZAPATISTAS (2008); Phillips, *supra* note 45; SARAH SONG, JUSTICE, GENDER, AND THE POLITICS OF MULTICULTURALISM (2007).

acknowledge)—racial, national, ethnic, gendered, and other collective identities.⁹⁹

But states never simply “recognize” (or refuse to recognize) identities. Instead, they play a crucial role in producing and reproducing them. States strongly shape national identities, for example, through citizenship law and family law.¹⁰⁰ States strongly shape racial, ethnic, and gender identities, as well. They institutionalize them in legal norms and in policies, for example, in census categories, and in the case of race in the United States, in racial zoning laws and explicitly racist federal housing policies.¹⁰¹ States vest some, but not other, identities with public significance by distributing resources and opportunities along group lines.¹⁰² They thus influence how citizens identify, and incentivize people to organize and mobilize *as members of particular groups*.

States construct identities, in other words, even *before* people advance political claims in their names, shaping group boundaries, group norms, and group practices, through laws, policies, and political institutions. What is more, when people press claims in the name of identity, state responses to those claims never simply “acknowledge [identity’s] existence or truth” (or fail to). Instead, they actively produce and reproduce identity. Recall Charles Taylor’s example of the proposed Meech amendment to the Canadian constitution. Even Taylor would acknowledge that the Canadian state *changes* Quebecois culture when it gives French-speaking parents the right to educate their children in English.¹⁰³ Indeed, the force of the example is his claim that the state changes culture when it acts to transform a linguistic tradition that comprises an important element of a particular identity. We want to underscore, however, that even if the Meech amendment had passed—if the Canadian state had legally enabled the Quebecois to restrict parents’ educational choices—state actors *still* would have shaped Quebecois culture. They would not (as Taylor suggests) merely have enabled the survival of authentic

99. OXFORD ENGLISH DICTIONARY (2d ed. 1989).

100. JACQUELINE STEVENS, *REPRODUCING THE STATE* (1999).

101. Clarissa Hayward, *The Difference States Make: Democracy, Identity, and the American City*, 97 AM. POL. SCI. REV. 501 (2003).

102. JUNG, *supra* note 97, at 19.

103. *See supra* notes 13–17 and accompanying text.

traditions and practices. Instead, they would have lent the coercive force of the state to those who would perpetuate the linguistic status quo, helping them prevail against those who would challenge and change what it means to be Quebecois.

Similarly, when the U.S. enabled the Santa Clara Pueblos to exclude from membership the children of women who marry outside the tribe, it lent the coercive force of the state to those who favored a particular set of membership rules. It helped some tribal members prevail in their struggle against others—others who challenged, and who hoped to change, those rules. As Sarah Song shows in her insightful analysis of this case, the U.S. shaped Pueblo identity, and it did so in ways that reproduced and reinforced the patriarchal norms of the larger society.¹⁰⁴

To be clear, our claim is not that a different outcome in the *Martinez* case would have constituted state non-intervention. To the contrary, we want to underscore that identity groups—those collectivities which people experience as deeply constitutive of their personal identities—rarely, if ever, define themselves independently and consensually. Members of groups—along with those non-members who vie for membership—struggle and negotiate with one another to create and re-create group boundaries and group norms. They do so in interaction with other groups, and in interaction with the major institutions of their political society. In Song’s words, “cultures are not entities that exist prior to social and political interactions but rather are created in and through them.”¹⁰⁵

Song characterizes the latter claim as a “modest” constructivist view. This view does not imply, she writes, “that cultures are always radically heterogenous and contested.”¹⁰⁶ We suspect most theorists writing on identity—strong multiculturalists, liberal multiculturalists, and Foucaultians alike—would accept as noncontroversial this modest constructivism. Still, the constructed and contested nature of identity is obscured when the normative-political debate is framed in terms of “recognition.” A case in point is Kymlicka’s reasoning with respect to *Martinez*. He endorses the U.S. Supreme Court decision,

104. SONG, *supra* note 98.

105. *Id.* at 39.

106. *Id.* at 38.

not on the grounds that gender-biased membership rules are good rules.¹⁰⁷ (Recall, he specifically cites these rules as an instance of “internal restriction”—an identity harm, to use the language introduced in Part IV). Instead, Kymlicka endorses the decision on the grounds that it refrains from “*interven[ing] forcibly* to compel the Pueblo council to respect [female members’] rights.”¹⁰⁸ He supports state accommodation of the Santa Clara Pueblos, in other words, because he worries state “intervention” is coercive.

The trouble with his reasoning (and with similar reasoning by others) is that accommodation *is* a form of intervention—a form that enables and promotes coercion. When state actors enable some tribal members to discriminate against others, when they enforce gender-biased property rights (or any property rights, for that matter), when they distribute educational opportunities and basic resources, such as housing and medical care and education, in ways that reproduce and reinforce some particular set of norms—*any* particular set of norms—they intervene in, and they help to shape, identity. At the same time, they coerce those who contest the particular norms they enforce.

Kymlicka’s reasoning would be sound, of course, if the answer to the question, “Who are the Santa Clara Pueblos?” were settled and stable—if there existed some obvious and unproblematic definition of the tribe’s (authentic) traditions and of its (true) boundaries. The very fact that this case arose, however, is evidence there is not. Any conceivable state action, including accommodation and other forms of recognition, contributes to identity-construction. It does not simply “acknowledge [identity’s] existence or truth,” but rather *makes identity*, in some particular, contestable form.

107. See *supra* notes 95–97 and accompanying text.

108. KYMLICKA, MULTICULTURAL CITIZENSHIP, *supra* note 21, at 165 (emphasis added). Kymlicka goes on to analogize liberal states’ “imposition” on cultural minorities to colonial efforts to export liberal principles to nonliberal states. *Id.* at 166. Of course, if the question at hand were whether the Santa Clara Pueblo tribe ought to use sexually discriminatory membership rules, as Kymlicka makes clear, his answer would be a resounding “no.” Still, he argues, the state should not intervene to “impose liberalism.” “[W]hat third party,” he asks, rhetorically, “has the authority to intervene forcibly to compel the Pueblo council to respect [members’] rights?” *Id.* at 165.

VI. DEMOCRATIZING IDENTITY

Among the important contributions Foucaultians have made to the identity debate in political theory is to draw attention to the danger inherent in seeking state solutions to identity's harms. In Wendy Brown's words, the turn to the state "casts the law in particular and the state more generally as neutral arbiters of injury rather than as themselves invested with the power to injure. . . . [T]he effort to 'outlaw' social injury," "powerfully legitimizes law and the state as appropriate protectors against injury and casts injured individuals as needing such protectors"¹⁰⁹

The Foucaultian alternative, however—the turn to genealogizing, and more generally to “refusing” identity—remains unsatisfying, for obvious reasons. If states shape and reshape identity, if states never simply acknowledge, but always also help define “who we are,” then theorists must ask *how* states do so, and how they might do so differently. As argued above, states distribute resources and opportunities and define rewards and sanctions in ways that affect how people are able and how they are motivated to perform identity. For this reason, the injunction, “*Perform identity differently!*” often rings hollow. Judith Butler famously celebrates drag as a form of resistance to dominant definitions of sex/gender.¹¹⁰ But such a performance, by itself, is insufficient to challenge the institutions that incentivize people to perform their identities as prescribed. Recall Richard Ford's example of the rules and the reward structure of Argentine tango. Although Ford does not discuss them, the gay milongas of Buenos Aires, where women often lead (including women who self-identify as “straight”), at least partly destabilize the gendered norms of the dance. Still, it would be naïve to regard gay milongeros as mounting an effective political challenge to patriarchal and heterosexist normative structures.

Nor are contestatory identity-performances even minimally effective in some political contexts. What is the analogue of the drag performance for those excluded from membership in the Santa Clara Pueblo tribe? Should the mother whose children are denied member

109. Brown, *supra* note 6, at 27.

110. BUTLER, *supra* note 70, at 174–80.

status resist by “performing” their inclusion? Should she perform their provision with healthcare, and with housing and schooling, as well? One need only pose questions such as these to appreciate the limits of an anti-institutional response.

States are not, as Wendy Brown reminds us, “neutral arbiters of injury.”¹¹¹ They cannot “recognize” identity without helping construct it. Nor can they construct identity in ways that are noncontroversial. But that does not mean every conceivable state construction of identity is equivalent, or that political theorists should refuse to address the question, “How should states construct identity?” If state actors necessarily make and remake identity, we want to argue in this final Part, they should do so in ways that render identitarian norms, boundaries, and practices as responsive as possible to those they affect. To construct identity democratically is a matter, less of “recognizing” it, than promoting *nondomination*, by which we mean that state of power relations in which all participants are enabled, and equally so, to challenge and change, or alternatively to defend, their terms.¹¹²

Nondomination in identity politics has at least three important dimensions. First, in every multicultural and socially stratified political society, it has an *inter-group* dimension, since in such societies relations of power tend to follow group lines. Second, whenever group boundaries are controversial, whenever group practices are internally contested and relations of power within groups hierarchical, nondomination has an *intra-group* dimension. Third and finally, nondomination has a *systemic* dimension, since people are unfree when subjected to social, yet impersonal forms of power, such as the power of norms that are deeply entrenched (for instance, because naturalized or sacralized).¹¹³

111. BROWN, *supra* note 58; *see also supra* notes 58–75 and accompanying text.

112. PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 66–67 (1997) (using traditional republican definition of non-domination as meaning a freedom everyone should have and is “the absence of domination in the presence of other people, not the absence gained by isolation”). As should become clear in the discussion that follows, our principal point of departure from Pettit is our emphasis on systemic domination.

113. This third dimension of domination is the dimension to which Foucaultians direct our attention. Returning to Richard Ford’s example, if *everyone* were to accept the gendered norms of Argentine tango—if these were wholly uncontested, such that those who identify as “men” and those who identify as “women” all were to accept norms of masculinity and femininity—

States should construct and reconstruct identity, our view is, with a view to promoting inter-group, intra-group, and systemic nondomination. In some cases, promoting nondomination along the first (inter-group) dimension may require the very political institutions multiculturalists recommend. It may require various forms of group rights, for instance, or even relatively broad powers of group self-government. The aim, however, is not to protect and preserve “cultures,” but to reverse significant identity-based forms of domination.

Promoting nondomination along the second (inter-group) dimension typically will require defining and protecting a wide range of individual rights. Intra-group nondomination requires rights to exit, to cite one important example. It requires individual political rights that ensure effective participation in the processes through which group boundaries and norms are defined. The aim, however, is not to promote individual autonomy, but to reduce—ideally to eliminate—the arbitrary exercise of power by some group members over others.¹¹⁴

Promoting nondomination along the third (systemic) dimension requires state action to ensure the malleability of group norms and group boundaries: to ensure their responsiveness, that is, to the human subjects whose lives they govern. To be sure, it may be the case—*contra* some theorists of “agonistic” democracy—that in a given social context it would be infelicitous to destabilize a particular identitarian practice.¹¹⁵ Even still, that practice should be *in principle* open to challenge and change. The institutions that best promote this systemic form of nondomination are procedurally democratic institutions that foster contestatory forms of political engagement in

then men and women *alike* would be dominated in the systemic sense. Men and women alike would be systemically unfree, even if men dominated women interpersonally.

114. For Pettit, power’s exercise is arbitrary when at the discretion of a powerful agent, who is not constrained to track the interests and opinions of the agent her action affects. See Pettit, *supra* note 110, at 52–58. *But see* Frank N. Lovett, *Domination: A Preliminary Analysis*, 84 THE MONIST 98, 102–04 (2001) (providing a critical analysis of Pettit’s arbitrary “power requirement”).

115. See generally Monique Deveaux, *Agonism and Pluralism*, 25 PHIL. & SOC. CRITICISM 1 (1999) (providing a persuasive critique of agonistic democracy).

which people critique and defend, and sometimes transform, the groups with which they identify.

Consider again the case of the Santa Clara Pueblo tribe. As argued in Part V, the problem with the U.S. Supreme Court response was *not* that it constituted state intervention. Either choice the Court might have made—to overturn the tribe’s membership rules or to uphold them—would have been coercive, since either action would have used public power to support a particular subset of tribal members in their struggle with their opponents. Nor, however, is the problem that the state transformed the (authentic) identity of this tribe, or that it failed to promote liberal autonomy. Instead, from a democratic–constructivist perspective, the problem is that the Court helped construct Santa Clara identity in a way that promoted intragroup domination. It reinforced and legitimized the power of the tribal council to make collective decisions (in this case, decisions about who is admitted to tribal membership, and who is not) that profoundly affect some people *who are excluded from the processes by which they are made*.¹¹⁶

Court-imposed liberal rules would not have avoided the difficulty. Indeed, to use the terms introduced above, state-enforced liberalization of the tribe’s membership rules would have constituted intergroup domination. The liberal state, without politically engaging those affected, would have imposed upon the Santa Clara tribe *its* preferred norms and *its* preferred boundaries.

The best way for the Supreme Court to promote nondomination in the *Martinez* case would have been for it to mandate that those significantly affected by membership rules—including not only tribal leaders and tribal members, but also people excluded from membership, who contested their exclusion—engage one another politically to determine tribal membership rules. The state should

116. The Supreme Court’s decision therefore violated a deeply held value in democracies, what democratic theorists call the “principle of affected interests”: the principle, to quote Robert Dahl, “[e]veryone who is affected by the decision of a government should have the right to participate in that government.” See ROBERT A. DAHL, *AFTER THE REVOLUTION?: AUTHORITY IN A GOOD SOCIETY* 49 (1990); see also Robert Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 PHIL. & PUB. AFF. 41–68 (2007) (providing a more recent defense of this principle).

have mandated, in other words, an inclusive and egalitarian democratic political contest.

The justices involved likely would have rejected any proposal along these lines, on the grounds that it is interventionist. The Court's position was that it should not interfere in tribal matters. The Santa Clara Pueblos, the *Martinez* ruling stressed, constitute "an Indian tribe that has been in existence for over 600 years."¹¹⁷ The U.S. Congress, the Court claimed, has demonstrated time and again its "desire not to intrude needlessly on tribal self government."¹¹⁸ Hence, the justices reasoned, American state actors should not intervene to shape the rules and the norms that govern this tribe.

Their position, however, is incoherent. The U.S. government has involved itself intimately in shaping Santa Clara Pueblo rules and procedures, not excluding the very procedures at stake in *Martinez*. Although it may be the case that this tribe in some form has been in existence for 600 years, the constitution according to which it governed itself when the Court handed down its 1978 decision was largely the work of the U.S. Bureau of Indian Affairs just four decades earlier.¹¹⁹ The Bureau wrote much of the Pueblo Constitution in 1935. It inserted into that constitution the provision on which *Martinez* turned: the provision barring tribal members from appealing council decisions in U.S. courts.¹²⁰

Indeed, the membership rules enshrined in the constitution were considerably *more* inclusive than the rules the tribal council determined. According to the 1935 document, "All children of mixed marriages between members of the Santa Clara pueblo and nonmembers, provided such children have been recognized and adopted by the council" were to be admitted as full members of the

117. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 (1978).

118. *Id.* at 71.

119. THOMAS BIOLSI, *DEADLIEST ENEMIES: LAW AND RACE RELATIONS ON AND OFF ROSEBUD RESERVATION* xxvi (Univ. of Minn. Press 2007) (2001).

120. *Id.* at xxviii. Biolsi notes that "the BIA determined as a general rule for IRA constitutions that there would be no separation of powers in tribal government . . . [they were] unnecessary complexities for new tribal governments supposedly just learning during the New Deal how self-government works." *Id.* He also points out that several Santa Clara members questioned the idea that the Council's decisions could not be appealed to courts outside the pueblo. *Id.*

tribe.¹²¹ Any change to the constitution, this document made clear, required approval by a majority of a quorum of at least thirty percent of adult tribal members and ratification by the U.S. Secretary of the Interior.¹²² A simple vote by the tribal council was insufficient to change membership rules. Hence, without exercising intergroup domination, the U.S. Court might have interpreted the move to categorically exclude the children of women who marry outside the tribe as a constitutional change. The state might have mandated public deliberation on this proposed change, followed by a vote open to all affected. Had it taken this path, it would have substantially amplified the voice of the Martinezes, as well as that of other parents in their position, reducing intragroup domination.

What if there were no such provision in the 1935 Constitution? What if, instead, that document had enshrined, irrevocably, patriarchal membership rules? If so, by our view, the case would constitute an instance of not only intragroup, but also systemic domination: collective norms rendered unresponsive to those whom they govern, in this case via institutional-procedural means. In such a case, although the Court should not *impose* new constitutional rules, it should require politically egalitarian and inclusive deliberation and collective decision-making processes: processes that take those laws as their subject.

The precise form such processes should take will vary with context. In some cases, courts might mandate periodic constitutional conventions, for instance, or the regular reconsideration of membership rules and other significant group norms. The goal in each instance would be to ensure that the terms of the power relations that constitute identities are not firmly settled, once and for all, but instead open, at least in principle, to challenge and change by those they affect.

121. Constitution and Bylaws of the Pueblo of Santa Clara, New Mexico, approved December 20, 1935, reprinted in Supreme Court Brief of the Petitioners, *Santa Clara Pueblo v. Martinez*, No. 76-682, Appendix (Oct. Term, 1976).

122. *Id.*

CONCLUSION

We began this Article with the famous Combahee River Collective Statement. In a sense we have ended with it, as well. Identity matters for political life, we have argued, neither because it expresses who people “really” are—that is, some deep truth about the (authentic) self—nor because one’s ascribed identity in its canonical form is the necessary context for autonomy and other liberal goods. Instead, we have emphasized, identity matters politically because people are so very often dominated along identitarian lines. “Recognition,” we have argued, is rarely adequate to challenge such identity-based domination. Instead, our constructivist-democratic alternative recommends that states promote nondomination, in the form of inclusive and egalitarian political contests over the identities at the heart of “identity politics.”