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6. Madison and Multiculturalism: Group Representation, Group Rights, and Constitutionalism

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There is no doubt that James Madison envisioned a republic that encompassed many different interests. At least three questions present themselves:

- 1) Did Madison envision a “multicultural” republic?
- 2) Are contemporary advocates of various forms of group rights or group representation, often presented under the banner of “multiculturalism,” advancing the Madisonian project, or undermining it?
- 3) Are group-differentiated rights a necessary and proper element of a constitutional order ordained and established to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and to our Posterity”?

Madisonian Pluralism and the Common Good

Madison openly embraced a pluralistic constitutional order. Indeed, he believed such diversity was essential to maintain liberty. Madison’s commitment to diversity in an extended republic directly contradicted the then widely held “small republic” theory forwarded by Montesquieu, who had famously declared,

It is in the nature of a republic to have only a small territory; otherwise, it can scarcely continue to exist. In a large republic, there are large fortunes, and consequently little moderation in spirits: the depositories are too large to put in the hands of a citizen; interests become particularized; at first a man feels he can be happy, great, and glorious without his homeland; and soon, that he can be great only on the ruins of his homeland.

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In a large republic, the common good is sacrificed to a thousand considerations; it is subordinated to exceptions; it depends upon accidents. In a small one, the public good is better felt, better known, lies nearer to each citizen; abuses are less extensive there and consequently less protected.¹

In contrast, Madison celebrated diversity and the extended republic. He believed that a wide diversity of what Montesquieu considered “particularized interests” supported, rather than threatened, liberty. In 1788 Madison declared, “Happily for the states, they enjoy the utmost freedom of religion. This freedom arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society. For where there is such a variety of sects, there cannot be a majority of any one sect to oppress and persecute the rest.”² Madison’s remarks echo Voltaire, who wrote in his “Letter on the Presbyterians” that “if there were only one religion in England, there would be danger of tyranny; if there were two, they would cut each other’s throats; but there are thirty, and they live happily together in peace.”³

Madison’s famous essay on the problem of faction, *Federalist* No. 10, is oft quoted but rarely carefully considered. Examine closely his definition of faction: “By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”⁴ What is notable about that definition is that it presupposes:

- A) that interests are not the same as rights,
- B) that interests may be opposed to rights,
- C) that citizens may be motivated by passions, as well as by interests, and
- D) that there is a common good (“the permanent and aggregate interests of the community”) to which particular interests or passions may be opposed.

Their critics often assert that classical liberals—among whom I count James Madison—believe that social and political life is merely a clash of particular interests, or even that there is no common good.⁵ But this is not what classical liberals (including modern libertarians) believe. They are liberals because they believe that liberty is, if not

the overriding common good, then at least a central element of the common good. If there are permanent and aggregate interests of a community, they will be shared by all of the particular interests, and it is the business of government to secure that public good. As Madison remarked, "It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people is the supreme object to be pursued; and that no form of government whatever, has any other value, than as it may be fitted for the attainment of this object."⁶

For classical liberals such as Madison at least one permanent and aggregate interest of the community *is* the securing of a regime of equal rights for all citizens. Indeed, Madison proposed in a speech before the House of Representatives:

That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.⁷

One might claim Madison as an advocate of a multicultural republic because he accepted a wide variety of commitments ("passions") and interests in the new republic. He is decidedly not a "multiculturalist" in the sense of endorsing group-specific rights or the rights of groups to special representation. As he noted in his essay on "Parties":

In every political society, parties are unavoidable. A difference of interests, real or supposed, is the most natural and fruitful source of them. The great object should be to combat the evil: 1. By establishing a political equality among all.⁸

Madison noted that the existence of parties, based on different interests, did not warrant the creation of "artificial parties."

From the expediency, in politics, of making natural parties, mutual checks on each other, to infer the propriety of creating artificial parties, in order to form them into mutual checks, is not less absurd than it would be in ethics, to say, that new

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vices ought to be promoted, where they would counteract each other, because this use may be made of existing vices.⁹

Madison envisioned a political system oriented toward the common good, not toward “conflicting rights” or group warfare. The common good consists of the maintenance of rules of conduct that are the same for all citizens.¹⁰

Madison’s commitment to the common good, that is, a good common to all citizens, is reflected in one of the most misunderstood terms in the Constitution, the “general welfare.” That term is found in the preamble, wherein are stated the reasons for which the Constitution has been ordained and established: “in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.” It is also found in the first clause of Article I, Section 8, which states that “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” The Constitution does not authorize securing the welfare of some at the expense of others; securing the welfare that is common to *both* Peter and Paul is the purpose for which the Congress is granted its limited powers. Article I, Section 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”) clearly implies that some powers are *not* “herein granted” and therefore cannot be legitimately exercised by the Congress.¹¹ The power to rob Peter to pay Paul, today referred to as “redistribution,” is not a power granted to the Congress under the Constitution. The term general welfare, which is so often interpreted as a blanket grant of authority to the federal government to do anything and everything (at least, anything that is not explicitly prohibited in the Constitution), is regularly cited to justify thousands upon thousands of acts that promote the welfare of a few at the expense of others. But reflection upon the meaning of the term general welfare suggests that it is not merely *anyone’s* “welfare” that is intended, but the welfare that is general, that is, common to all.

The Constitution was proposed and ratified “in order to” secure certain limited ends. It authorizes neither a regime of differentiated

caste privileges nor an unlimited power of majorities to impose their preferences upon minorities. Madison made that clear when he proposed in his speech of June 6, 1787, to the federal convention that drafted the Constitution that the proposed Constitution would be superior to the Articles of Confederation in “providing more effectually for the security of private rights and the steady dispensation of Justice” and asked, “In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. What motives are to restrain them?”¹² After noting that conscience rarely has much effect on large numbers of men, and cataloguing various forms of oppression experienced by polities ancient and modern, he asks, “What has been the source of those unjust laws complained of among ourselves?” and responds, “Has it not been the real or supposed interest of the major number?”¹³ He concludes that:

The lesson we are to draw from the whole is that where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a Republican Gov^t the majority if united have always an opportunity. The only remedy is to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that in the 1st place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2nd place, that in case they sh^d have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale & in such a form as will controul all the evils w^{ch} have been experienced.¹⁴

In *Federalist* No. 10—itself largely an elaboration of his speech of June 6, 1787, before the Convention—Madison stated that “to secure the public good, and private rights against the danger of such a [majority] faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed.”¹⁵ Madison proposed, rather than democracy (the other form of “popular government”), a republic, “by which I mean a government in which the scheme of representation takes place,” which differs from a democracy in “the delegation of the government . . . to a small number of citizens elected by the rest”

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and “the greater number of citizens, and greater sphere of country, over which [a republic] may be extended.”¹⁶

The two solutions are, thus, first, to substitute representation for direct democracy, in order to “refine and enlarge the public views, by passing them through the medium of a chosen body of citizens,” and second, to increase the transaction costs necessary to assemble a majority faction animated by a common interest contrary to that of the whole.¹⁷ A system of representation, as distinct from direct democracy, would encourage deliberation and protect the public good from great swings in public opinion ignited by passion. It would also weaken the advantages of potential demagogues, as Madison noted in *Federalist* No. 58:

In all legislative assemblies, the greater the number composing them may be, the fewer will be the men who will in fact direct their proceedings. In the first place, the more numerous any assembly may be, of whatever characters composed, the greater is known to be the ascendancy of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information and of weak capacities. Now it is precisely on characters of this description that the eloquence and address of the few are known to act with all their force. . . . On the same principle the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people.¹⁸

The qualifications and election procedures for the membership of the United States Senate set out in Article I, Section 3 of the Constitution exemplify Madison’s republican principles: “Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. . . . so that one third may be chosen every second Year” and “No person shall be a Senator who shall not have attained to the Age of thirty Years.” Staggered elections insulate the Senate from the shifting passions of the electorate, and the age requirement seeks to limit the membership to a group more likely to have attained some wisdom, or at least to be less excited by the passions of the moment. The combination of the two is more likely to generate greater stability in the law, which is to say, a more consistent articulation and defense of the public good. As Madison noted in *Federalist* No. 62:

The most deplorable effect of all [the effects of a mutable policy] is that diminution of attachment and reverence which steals into the heart of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government any more than an individual will long be respected, without being truly respectable, nor be truly respectable without possessing a certain portion of order and stability.¹⁹

Madison clearly stated the purpose of political representation:

The aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy, are numerous and various. The most effectual one is such a limitation on the term of appointments, as will maintain a proper responsibility to the people.²⁰

Madison focused attention upon the process of choosing representatives. Republican government relies on a democratic element (“the elective mode”), but it includes other elements, as well, such as the electoral college, apportionment of electors among the states, term limits, and the like.

Madison sought to create a stable system of government that can effectively promote the authentically common good and at the same time resist the natural tendency of human beings toward factional conflict. His political theory has little, if any, room for systems of group-specific or group-differentiated rights or representation. (There is an interesting exception, which is the rights of the politically organized Indian tribes, to which I will refer at the end of this essay, and which is considered at greater length in Jacob Levy’s chapter in this volume.)

Multicultural Collectivism and Group Representation

Many political theorists now consider the idea of equality before the law to be old-fashioned or quaint. Others openly denounce it as a form of oppression. Some of those thinkers even claim the

Madisonian mantle, by which they mean a concern for protecting the interests of minorities within a broadly democratic (or, in Madison's term, popular) political framework. Those thinkers hope to protect minority interests not through guarantees of equal rights by a government of limited powers, but either by guaranteeing representation to groups as groups, or by erecting and continually adjusting a kaleidoscopic array of *unequal* group-specific rights, or by both.

Lani Guinier, an interesting and challenging defender of group representation, has set out an approach that she explicitly identifies with James Madison. She argues that Madison's concern with the protection of minorities from majority tyranny led him to embrace "the rule of shifting majorities, as the losers at one time or on one issue join with others and become part of the governing coalition at another time or on another issue." She calls "a majority that rules but does not dominate" a "Madisonian majority."²¹ From the very beginning, however, Guinier mistakes what Madison means by representation, when she states that Madison objects to majority tyranny because "the majority may not represent all competing interests."²² The majority, for Madison, does not represent interests; it *has* interests. Representatives deliberate about and attempt to secure the common interest and are answerable to those they represent. Guinier's misunderstanding of the role of representation sets the stage for a theory of political conflict in which the common good disappears as the goal of government. She claims that "including all sectors of society in government operation is consistent with Madison's vision" and offers as evidence *Federalist* No. 39, which she characterizes as "rejecting elitist plutocracy."²³

Guinier does focus, however, on a problem with which a Madisonian should indeed be concerned: the permanent minority in a bipolar conflict. If there were a majority united by a common passion or interest that faced a minority that is both easily distinguished from the majority and incapable of becoming a majority, the minority would likely be systematically oppressed. In the case that Guinier considers, there are two major groups in America—blacks and whites—and one of them is an overwhelming majority. As such, it has been able to oppress the other systematically and brutally. Because of "the documented persistence of racial polarization . . . racism excludes minorities from ever becoming part of the governing coalition, meaning that the white majority will be permanent."²⁴

Guinier's solution is what she calls, inspired by her young son's ideas about fairness, "the principle of taking turns."²⁵ She seeks not merely to secure the rights of black Americans to the suffrage, but also to obtain representation for blacks in the legislature by "authentically black" representatives. And she seeks not only representation of black voters by "authentically black" legislators, but also guarantees of particular legislative outcomes. She endorses the criterion of racial "authenticity," which for her "reflects the group consciousness, group history, and group perspective of a disadvantaged and stigmatized minority. Authenticity recognizes that black voters are a discrete 'social group' with a distinctive voice."²⁶ As such, representatives who are "descriptively black" but do not agree with the substantive policy agenda of Ms. Guinier either exhibit "false consciousness"²⁷ or are not authentically black. The "distinctive voice" of black America should be represented by authentically black representatives who represent authentic black policy preferences (which may or may not correspond to what the majority of descriptively black Americans say they prefer). Thus, "a theory of representation that derives its authority from the original civil rights' vision must address concerns of qualitative fairness involving equal recognition and just results. For those at the bottom, a system that gives everyone an equal chance of having their political preferences *physically represented* is inadequate. A fair system of political representation would provide mechanisms to ensure that disadvantaged and stigmatized minority groups also have a *fair chance* to have their policy preferences *satisfied*."²⁸

Before considering Guinier's proposed means to ensure that minority groups have a fair chance to have their policy preferences satisfied, let's consider more carefully the issue of authenticity. In a discussion of authenticity that was cut from the version of her law review article that appeared in her book, Guinier states:

Identifying "black representatives" raises several questions. For example, would descriptively black representatives who were also Republicans qualify as black representatives? More generally, is it the race of the representative that makes them part of the minority voting group? Although no one answer may suffice, the court should consider only a representative's status as the minority group's representative of choice. Therefore, only a representative sponsored by the black community and electorally accountable to it would count for purposes of a legislative bloc voting analysis.²⁹

It is in this vein that opponents referred to current Secretary of the Interior Gale Norton during the period of her confirmation hearings as “James Watt in a skirt,” apparently on the grounds that an authentic woman could not hold the views that she held.³⁰ Similarly, Margaret Thatcher’s enemies in Britain repeatedly referred to her as a “female impersonator.” Thus, members of a group who disagree with a self-appointed leadership of that group are labeled “inauthentic” if they disagree with that self-appointed leadership. For example, Andrew Sullivan is an openly gay man who, on grounds of justice, opposes legislation interfering with contractual relations by banning private discrimination on the basis of sexual orientation. He is routinely pilloried by self-appointed gay politicians as “not really gay” and as a traitor to the authentic gay community.³¹ An implication of such claims is that whites who agree with Lani Guinier would not be “authentically white,” men who support feminism would not be “real men,” and heterosexuals who favor gay marriage would not be “authentically heterosexual.” If the latter are absurd, so are the former. Such claims that ideas are determined by race, gender, or sexual orientation are not far from the claims of polylogism made by the National Socialists (race or nationality) and Marxists (class) in the last century, and are subject to criticism on the same logical grounds.³²

In discussing legal solutions to cases raised by the Voting Rights Act, Guinier has proposed various forms of proportional representation to encourage group representation and the “fair chance” for the satisfaction of the authentic policy preferences of minorities. Although she is careful to hedge her proposals with various caveats, she prefers a form of proportional representation known as “cumulative voting,” in which legislators are elected at-large (rather than in geographically separated districts) and voters are allocated a number of votes equal to the number of offices being chosen, which votes they can then cast in any manner they prefer, including casting all of them for one candidate. Similarly, she proposes cumulative voting as a method of legislation, in order to avoid marginalization of minority legislators. In this manner, voters and legislators can reveal not only the existence of their preferences, but also the intensity of those preferences. If a proportional representation scheme succeeds in electing more “authentically black” legislators, but they fail to achieve effective “proportional interest representation,” the minority legislators could be given a “minority veto”:

If modifying the exclusion threshold alone did not yield proportionate interest representation, winner-take-all majority rule by a permanent, hostile legislative majority could be modified. Where majority representatives refuse to bargain with representatives of the minority, simple majority rule votes would be replaced. "A minority veto" for legislation of vital importance to minority interests would respond to evidence of gross "deliberative gerrymanders."³³

What is at stake is the guarantee that authentically black preferences be satisfied: "If it is true, as I have argued, that representatives are equal only if existing distribution of power, resources, and prejudices do not play an 'authoritative' role in their deliberations, then it is not clear that the remedial goal of equal political participation in the form of a fair and equal distribution of preference satisfaction is realistic, especially within a litigation context."³⁴

Guinier does not directly propose that votes be differently weighted on the basis of race, but she does believe that black voters will cast their votes as a bloc and thereby be represented as a group: "As a discrete and insular minority, blacks may be able to take maximum advantage of interest representation, in part because, as a small group with group consciousness, they are better able to organize collectively."³⁵

Others have also endorsed replacing the dominant American form of representation—geographically distinguished single-member districts that vote on a winner-take-all, first-past-the-post system—with proportional representation as a means of representing racial interests. Robert Richie and Steven Hill argue that proportional representation (PR) "provides better representation for racial minorities" and that "minorities would have greater opportunities to negotiate for influence because they could 'swing' among parties."³⁶ Although they assert that "the case for PR is fundamentally nonpartisan," they stake much of their case on their claim that "American political progressives have a particularly urgent need to support PR because of the growing problems created by a lack of a serious electoral vehicle to the Democrats' left."³⁷

Will Kymlicka generally endorses group representation as "not inherently illiberal or undemocratic,"³⁸ but he does not try "to define or defend any specific model of group representation," for he does "not think it is possible to say much more at the general level."³⁹

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Among the alternatives he considers plausible are proportional representation as a means of securing group representation and guaranteeing seats for members of underrepresented or disadvantaged groups. In addition, Kymlicka and other writers endorse self government rights for indigenous national minorities, an issue that I will consider later. (I will deal at greater length with Kymlicka's endorsement of group-specific rights in the next section.)

Madison or Calhoun?

One of the most remarkable features of the case made for group representation by Guinier, Richie and Hill, Kymlicka, and others is not whom they cite, but whom they do not cite: John C. Calhoun. Rather than advancing Madison's project, they are advancing Calhoun's. The difference is significant, for Calhoun had effectively given up on the idea of a common good and replaced it with particular interests, each with the power to veto changes harmful to it. As Calhoun stated:

If the whole community had the same interests, so that the interests of each and every portion would be so affected by the action of the government, that the laws which oppressed or impoverished one portion, would necessarily oppress and impoverish all others—or the reverse—then the right of suffrage, of itself, would be self-sufficient to counteract the tendency of the government to oppression and abuse of its powers; and, of course, would form, of itself, a perfect constitutional government.⁴⁰

Calhoun explicitly rejected Madison's solution of an extended republic because "the more extensive and populous the country, the more diversified the condition and pursuits of its population, and the richer, more luxurious, and dissimilar the people, the more difficult it is to equalize the action of the government—and the more easy for one portion of the community to pervert its powers to oppress, and plunder the other."⁴¹

It may be obvious why Guinier would not cite a thinker who was one of America's most brilliant political theorists, but also a defender of slavery, the "peculiar institution" of the South. It is equally clear that Calhoun's work exercised a great influence on her.⁴² In order to avoid systematic domination of one interest by another, Calhoun argued that interests themselves should be directly represented:

There is . . . but one mode in which this can be effected; and that is, by taking the sense of each interest or portion of the community, which may be unequally and injuriously affected by the action of the government, separately, through its own majority, or in some other way by which its voice may be fairly expressed; and to require the consent of each interest, either to put or to keep the government in action. This, too, can be accomplished only in one way—and that is, by such an organism of the government—and, if necessary for the purpose, of the community also—as will, by dividing and distributing the powers of government, give to each division or interest, through its appropriate organ, either a concurrent voice in making and executing the laws, or a veto on their execution.⁴³

Thus, each interest should be guaranteed either a fair and equal distribution of preference satisfaction or a veto on the actions of the whole.

Calhoun, Guinier, Kymlicka, and other advocates of group representation have given up on the very idea of the common good, which is central to the Madisonian enterprise. Calhoun distinguished his approach precisely by eschewing the idea of a common interest:

It results, from what has been said, that there are two different modes in which the sense of the community can be taken; one, simply by the right of suffrage, unaided; the other, by the right through a proper organism. Each collects the sense of the majority. But one regards numbers only, and considers the whole community as a unit, having but one common interest throughout; and collects the sense of the greater number of the whole, as that of the community. The other, on the contrary, regards interests as well as numbers—considering the community as made up of different and conflicting interests, as far as the action of the government is concerned; and takes the sense of each, through its majority or appropriate organ, and the united sense of all, in the sense of the entire community. The former of these I shall call the numerical, or absolute majority; and the later, the concurrent, or constitutional majority.⁴⁴

Calhoun makes a strong case that even the normal functioning of a constitutionally limited government entails differential impacts, simply because of the value of the emoluments of office,⁴⁵ but slavery

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weighed heavier in his overall case. As Calhoun noted, “We [the slave states] are already in a minority in the House of Representatives and the Electoral College; so that with the loss of the Senate, we shall be in a minority in every department of the Federal Government; and ever must continue so, if the non-slaveholding States should carry into effect their scheme of appropriating to their exclusive use all the territories of the United States. But, fortunately, under our system of government, mere numbers are not the only element of power. There are others, which would give us ample means of defending ourselves against the threatened danger, if we should be true to ourselves.”⁴⁶

Proportional representation may have its advantages, but I believe that it would be unwise to implement it, at least in the forms proposed by Guinier and by Richie and Hill, mainly for the very reasons that its advocates give for proposing it: it would lead to a fracturing of the American polity and would undermine the common good. Proportional representation would substitute for the *general* welfare a constitutional vision of opposing interests engaged in a zero sum competition for limited resources. A greater dedication to the common good, as instantiated by the Constitution, is far preferable to the Balkans-style politics that Guinier and other supporters of group representation envision. Proportional representation also has procedural disadvantages. It removes the search for consensus from the constituency to the legislature, with no obvious advantage to the republic as a whole. Tiny groups of extremists or single-issue zealots may find themselves in positions of exaggerated influence as swing votes. And governing coalitions and therefore policies may change dramatically, because of changing legislative coalitions, not changes in votes. Proportional representation has few advantages and several disadvantages. Since the United States is not in the midst of a political crisis, there is little reason to change what ain’t (relative to the alternative) broke.

The advocates of group representation explicitly reject the Madisonian vision of the common good achieved through political representation of equal citizens in an extensive and pluralistic republic. Their vision is a war of all against all, not, to be sure, as the goal, but as the result. As the Lebanese Constitution rather innocently stated, “for the sake of justice and amity, the sects shall be equitably represented in public employment and in the composition of the

ministry, provided such measures will not harm the general welfare of the state."⁴⁷ This commitment to "justice and amity" produced precisely the opposite, as Lebanon erupted into a veritable orgy of murder in 1975, when the Maronite Christians, who had been favored by the old constitutional order (based on the census of 1943), refused to cede power to the increasing portion of the population that followed Shiite Islam. A piece of paper may state that such representation is not to harm "the general welfare of the state," but once groups achieve representation they are typically loathe to surrender it in the name of the common good or the general welfare.⁴⁸

Multicultural Collectivism and Group Rights

Group consciousness has brought about not only calls for group representation, but also calls for group-specific (or group differentiated) legal and personal rights and entitlements. This paper cannot deal with all the arguments for these theories, but a few common elements can be identified. They include: 1) a rejection of the ideal of legal equality as itself a form of oppression; 2) demands for reparations for historical injustices; and 3) a new interpretation of freedom as requiring that legal equality of rights be abolished in favor of complex sets of rights that are differentiated by membership in ascriptive groups. I will provide a brief excursion through a rather extensive literature, along with a Madisonian-influenced commentary and critique, followed by a statement of what I take to be the most plausible Madisonian response.

Equality as a Form of Oppression

Catharine MacKinnon, law professor at the University of Chicago, has become a prominent advocate of the idea that equality itself is a form of oppression. Thus, in her *Toward a Feminist Theory of the State*, she states, "Taking the sexes 'as individuals,' meaning one at a time, as if they do not belong to genders, perfectly obscures these collective realities and substantive correlates of gender group status behind the mask of recognition of individual rights."⁴⁹

Although it is not entirely clear what remedies would flow logically from MacKinnon's pronouncements, the incoherence of her approach is indicated by the following statement:

Under sex equality law, to be human, in substance, means to be a man. To be a person, an abstract individual with

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abstract rights, may be a bourgeois concept, but its content is male. The only way to assert a claim *as* a member of the socially unequal group women, as opposed to seeking to assert a claim *against* membership in the group women, is to seek treatment on a sexually denigrated basis. Human rights, including "women's rights," have implicitly been limited to those rights that men have to lose. This may be in part why men persistently confuse procedural and abstract equality with substantive equality: for them, they are the same. Abstract equality has never included those rights that women as women most need and never have had. All this appears rational and neutral in law because social reality is constructed from the same point of view.⁵⁰

She rejects what she calls "abstract equality" and asserts that such equality does not include "those rights that *women as women* most need." To consider "women as women" is precisely to consider them abstractly, that is, in abstraction from their other characteristics (age, race, size, education, etc.). To treat both Catharine and Dorine as women is precisely to abstract from the fact that one is white and the other black. Although MacKinnon tries to offer a general critique of abstract individualism as merely an ideological front for masculine privilege and the oppression of women, her generic arguments destroy her own case for women-specific rights. That extreme incoherence marks many attempts to show how the ideas of abstract rights, that is, rights that apply to unspecified persons, and equality before the law are in fact merely especially invidious forms of oppression.

Writing also from a self-described feminist perspective, Iris Marion Young argues for differentiated rights for men and for women, as well as for ethnic and other groups, on the general grounds that:

where differences in capacities, culture, values, and behavioral styles exist among some groups, but some of these groups are privileged, strict adherence to a principle of equal treatment tends to perpetuate oppression or disadvantage. The inclusion and participation of everyone in social and political institutions therefore sometimes requires the articulation of special rights that attend to group differences in order to undermine oppression and disadvantage.⁵¹

More strongly, she claims that, "A general perspective does not exist which all persons can adopt and from which all experiences and perspectives can be understood and taken into account."⁵²

In support of her strong claim that equality before the law is inherently oppressive, Young merely reports that “many” activists “struggling for the full inclusion and participation of all groups in this society’s institutions and positions of power, reward, and satisfaction, argue that rights and rules that are universally formulated and thus blind to differences of race, culture, gender, age, or disability, perpetuate rather than undermine oppression.”⁵³

It is central to Young’s case for assigning different rights to sexual genders (and to other ascriptive groups) that the very idea of a common good is a myth and that, in fact, it is impossible to “walk a mile in another’s shoes” or to understand the claims that others may make. Thus:

Instead of a universal citizenship in the sense of this generality, we need a group differentiated citizenship and a heterogeneous public. In a heterogeneous public, differences are publicly recognized and acknowledged as irreducible, by which I mean that persons from one perspective or history can never completely understand and adopt the point of view of those with other group-based perspectives and histories. Yet commitment to the need and desire to decide together the society’s policies fosters communication across those differences.⁵⁴

I do not believe that we should so readily accede to Young’s claim that “persons from one perspective or history can never completely understand or adopt the point of view of those with other group-based perspectives and histories.” If by “completely understand or adopt the point of view” she means actually become that other person, then her claim is correct but irrelevant. If to understand a play by Shakespeare I had to actually be Shakespeare (and be him at the very moment that he completed the play), then Young’s words themselves would be incomprehensible to all but her. Similarly, if I had to have had the same experiences as another person to understand her claim of right, then acts of justice would be impossible.⁵⁵ That sets an erroneous standard of understanding, one that is inappropriate for law and politics as it is for literature. To understand the claim for justice of another is not, in fact, impossible, just as it is not impossible to understand Young’s writings; it is hardly absurd to seek to achieve an objective standpoint from which to judge claims of justice, as Young presumes.⁵⁶ Understanding a play, a foreign

language, or a claim for justice may be difficult, but that is not the same as being impossible.⁵⁷ Furthermore, Madison and the other Founders understood quite well that one could not and should not expect citizens always to adopt the perspective of the common good; that would be a shaky foundation on which to build a republic. Madison in particular certainly understood that citizens are quite often motivated by both interests and passions that are contrary to the general interest. Madison's constitutional project assumed that the public would be, in Young's term, "heterogeneous." But the fact that citizens are diverse and that many or most of them fail to adopt the perspective of the common good entails neither that the system of rights and obligations secured by the Constitution cannot embody or secure the common good nor that we should abandon the idea of citizenship or republican virtue altogether. Some degree of republican virtue is required for a workable constitutional order, but Madison's defense of equal rights does not assume that all citizens will adopt a universal perspective or that citizenship requires that one "completely" understand or adopt the point of view of other citizens.

Young's position, like MacKinnon's, is fraught with problems of internal coherence, for if what she believes is true, how could she or those who join her in undermining the ideal of equality before the law know the histories or experiences of others, and therefore be able to determine what their rights should be? After all, she does not assert that seekers of differentiated rights may unilaterally assert them against the rights, interests, or passions of others; indeed, she specifically denies it. Instead, they must emerge out of some kind of democratic process; they must be "publicly recognized." But if that democratic process presupposes differential rights to input, then the argument is circular, for it requires to be already established what it purports to produce.

In a way that brings to mind Oscar Wilde's complaint about socialism (too many committee meetings), Young writes, "All citizens should have access to neighborhood or district assemblies where they participate in discussion and decision making. In such a more participatory democratic scheme, members of oppressed groups would also have group assemblies, which would delegate group representatives."⁵⁸ But which groups are to get these special rights? Which groups "count"? According to Young, "These principles do not apply to any persons who do not identify with majority

language or culture within a society, but only to sizeable linguistic or cultural minorities living in distinct though not necessarily segregated communities."⁵⁹ So size matters when it comes to determining fundamental rights. In abandoning the highly salient ideal of equal individual rights before the law, Young plunges into a morass of circular argumentation and self-contradiction.⁶⁰

Reparations to Groups for Historical Injustices

The second form of group-specific rights that I will consider is, at least superficially, based on adherence to a liberal concern with rights and restitution. It is clearly differentiated from the view articulated by MacKinnon, Young, and many other advocates of group-differentiated rights. As Young notes of her approach, "The goal is not to give special compensation to the deviant until they achieve normality, but rather to denormalize the way institutions formulate their rules by revealing the plural circumstances and needs that exist, or ought to exist, within them."⁶¹

In contrast, demands for reparations rest on background claims for equal justice, on the claim that what has been taken unjustly should be restored.⁶² Human history is filled with examples of injustices against groups of people, and when they can be corrected, there is certainly at least a good case that they should be. The suffering of Jews and Roma under the National Socialists, to take perhaps the most well known example, has led to restitution and reparations of various kinds. Those whose property was expropriated under Communist rule have received compensation in some formerly Communist states. In the United States, surviving Japanese Americans who suffered loss of liberty and estate as a result of President Franklin D. Roosevelt's Executive Order 9066, issued on February 19, 1942,⁶³ received an official apology and payments of \$20,000 each as a result of passage of the Civil Liberties Act of 1988, which President Ronald Reagan signed into law on August 10, 1988.⁶⁴

As this essay is written, the primary claim in the United States for reparations from the United States government, or from all or some citizens of the United States, is the claim for reparations to black Americans.⁶⁵ Randall Robinson, founder and president of the TransAfrica Forum and author of *The Debt: What America Owes to Blacks*, argues that:

there is much new fessing-up that white society must be induced to do here for the common good. First, it must

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own up to slavery and acknowledge its debt to slavery's contemporary victims. It must, at long last, pay that debt in massive restitutions made to America's only involuntary members. It must help to rebuild the black esteem it destroyed, by democratizing access to a trove of histories, near and ancient, to which blacks contributed seminally and prominently. It must open wide a scholarly concourse to the African ancients to which its highly evolved culture owes much credit and gives none. It must rearrange the furniture of its national myths, monuments, lores, symbols, iconography, legends, and arts to reflect the contributions and sensibilities of all Americans. It must set afoot new values. It must purify memory. It must recast its lying face.⁶⁶

Robinson offers a variety of arguments for reparations, but two are especially prominent. First, African Americans were robbed of the value of their labor, from which others benefited. The descendants of those who benefited are now richer than they would be otherwise, and the descendants of those who were robbed are poorer than they would be otherwise. Thus:

Through keloids of suffering, through coarse veils of damaged self-belief, lost direction, misplaced compass, shit-faced resignation, racial transmutation, black people worked long, hard, killing days, years, centuries—and they were never *paid*. The value of their labor went into others' pockets—plantation owners, northern entrepreneurs, state treasuries, the United States government.⁶⁷

This argument has considerable appeal to liberals (and I count authentic Madisonians as such) because it claims restitution for what was unjustly taken. Such a claim certainly could have provided justification for the confiscation of the estates of slave-holders and their distribution to freed slaves, as was proposed in the famous Special Field Order No. 15 issued by Major-General W. T. Sherman on January 16, 1865.⁶⁸ However, a substantial amount of time has passed between the enslavement and exploitation that Robinson so forcefully describes and the present. There are no living persons who were either slaves or slave-holders. That fact does not dispense with claims for reparations; those who inherited less because the wealth of their ancestors was stolen could, after all, be compensated by those who inherited more because their ancestors stole. This

argument, however, is difficult to maintain after the passage of so long a time. The populations are today so mixed and the strands so intertwined that we cannot determine the justice of inherited endowments. For example, consider the heirs of the hundreds of thousands of soldiers who died in the war that eliminated slavery. What should those heirs receive in compensation for the loss of the lives and the livelihood of their ancestors, who might otherwise have left them wealth?⁶⁹

In principle, reparations arguments are acceptable within a liberal theory of justice, but such reparations must be tied to the actual harm suffered by some and the existence of benefits that are unjustifiably held by others. If someone harms another, the victim should be made whole. If the one who committed the harm is dead, his or her heirs do not bear any criminal responsibility. If, however, they materially benefited from the harm and the wealth can be transferred to the heir of the harmed, who has a greater claim, then there is an argument for making the transfer. But if the heirs of the one who harms did not benefit, then taking anything from them is itself criminal. For example, transferring resources from “the Russians” to Tatars, as reparations for the harms imposed on Tatars by the Soviet state, would be unjust, for the overwhelming majority of Russians did not benefit from that state, but were also victimized by it. The average white American is not, in fact, a beneficiary of the criminal enslavement of others, past or present, and it would be an injustice to hold him or her responsible.⁷⁰

The second commonly offered reason for reparations payments is that the culture of African Americans has been systematically harmed, and this harm translates into systematic disadvantage for African Americans, disadvantages that are imposed on them by whites and for which they deserve compensation. Thus, as Randall Robinson formulates the thesis:

Culture is the matrix on which the fragile human animal draws to remain socially healthy.⁷¹

Contemporary discrimination alone does not explain the persistence of these income gaps. Another culprit is a mutant form of the coarse and visible old discrimination. This sneaky and invisible culprit can be called conditioned expectation.⁷²

By now, after 380 years of unrelenting psychological abuse, the biggest part of our problem is inside us: in how we have

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come to see ourselves, in our damaged capacity to validate a course for ourselves without outside approval.⁷³

For those reasons, Robinson supports the proposal made by Robert Westley that “a private trust be established for the benefit of all African Americans. The trust would be funded out of the general revenues of the United States” and would support programs designed to expand and improve the educational opportunities of African Americans and, notably, to fund political activities: “The broad civil rights advocacy necessitated by a persistent climate of American racism would be generously funded, as well as the political work of black organizations seeking, as Ron Walters has suggested, to ‘own’ the *politics* of the black community.”⁷⁴

Most advocates of reparations payments quickly dismiss the idea of individual compensation. As Darrell L. Pugh notes, “The fact that the reparations being suggested are prospective and primarily benefit nonvictims argues against the individual payment approach.”⁷⁵ As with Robinson, Pugh (citing the authority of Boris I. Bittker, who wrote on the issue in the 1960s and 1970s) suggests instead that “creation of a national trust fund, administered by ‘legitimate’ representatives of the African American community with oversight by Congress, might be one answer.”⁷⁶ The point is not to compensate individual harmed victims, but to rebuild a culture that has been damaged. (Note that the representatives must be “legitimate,” a criterion that seems equivalent to the “authentic” criterion invoked by Lani Guinier.)

How long might such a group entitlement last? Will Kymlicka assumes that such race-differentiated entitlements would be remedial and time-limited: “A degree of short-term separateness and colour-consciousness is needed to achieve the long-term goal of an integrated and colour-blind society.”⁷⁷ Others, however, make it clear that the debt owed by whites to blacks has no time limit. As Robinson argues, “The life and responsibilities of a society or nation are not circumscribed by the life spans of its mortal constituents. Social rights, wrongs, obligations, and responsibilities flow eternal.”⁷⁸ Indeed, the debt can never be repaid until and unless the understanding of African history is changed:

This then is the nub of it. America’s contemporary racial problems cannot be solved, racism cannot be arrested,

achievement gaps cannot be fully closed until Americans—all Americans—are repaired in their views of Africa's role in history.⁷⁹

Setting such a standard, and specifically one that relies on a highly contested account of the history of Africa, indeed implies a perpetual debt and, correspondingly, a perpetual entitlement of "legitimate" representatives of the African American community to enrich those they believe worthy at the expense of others.

The fact that Robinson even mentions the possibility of "punitive damages"⁸⁰ indicates that he believes that "whites" as a group have interests implacably opposed to those of "blacks" as a group. Otherwise, why even consider the possibility of *punishment* of whites as a group?

In addition to enriching and empowering a class of authentic or legitimate representatives (authentic or legitimate as determined by whom?), the most serious consequences of the perpetual status of the debt (dare I say dependency) is made clear by a moving description of a young girl who is struggling in school:

The profound consequences constitute still another particular in a long bill of them against the government of the United States and others who benefited from slavery. But this is why I have expended so much time here on the issue of reparations, for the very discussion engendered will help an embattled nine-year-old to know finally what happened to her, that she is blameless, that she has had something taken from her that has a far more than material value.⁸¹

Much more could be said both in favor of, and in criticism of, reparations for the American descendants of enslaved Africans. But current proposals would leave blacks perpetually in tutelage, second class citizens lorded over by first class overlords, all of whom would be "authentic" and "legitimate" representatives of their community. It is certainly not a proposal for the protection of minority interests of the sort that a Madisonian would envisage and bears greater resemblance, instead, to the black Bantustans or "homelands" established under the tribalism of Afrikaner apartheid. In such homelands the central state designated the ruling elites, funded them, and charged them with supervising the development of their communities.⁸²

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Empowering elites to administer (in perpetuity) resources to a dependent class distinguished by their race is incompatible with virtually any recognizably liberal vision of politics, Madisonian or otherwise. Reparations to individual victims from those who have benefited may be justified, but a case for that has not been established by Robinson's arguments.

There might even be a case for reparations of some sort as a means of securing the stability of a republican political and legal order that is more conducive to justice than the most likely alternative. Such an admission may, however, cut several ways, depending on which group would be most likely to undermine republican institutions absent special consideration. That is the upshot of Madison's speech on the slave trade clause of the Constitution before the Virginia Ratifying Convention:

I should conceive this clause to be impolitic, if it were one of those things which could be excluded without encountering greater evils. The southern states would not have entered into the union of America, without the temporary permission of that trade. And if they were excluded from the union, the consequences might be dreadful to them and to us. We are not in a worse situation than before. That traffic is prohibited by our laws, and we may continue the prohibition. The union is not in a worse situation. Under the articles of confederation, it might be continued forever: But by this clause an end may be put to it after twenty years. There is therefore an amelioration of our circumstances.⁸³

Such arguments from expediency are, however, premised on the existence of a clear danger to the continued existence of the republic itself. No such danger exists at the present time. Further, they could just as easily cut against reparations for the heirs of slaves as in favor; which way it would cut would depend on the bargaining powers of the different parties, rather than on any claims to justice.

Inequality of Rights as a Precondition of Freedom

Will Kymlicka has argued effectively for group-differentiated rights.⁸⁴ Such rights are necessary, he claims, to protect the viability of groups that provide communal ties, without which individuals could not enjoy the range of "meaningful choices" necessary to be able to enjoy freedom. Such ties might be eroded without such special rights, obligations, and correlative powers of enforcement.

In the case of North American Indians, Kymlicka claims that “the viability of Indian communities depends on coercively restricting the mobility, residence, and political rights of both Indians and non-Indians.”⁸⁵ (It should be noted in passing that Kymlicka does consider the role of federalism in the U.S. constitutional system as a means of protecting minorities and finds it wanting. His account, however, is unfortunately full of factual errors.⁸⁶ More importantly, Kymlicka relies on an implicit baseline, in comparison to which American federalism allegedly worsens the positions of minorities: “Federalism may well serve to worsen the position of national minorities, as has occurred in the United States, Brazil, Australia, and other territorial federalisms.”⁸⁷ Worsened in comparison to what? Perhaps the U.S.S.R., which did institutionalize explicitly national political units? Or worsened in comparison to a non-existent fantasy world?)

Kymlicka derives this right to cultural membership indirectly from the framework outlined by John Rawls in his *A Theory of Justice*. Kymlicka highlights Rawls’s notion of “self-respect” as a precondition for the pursuit of any rational plan of life (hence as a “primary good”) and then tries to determine the preconditions for self respect. A cultural context within which choices can be made is such a precondition: “The decision about how to lead our lives must ultimately be ours alone, but this decision is always a matter of selecting what we believe to be most valuable from the various options available, selecting from a context of choice which provides us with different ways of life.”⁸⁸ Thus, “Liberal values require both individual freedom of choice and a secure cultural context from which individuals can make their choices.”⁸⁹ Furthermore, belonging replaces accomplishment as the focus of self-esteem: “national identity is particularly suited to serving as the ‘primary foci of identification,’ because it is based on belonging, not accomplishment.”⁹⁰

Kymlicka distinguishes between “internal restrictions” and “external protections”: the former are restrictions placed by the group on its own members, and the latter are restrictions on the interaction of members of the wider society with members of the protected group or entitlements to benefits from the wider society.⁹¹ He favors external protections and opposes internal restrictions. He opposes the latter on the ground that “protecting people from changes in the character of their culture can’t be viewed as protecting

their ability to choose."⁹² But he cannot help but slide directly toward such paternalism and control on the members of minority groups: "The viability of Indian communities depends on coercively restricting the mobility, residence, and political rights of both Indians and non-Indians."⁹³

Kymlicka believes that sets of group-differentiated rights pose no danger to social or political unity, since in the cases he considers the groups seek inclusion or integration: "Enabling integration may require some modification of the institutions of the dominant culture in the form of group-specific polyethnic rights, such as the right of Jews and Muslims to exemptions from Sunday closing legislation, or the right of Sikhs to exemptions to motorcycle helmet laws."⁹⁴ These examples could also be accommodated by a reformulation of the rule so that it would apply to all. Rather than propose exemptions, which means that some persons are empowered to decide who will be punished for infractions and who will not be punished, why not simply propose the abolition of compulsory shop closing laws and the elimination of compulsory helmet laws? It seems never to occur to Kymlicka that the state might have no business interfering in personal choice or voluntary transactions in this manner. If such foolish and paternalistic restrictions were removed for all, then no one would feel the exclusion that so concerns Kymlicka.

Moreover, compulsory shop closing laws in Europe and North America are usually defended as a requirement for the maintenance of the cultural and religious identity of the majority Christian community; some might argue that they are a precondition for the self-esteem of the members of that community. To be consistent, Kymlicka would have to argue that only non-Christians should be allowed to buy and sell on Sundays, whereas Christians should be forbidden by law from doing so. Perhaps special Christian police forces would enforce such group-specific restrictions. A more authentically liberal solution would be to propose the same rule—liberty—for all. That is true also of most of the other plausible examples that Kymlicka gives of means to avoid oppressing a minority, such as exemptions for the Amish from Social Security (which they erroneously believe is an actuarially sound insurance system) and compulsory education.⁹⁵

Kymlicka's proposal for group-differentiated rights is flawed in other ways. Rights that are given and taken, and that have to be

periodically revised by someone with power, are not rights at all.⁹⁶ Someone has to be in the position to grant, take away, or otherwise adjust Kymlickian differential rights, and that person or those persons will be, in effect, the real holders of the rights because they hold the powers to grant them or to take them away. Equality of rights for all has a salience that carefully tweaked inequalities do not. The latter require philosopher kings to create and administer them. Thus, the adoring newspaper headline about Will Kymlicka's worldwide crusade to eliminate equality before the law: "A Philosopher in Red Sneakers Gains Influence as a Global Guru."⁹⁷ But as Plato found during his disastrous mission to Syracuse, philosophers rarely get the final word on matters of political power. Establishing systems of unequal rights will probably foster intergroup conflict, not intergroup comity, and we have seen in the last century just how terrible such conflict can be. Stipulating that "such measures will not harm the general welfare of the state," as the Lebanese Constitution did, is about as effective as stipulating that socialism shall be imposed, provided that it works.

Further, the boundary between external protections and internal restrictions on which Kymlicka puts so much weight is less impermeable than he thinks. For example, a restriction on the rights of indigenous peoples to sell their land counts as an external protection, but it will certainly look to at least some members of the group as an internal restriction. Not only are outsiders restricted from contracting with them, but they are restricted from contracting with outsiders.⁹⁸ The unity of the community that emerges is likely to be manipulated by those with the power to control members of the group. And although this may in some cases (and in some sense) preserve a political community by restricting the rights of its members, it also ensures that opportunities for enrichment will be foregone, so that members of the community also share common poverty. Such poverty may bind a community together, but it is not usually so desirable for the non-elite members of the community who suffer from it. Such special rights are also often liabilities. For example, the inability to sell land means that one cannot get a mortgage on it. One has possession, but not capital.⁹⁹ Contrary to Kymlicka's assertions, the alleged protections for such groups have a poor historical record.

"Special rights" may also prove to be terribly disadvantageous in other ways. The special status of Jews in European history is instructive in this regard. In that case, R. I. Moore cogently points out:

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As so often in Jewish history special treatment was dangerous, and what began as a privilege later became the means of oppression. Protection of the Jews and jurisdiction over them became one of the rights which the counts usurped from the crown in the tenth century, and the feudatories from the counts in the eleventh.¹⁰⁰

In the *Leges Edwardi Confessoris* it is stated that "All Jews wherever they are in the kingdom must be under the guardianship of the king; nor may any of them be subject to any baron without the licence of the king, because Jews and all their property are the king's."¹⁰¹ The special status of many American Indian bands and nations as "domestic dependent nations"¹⁰² also does not present an especially happy picture of how group-differentiated rights may actually work in practice.¹⁰³

Although Kymlicka repeatedly insists that the group-differentiated rights he endorses are individual rights, he consistently refers to "the group" making choices about whether or how their culture will change. Thus, "While indigenous peoples do not want modernization forced upon them, they demand the right to decide for themselves what aspects of the outside world they will incorporate into their cultures."¹⁰⁴ Who are the "they" here? If he means the individual members, their rights to decide what aspects of the outside world they wish to accept would be respected in a regime of equal rights. It seems clear that Kymlicka means the group as a whole, or at least its political leaders, in which case majorities (as a matter of practice, this means oligarchic elites) have the right, and he cannot assert that such rights are individual, rather than collective, rights. In virtually every case, despite his persistent denials, Kymlicka gives to the elite members of groups (frequently people who are articulate, like himself, or people who are brutal, violent, and ruthless in eliminating opposition) the right to determine how the other members of the group will live, and if that is not an "internal restriction," it is not clear what would be.¹⁰⁵ As Charles Taylor notes of restrictive laws in Quebec, "Restrictions have been placed on Quebecers by their government, in the name of their collective goal of survival."¹⁰⁶ Kymlicka's approach follows the general trend of declarations, conventions, and covenants governing indigenous people, most of which do not mention individual rights of the members of indigenous nations, such as the right to own land individually or freely in

association with others, but consistently refer only to the right of “peoples” to “lands” and “territories.” A philosophical defense of such restrictions is offered by Michael McDonald, who complains of “the distorting force of individual mobility rights” and asserts “such rights can intentionally or unintentionally lead to the destruction of worthwhile groups.”¹⁰⁷ The approach is decidedly collectivist, rather than individualist. Thus, Article 17, Section 2 of the Convention concerning Indigenous and Tribal Peoples in Independent Countries states, “The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.”¹⁰⁸ Such “rights” are explicitly collective rights, founded on race or ethnicity, and not, *pace* Kymlicka, individual rights. They subject individuals to the rule of the collectivity to which they are assigned, which quite often means in practice subordination to the rule of parasitic and predatory elites who have attained preeminence or power within and therefore over their own national or ethnic group.

Kymlicka rests his case on the alleged unavoidability of the mixture of state and ethnicity: “The state cannot help but take an active role in the reproduction of cultures.”¹⁰⁹ To avoid oppression and to guarantee each group the recognition its members need as a primary good necessary for the pursuit of rational plans of life, the state should interact with the members of each ethnic group differently. Thus, since “there is no way to have a complete ‘separation of state and ethnicity,’” it follows that “the only question is how to ensure that these unavoidable forms of support for particular ethnic and national groups are provided fairly—that is, how to ensure that they do not privilege some groups and disadvantage others.”¹¹⁰ Further, he argues that “the most plausible reason” for not granting automatic citizenship to each and every human who might desire it is “to recognize and protect our membership in distinct cultures,” and this, in turn, “is also a reason for allowing group-differentiated citizenship within a state.”¹¹¹

Such reasoning is compatible with nationalist or socialist thought but not with liberalism. The liberal approach recognizes the inevitability of conflicts over common goods among people with different ends and therefore limits the state to those things necessary to the maintenance of a civil society, to what is in fact a good common to

all. That is the most plausible interpretation of the “necessary and proper” clause of the United States Constitution, a clause that is usually misinterpreted to mean “convenient and not clearly prohibited.” If government schools inevitably impart some set of moral values (which, of course, includes the currently dominant null set promulgated in most government schools), we may consider alternatives to monopoly state schooling, rather than trying to fine-tune the curriculum so that each and every ethnic group will not feel excluded. The result of the latter has turned out to be (in the United States, at least) a curriculum remarkably devoid of moral and other content. Kymlicka never considers whether individuals may have a right to withdraw from coercive state-imposed systems; exemptions may be “granted” by the state, but they should always be understood to be gifts or dispensations made by those with the power and the right to grant or to deny them. They are not rights.¹¹²

Kymlicka and others start with the fixed point of national borders and restrictions on freedom of movement and trade, assuming that nothing could be less controversial than protectionism and controls on the movement of people. They treat the relatively recent invention of the passport and of controls on movement in European history as if they were an inheritance of the ages.¹¹³ As Kymlicka writes of group-differentiated rights, “they are logically presupposed by existing liberal practice.”¹¹⁴ By this he means restricting rights to work, travel, own property, and the like to citizens. The statement is true only if we consider shooting people who try to sneak across the borders in search of opportunities to offer their services to willing employers to be part of “liberal practice.” But Kymlicka does have a thin wedge to open the door to group-differentiated rights: even if borders were open to trade and travel, one legal right at least would not be open to any and all who desired it. One right that should be reserved for citizens is the right to vote. That is an important limitation on the scope of a legal right, but voting is hardly a natural right like the right to own property or the right to choose one’s profession; it is a procedural right that is useful as a means of protecting our fundamental rights, such as the right to freedom of religion or the right to choose one’s profession or spouse. And it is a very, very, very thin wedge to use to create a general theory of group-restricted rights. “To recognize and protect our membership in distinct cultures” is hardly “the most plausible reason” for limiting the franchise to citizens and limiting citizenship to those who

are a part of the civic culture of liberalism. Further, the idea that citizenship should be limited to members of distinct ethnic or cultural groups is hardly widely accepted as a part of liberalism. Kymlicka puts a great deal of weight on the alleged intuitive plausibility of his thesis, but his intuition is not shared by many other contemporary liberals.¹¹⁵

Unlike Madison and other classical liberals, Kymlicka is willing or even eager to jettison legal stability in favor of an ever changing kaleidoscope of rights and obligations. The very variety and flexibility of rights regimes that Kymlicka endorses—a plurality that requires wise supervisors, adjudicators, and assigners of rights to and among groups—has terrible consequences for the rule of law generally. Rather than being a condition of freedom, as Kymlicka asserts,¹¹⁶ these regimes require subjection to the arbitrary will of others who are empowered to tweak, adjust, change, and rearrange rights as they see fit. Traditional liberalism defined that subjection as the very condition of tyranny, rather than of liberty.¹¹⁷

It seems that the one fixed point for Kymlicka is the existence of national state borders, protectionism, immigration controls, and armed border guards, not an especially promising point for an allegedly liberal theory of rights. Yet Kymlicka's own argument for group-differentiated rights can just as easily be used against him, by identifying groups with common identities and interests that transcend national state borders and whose claims or rights, therefore, to be protected, would require that those very borders be eliminated. One obvious example is the travel of nomadic peoples across state borders; examples include the Somali of the Ogaden, the Sami of Scandinavia, Finland, and Russia, and others. Other groups whose "identities" transcend national borders include religious groups and gay people. In the case of religion, Jeremy Waldron brings up the helpful example of a Catholic Breton who considers her religion, which is shared by people in many other national communities, as more important to her sense of self than her Celtic ethnicity: "That feature of her life—that as a Breton she shares a faith and a church with Irish, Italians, Poles, Brazilians, and Filipinos—may be much more important to her identity than anything which (say) a Tourist Board would use to highlight her cultural distinctiveness."¹¹⁸ Barring her from freedom of travel, trade, and interaction with her fellow Catholics in the name of her Celtic ethnicity would likely be far

more damaging to her than Kymlicka seems willing to admit. Taking border guards and protectionism as a given is to constrain the liberty that she would see as most instrumentally valuable to the fulfillment of her identity.

Another case overlooked by Kymlicka is that of gay people. As Carl Stychin points out, "If we accept the possibility of group based identity and rights," then the theories of multiculturalism and diversity advanced by Charles Taylor and Will Kymlicka "are going to be more complicated than we (and they) might first have considered."¹¹⁹ Stychin's critique is not, however, based on a call for equal individual rights; he agrees fundamentally with thinkers such as Taylor and Kymlicka but carries their project to its own absurd conclusion. Stychin shows how a serious commitment to group-differentiated rights on Kymlickian foundations (self-esteem, recognition, etc.) ultimately destroys the very national borders that Kymlicka considered determined starting points. As Stychin argues, "lesbians and gays (and, for that matter, many others) are skeptical when they read Kymlicka's arguments about culture. For many of us, an important cultural reference point is queer culture, which seems more than capable of surviving (and thriving) in the current cultural conditions."¹²⁰ But he concludes from the fact that such identities and communities are transnational that "lesbian, gay, bisexual, and queer politics and culture can bring to a study of national identities a framework in which identity is self-consciously contingent and in process, characterized by reinvention and an ongoing questioning of borders and membership."¹²¹ Stychin finds that prospect exciting, but one wonders whether people who have suffered through border changes in the past—those in Poland, for example—are likely to be as excited about an ongoing questioning of borders and membership. Stychin takes the multicultural project of Kymlicka and others seriously enough to bring it to its absurd conclusion: all the rules, all the time, are always open to "reinvention." As he says, "As nations struggle with their sense of self, they could do well to appropriate this excitement of reconstitution, which I would describe as a queering of the nation itself."¹²² An authentically liberal perspective would simply recognize the equal individual rights of gay people, including the rights to travel and work where they wish, to marry, and so on, so that gay partners who are citizens of different countries would not be separated by odious border controls, residence permits, and

work permits. Group-differentiated rights, when taken seriously, lead to both logical and legal instability. Equal individual rights, on the other hand, are stable, predictable, salient, and knowable by and to all and do not rest on such odious and immoral practices as terrorizing those who wish to cross state borders for peaceful purposes.

Madison's vision of "establishing a political equality among all"¹²³ provides a much more stable foundation from which to secure the common good than do any of the innumerable variety of systems of inequality proposed by multiculturalists. Madison envisioned a constitutional order encompassing a wide variety of factions living together under a regime of equal rights. He defended such a republican order in the name of liberty, for he did not think that liberty would be as secure in the small republic that Montesquieu and some of the anti-Federalists believed was the only secure repository of liberty.¹²⁴ For example, "Brutus," writing in opposition to adoption of the Constitution, argued that:

History furnishes no example of a free republic, any thing like the extent of the United States. The Grecian republics were of small extent; so also was that of the Romans. Both of these, it is true, in process of time, extended their conquests over large territories of country; and the consequence was, that their governments were changed from that of free governments to those of the most tyrannical that ever existed in the world.¹²⁵

In a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving against those of the other. This will retard the operations of government, and prevent such conclusions as will promote the public good.¹²⁶

Madison drew precisely the opposite conclusion:

The lesson we are to draw from the whole is that where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a Republican Gov^t the majority if united have always an opportunity. The only remedy is to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that in the 1st place a majority will not be likely at the same moment to have a common interest

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separate from that of the whole or of the minority; and in the 2^d place, that in case they sh^d have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale & in such a form as will controul all the evils w^{ch} have been experienced.¹²⁷

Kymlicka and others are trying to replicate within each extended or multicultural republic a set of little republics, each ethnically (relatively) homogeneous, and each, therefore, more likely to experience the tyranny by majorities over minorities. Madison sought to prevent such tyranny by expanding the scope of the American republic. The establishment of such little republics is likely to generate conflicts among those with group-differentiated rights about what the ultimate decisionmakers of the state are going to put into each Christmas stocking of rights.¹²⁸

A fairly obvious example of the possible conflicts among groups that are made inevitable by such schemes of group-differentiated rights is presented by the conflict between feminist and multiculturalist approaches. Feminist theorist Susan Moller Okin has raised the problem of the treatment of women in cultural, ethnic, religious, or national groups whose traditions incorporate or rest upon the subordination of women.¹²⁹ In response, Will Kymlicka noted that “Okin says she is concerned about the view that the members of a minority ‘are not sufficiently protected by the practice of ensuring the individual rights of their members,’ and minority group members are demanding ‘a group right not available to the rest of the population.’ But many feminists have made precisely the same argument about gender equality—i.e., that true equality will require rights for women that are not available to men, such as affirmative action, women-only classrooms, gender-specific prohibitions on pornography, gender-specific health programs, and the like. Others have made similar arguments about the need for group-specific rights and benefits for the disabled, or for gays and lesbians. All of these movements are challenging the traditional liberal assumption that equality requires identical treatment.”¹³⁰ The very fact of the limitless variety of group-differentiated rights may be the strongest argument for equal rights.

Madison and the Indians

There is one exception to the general argument for equal rights under the rule of law, and that is the status of the native American

nations, on whose behalf Madison devoted much effort and whose status is recognized in the Constitution of the United States of America. (For Madison's views and efforts on behalf of the American Indians, see Jacob Levy's contribution to this volume.) Thus, Article I, Section 8, Clause 3 of the Constitution vests in the Congress of the United States the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." Article VI, Clause 2 further specifies that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This clearly means that all of the treaties with the Indian tribes that preceded the new Constitution of the United States were part of the "supreme law of the land," for it specifically refers to "all Treaties *made*, or which shall be made" (emphasis added). On the basis of the historical facts and the law of the land, Chief Justice Marshall declared in *Worcester v. Georgia*, "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . ." ¹³¹ Thus, the new Constitution did not completely wipe out the preexisting political independence of the Indian tribes, although Marshall's denomination of them as "domestic dependent nations" in "a state of pupilage" to the United States government implied something less than independence. Whether Marshall's reading of the status of the Indian tribes is tenable, the United States government is obligated to respect all of the particular rights and obligations specified in the 367 ratified treaties between Indian tribes and the American government. ¹³² Adherence to all such treaties is justified not only by the preexisting status of the Indian tribes, but more importantly, by the fundamental legal obligation to fulfill the terms of the Constitution. Arguments about securing a higher kind of freedom by "recognizing" the special status of groups are irrelevant to adherence to the law of the land.

Special legal and political status for Indian tribes and bands is justified by the fact of their preexisting political status and the requirement that treaties already entered into be respected. To do otherwise would be to violate fundamental requirements of justice,

and to replace law with brute force and power. For the same reasons that new group-differentiated rights should not be conjured up by legislative fiat, legally binding treaties should not be unilaterally abrogated (unless the treaty itself provides for such abrogation).

The variety of regimes of group-differentiated rights that are presented as realizations of multiculturalism is too great to catalogue or to rebut in this essay.¹³³ The above remarks merely rebut some of the more prominent variants and should point the way to a general liberal defense of the idea of equality before the law.

Conclusion

The project that Madison and his colleagues (both those who supported and those who opposed the Constitution) launched has proven itself quite attractive in comparison to other existing regimes. Despite its many flaws and failings, it has secured more liberty and more prosperity for more people than any other regime in the history of humanity. I see no reason to replace a regime of equal individual rights, itself the result of heroic struggles familiar to students of American history, with any of the variety of mutually incompatible regimes of group-differentiated rights. Equality is unique; inequality is not. That fact alone should indicate to us that any proposed regime of unequal rights will be opposed by all the advocates of other competing regimes of unequal rights. Each group (or, more precisely, the elite self-appointed leaders of each group who expect to benefit) will struggle for maximum advantage, to the detriment of the common good.

In every case, advocates of unequal rights reject the common good, whether explicitly in theory or implicitly in practice. In place of Madison's attempt to protect "the rights of other citizens, or the permanent and aggregate interests of the community,"¹³⁴ advocates of group-differentiated rights have adopted Calhoun's vision of legal and political processes as "considering the community as made up of different and conflicting interests, as far as the action of government is concerned."¹³⁵ The common good is a central element of the classical liberal/libertarian tradition of thinking. The common good, at least under the normal circumstances of justice, is liberty and the rule of law. Advocates of group-differentiated rights reject both by subjecting citizens to those empowered to change the rules, reallocate rights, and create caste distinctions among them.

We may, then, answer the three questions with which I opened this essay:

1. Did Madison envision a “multicultural” republic?
Yes, if by multicultural we mean encompassing a wide variety of passions and interests. No, if by multicultural we mean regimes of group-differentiated rights.
2. Are contemporary advocates of various forms of group rights or group representation, often presented under the banner of “multiculturalism,” advancing the Madisonian project, or undermining it?
Such thinkers are undermining Madison’s project and advancing Calhoun’s radically different vision of the Constitution.
3. Are group-differentiated rights a necessary and proper element of a constitutional order ordained and established to “form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and to our Posterity”?
Such group-differentiated rights are neither necessary to securing the goods listed in the preamble, nor proper, for they violate fundamental principles of republican government and the rule of law, and are therefore not authorized under the Constitution.

Madison’s vision of an extended republic as the framework for liberty remains inspiring. Millions of people, from virtually every nation, race, ethnicity, and religion still seek to become citizens of the United States of America. They seek to live in a nation in which “government is instituted and ought to be exercised for the benefit of the people.”¹³⁶ For pursuit of the common good to be institutionally stable, it should not encompass too many goals. The more goods that are claimed to be common, the less likely that the entire bundle will, in fact, amount to the common good. That is why the Founders excluded supporting religion from the common good; not because they discounted the importance of religion, but because the variety of religions meant that no one religion could be considered the common good among practitioners of many religions. As Madison noted, the benefit of the people “consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.”¹³⁷

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Accordingly the Constitution does not establish particular religion; it prohibits the Congress from making any law “respecting an establishment of religion, or prohibiting the free exercise thereof.” The common good—for Christians, Jews, Muslims, Buddhists, Hindus, atheists, and others—is liberty of religion. And the particular goods that people pursue are quite simply not the business of government. The Declaration of Independence asserts rights to “Life, Liberty, and the Pursuit of Happiness,” just as Madison identifies the common good with “pursuing and obtaining happiness and safety” (emphasis added). Just as for religion, so for cultural goods and identity, education, preferences for material goods and all the other means of pursuing happiness, government may secure our *right to pursue* those goods by providing for justice and defense but is not authorized to provide the goods themselves. That is the proper responsibility of the citizens themselves, acting in their capacities as private persons.

A legal order that can secure a framework within which a great variety of persons who are members of many different cultural, ethnic, religious, or national groups can pursue and obtain happiness and safety *is* the common good, and that legal order is undermined by attempts to use it to secure the concrete good of this or that group, or to tweak it to fulfill the preferred arrangements of entitlements and obligations of this or that activist or philosopher. Americans should do as Madison’s friend Thomas Jefferson urged them in his First Inaugural Address,

Let us then, with courage and confidence pursue our own federal and republican principles, our attachment to our union and representative government.¹³⁸

Notes

1. Montesquieu, *The Spirit of the Laws*, trans. and ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), Part I, Chapter 16, “Distinctive Properties of the Republic,” p. 124.

2. James Madison, “Speech in the Virginia Ratifying Convention on Taxation, a Bill of Rights, and the Mississippi,” in *James Madison: Writings*, ed. Jack N. Rakove (New York: Penguin Putnam, 1999), pp. 381–82. The context of Madison’s remarks is that a bill of rights formally guaranteeing religious freedom is not necessary to the enjoyment of such liberty.

3. François-Marie Arouet Voltaire, *Candide and Philosophical Letters* (1734; New York: Random House, 1992), p. 141.

4. *The Federalist* No. 10 (James Madison).

5. See, for example, Amitai Etzioni, “The Responsive Community: A Communitarian Perspective,” Presidential Address, American Sociological Association, August

20, 1995. *American Sociological Review*, (February 1996), 1–11: “Most important for the point at hand is that libertarians actively oppose the notion of ‘shared values’ or the idea of ‘the common good,’” (available at www.gwu.edu/~ccps/etzioni/A241.html). Further, Etzioni asserts in “Libertarian Follies,” *The World & I*, May 1995, pp. 365–77, “Libertarians seem to fear that the recognition of the common good as a value that is co-equal with personal freedom will endanger the standing of that liberty.” For an attempt to set the record straight, and to articulate a classical liberal conception of the common good, see Tom G. Palmer, “Myths of Individualism,” *Cato Policy Report* 18, no. 5 (September/October 1996) (available at www.cato.org/pubs/policy_report/cpr-18n5-1.html). For a nuanced statement of the liberal idea of “self-interest,” see “The Secret History of Self-Interest,” in Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

6. *The Federalist* No. 45 (James Madison).

7. James Madison, “Speech in the House of Representatives, June 8, 1789,” in *The Mind of the Founder: Sources of the Political Thought of James Madison*, ed. Marvin Meyers (Hanover, N.H.: University Press of New England, 1981), p. 164.

8. Madison, “Parties,” in *James Madison: Writings*, p. 504.

9. *Ibid.*, p. 505.

10. Not only should the rules be common, but they must be stable if they are to be just and compatible with the order of a free society. Madison described the effects of a “mutable policy” starkly: “It poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is today can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known and less fixed?”

“Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few, over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue; or in any manner affecting the value of the different species of property, presents a new harvest to those who watch the change and can trace the consequences; a harvest reared not by themselves but by the toils and cares of the great body of their fellow citizens. This is a state of things in which it may be said with some truth that laws are made for the *few* not for the *many*.” *The Federalist* No. 62 (James Madison).

11. As Madison noted in opposing on the floor of Congress the establishment of a national bank, “No argument could be drawn from the terms ‘common defence, and general welfare.’ The power as to these general purposes, was limited to acts laying taxes for them; and the general purposes themselves were limited and explained by the particular enumeration subjoined. To understand these terms in any sense, that would justify the power in question, would give to Congress an unlimited power; would render nugatory the enumeration of particular powers; would supercede all the powers reserved to the state governments. These terms are copied from the articles of confederation; had it ever been pretended, that they were to be understood otherwise than as here explained?” James Madison, “Speech in Congress Opposing the National Bank,” in *James Madison: Writings*, p. 483.

12. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, ed. Gaillard Hunt and James Brown Scott (New York: W. W. Norton & Co., 1987), p. 76.

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13. *Ibid.*, p. 77. It is worth noting that just prior to these questions, Madison states “We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man.” Madison, like many of the other Founders, was acutely aware of the injustice of slavery and saw it as one form of the oppression that their innovative approach to government was to eliminate. See also his “Memorandum on Colonizing Freed Slaves,” in *James Madison: Writings*, pp. 472–73, in which he argued that incorporation of a freed black population into American society would be “rendered impossible by the prejudices of the Whites, prejudices which proceeding principally from the differences of colour must be considered as permanent and insuperable.” He proposed colonization of Africa, for “an experiment for providing such an external establishment for the blacks might induce the humanity of Masters, and by degrees both the humanity and policy of the Governments, to forward the abolition of slavery in America.”

14. *Ibid.*, p. 77.

15. *The Federalist* No. 10 (James Madison).

16. *Ibid.*

17. Here Madison seemed not to consider the possibility of a tyranny of special interests that, having smaller transaction costs than the majority, can impose diffuse microburdens on the majority, the aggregate of which, when concentrated in the hands of a minority, provide a substantial incentive to organize factions against the common interest. This is the phenomenon of “diffused costs, concentrated benefits” with which students of rent-seeking in modern politics are so well acquainted. Second, such particular interests may engage in logrolling, in which legislators trade votes on issue A for votes on an unrelated issue B, to create legislative majorities that are systematically opposed to the common interest.

18. *The Federalist* No. 58 (James Madison).

19. *The Federalist* No. 62 (James Madison).

20. *The Federalist* No. 57 (James Madison).

21. Lani Guinier, *The Tyranny of the Majority* (New York: The Free Press, 1994), p. 4.

22. *Ibid.*, p. 3.

23. *Ibid.*, pp. 57, 216. A careful reading of *The Federalist* No. 39 did not reveal to me any connection of Madison’s ideas to Guinier’s statement that “all sectors of society” should be included in “government operation.”

24. *Ibid.*, p. 103.

25. *Ibid.*, p. 5.

26. *Ibid.*, p. 58.

27. *Ibid.*, p. 227, footnote 154, and p. 245, footnote 42.

28. *Ibid.*, p. 70.

29. Lani Guinier, “No Two Seats: The Elusive Quest for Political Equality,” *Virginia Law Review* 77 (1991), p. 1514, footnote 299. Henry Louis Gates Jr. endorses *The Tyranny of the Majority* on the back cover of the book as “At last . . . the public hearing she was denied. . . . It doesn’t matter where you stand; it’s all here, to argue or agree with.” Stephen L. Carter, in his foreword to the book, stated that “the debate, after all, was about her written record. It is high time, then, for the record to be available for all to view. Let readers make up their own minds, without the intercession of media experts and electronic sound bites.” Apparently, Gates and Carter were deceived, for a number of the more startling claims that appeared in her law review articles did not make it into the book.

30. See, for example, Doug Kendall, "Gale Norton Is No James Watt; She's Even Worse," *Los Angeles Times*, January 9, 2001: "The more you learn about Norton, the more the label 'James Watt in a skirt' seems unfair to Watt."

31. See, for example, the remarks of gay writer Charles Kaiser, quoted in the *New York Times*: "I certainly think that Andrew's popularity, especially on the talk-show circuit has a lot to do with his own self-hatred, which makes him an especially attractive kind of homosexual to a certain kind of talk-show host. Which is the reason that his prominence is so infuriating to the rest of the community." "Conservative Gay Columnist Is under Fire," by Felicity Barringer, *New York Times*, August 6, 2001. The main topic of the essay is the firestorm of criticism attracted by Norah Vincent, a columnist for the *Village Voice* and the *Los Angeles Times* who is a lesbian and a libertarian, and therefore a prime target for collectivist gay writers. As one dissident editor at the *Village Voice*, Richard Goldstein, put it, "The liberal press needs to ask itself why they consistently promote the work of gay writers who attack other gay people." Note that the "other gay people" whom Norah Vincent and Andrew Sullivan have on occasion criticized are collectivists and statists, but their collectivism and statism are implicitly equated by Goldstein with their homosexuality, so anyone who criticizes them is criticizing "gay people," and not "collectivist statists." In Goldstein's view, it is an essential property of being homosexual that one favor state power over individual rights.

32. See, for example, Ludwig von Mises, *Human Action* (Chicago: Henry Regnery Company, 1966), pp. 75–91.

33. Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success," *Michigan Law Review* 89 (1991): 1140. This discussion, too, was deleted from the version of the essay that appeared in her book *The Tyranny of the Majority*.

34. Lani Guinier, *The Tyranny of the Majority*, p. 113.

35. *Ibid.*, p. 254.

36. Robert Richie and Steven Hill, *Reflecting All of Us: The Case for Proportional Representation* (Boston: Beacon Press, 1999), pp. 14, 15.

37. *Ibid.*, p. 18.

38. Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), p. 151.

39. *Ibid.*, p. 150.

40. John C. Calhoun, *A Disquisition on Government*, in *Union and Liberty: The Political Philosophy of John C. Calhoun*, Ross M. Lence, ed. (Indianapolis: Liberty Fund, 1992), p. 14.

41. *Ibid.*, p. 15.

42. Guinier's discussion of what she calls a "Madisonian majority" (*The Tyranny of the Majority*, p. 4) is strikingly parallel to Calhoun's discussion of how "a minority might become the majority" (*A Disquisition on Government*, p. 20) and is rejected as a solution to the problem of majority domination for the same reasons, namely, that (for Guinier) blacks as a bloc facing another racial bloc cannot transform themselves into the majority and (for Calhoun) the minority bloc of slave states cannot transform itself into a majority bloc, at least given the demographic trends in the United States in Calhoun's time.

43. Calhoun, p. 21.

44. *Ibid.*, pp. 23–24.

45. *Ibid.*, pp. 16–19. Here Calhoun makes a powerful point that is fully consistent with a Madisonian approach; the more Madisonian solution, however, would seem

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to be to strive for strictly limited government and for strict economy in those functions best discharged by government, rather than to attempt to guarantee a system of group representation that would, in any case, be more likely to generate collusion among groups represented to capture disproportionate shares of such emoluments.

46. John C. Calhoun, "Speech at the Meeting of the Citizens of Charleston" (March 9, 1847), in *Union and Liberty: The Political Philosophy of John C. Calhoun*, p. 526. In his *A Discourse on the Constitution and Government*, Calhoun presented an interpretation of the United States Constitution through his theory of the concurrent majority, and asserted that the United States was "preeminently a government of the concurrent majority." In *Union and Liberty: The Political Philosophy of John C. Calhoun*, p. 121.

47. Lebanese Constitution, Article 95, cited in Enver M. Koury, *The Crisis in the Lebanese System: Confessionalism and Chaos* (Washington, D.C.: American Enterprise Institute, 1976), p. 5. Article 95 was added by the constitutional law of November 9, 1943. It effectively abrogated Article 7: "All the Lebanese are equal before the law. They enjoy equal civil and political rights and are equally subjected to public charges and duties, without any distinction whatsoever."

48. In the Lebanese case, the rough proportion between demography and political office was upset by an enormous demographic change; unsurprisingly, those who were favored by the old scheme did not want to give it up in favor of the new, and the result was a savage civil war that is still not fully over.

49. Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989), p. 228.

50. *Ibid.*, p. 229.

51. Iris Marion Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," in *Feminism and Political Theory*, Cass R. Sunstein, ed. (Chicago: University of Chicago Press, 1990), p. 118.

52. *Ibid.*, p. 129.

53. *Ibid.*, p. 134.

54. *Ibid.*, p. 125. One might wonder why someone with Young's general philosophical presuppositions would favor "communication across those differences." Communication across difference presupposes something common, which seems to be what Young is rejecting.

55. These issues, in the context of the written word, are carefully explored by Roman Ingarden in *The Literary Work of Art: An Investigation on the Borderlines of Ontology, Logic, and Theory of Literature*, trans. by George R. Grabowicz (Evanston, Ill.: Northwestern University Press, 1973). See also Roman Ingarden, *The Cognition of the Literary Work of Art*, trans. by Ruth Ann Crowley and Kenneth R. Olson (Evanston, Ill.: Northwestern University Press, 1973) and *The Work of Music and the Problem of Its Identity*, trans. by Adam Czerniawski (Berkeley, Calif.: University of California Press, 1986). Ingarden offers a powerful general critique of the sort of claim of incommensurability and incomprehensibility that Young makes.

56. On the issue of objectivity in general, see Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986).

57. Note also that Young asserts the inability to "completely understand or adopt the point of view of those with other *group-based* perspectives and histories" (italics added), but certainly if this claim is true, it would be even more the case for communication among individual members of the same groups, for individual life histories among group members differ. Young has smuggled into the discussion a remarkable

set of implausible ontological claims about groups and their relationships to both the individuals who comprise them and to other groups.

58. "Polity and Group Difference," p. 133. Nowhere does Young mention or consider the tremendous advantage in such meetings held by the articulate over the inarticulate. College professors, who live by the spoken and written word, are often quite eager to center the power over others in forums where—*mirabile dictu!*—it is they who have the greatest advantage; in this, they are no different from other minority factions and should be treated with the same suspicion as are all other special interest groups.

59. "Polity and Group Difference," p. 139–40.

60. The incipiently authoritarian nature of her case is indicated in her reference to the Nicaraguan state: "Reports of experiments with publicly institutionalized self-organization among women, indigenous peoples, workers, peasants, and students in contemporary Nicaragua offer an example closer to the conception I am advocating." Iris Marion Young, "Polity and Group Difference," p. 132. (The essay originally appeared in 1989; no mention is made of the war waged by the Sandinistas on the Mosquito Indians and other indigenous groups.) "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship."

61. Young, p. 140.

62. As Bartolomé de las Casas concluded his defense of the American Indians in 1550, "The Indians are our brothers, and Christ has given his life for them. Why, then, do we persecute them with such inhuman savagery when they do not deserve such treatment? The past, because it cannot be undone, must be attributed to our weakness, provided that what has been taken unjustly is restored." Bartolomé de las Casas, *In Defense of the Indians*, trans. by Stafford Poole (DeKalb, Ill.: Northern Illinois University Press, 1992), p. 362.

63. See "Executive Order 9066: Authorizing the Secretary of War to Prescribe Military Areas," in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, Roy L. Brooks, ed. (New York: New York University Press, 1999), pp. 169–70.

64. Civil Liberties Act of 1988, *U.S. Statutes at Large* 102 (1988): 903. In addition, the act authorized the establishment of a special education fund.

65. For a representative statement on the issue, see the transcript of a TransAfrica Forum program at www.transafricaforum.org/reports/print/reparations_print.shtml.

66. Randall Robinson, *The Debt: What America Owes to Blacks* (New York: Penguin Putnam, Inc., 2000), pp. 107–08.

67. *Ibid.*, p. 207.

68. See "Special Field Order No. 15," in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, pp. 365–66. The order does not specify the reasons for the settlement (beyond encouraging enlistment in the United States military) and merely refers to "The islands from Charleston south, the abandoned rice-fields along the rivers for thirty miles back from the sea, and the country bordering the St. John's River, Florida." This reflects its status as a document of war, rather than a postwar settlement of accounts or reparations.

69. For statements of some of the problems inherent in an attempt to make such endowment-based compensation, see John McWhorter, "Blood Money: Why I Don't Want Reparations for Slavery," and Deroy Murdock, "A Bean Counting Nightmare to Avoid," both in *American Enterprise*, July/August 2001.

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70. Some of these points were made in a somewhat inflammatory manner by David Horowitz in newspaper advertisements in college papers. See www.frontpagemag.com/horowitzsnotepad/2001/hn01-03-01.htm for a list of Horowitz's ten reasons to oppose reparations. I find numbers eight and nine on the list to provide very weak arguments against reparations, namely that transfer payments (welfare) to black Americans have already paid any putative debt and that the fact that American-born black people are richer than African-born black people indicates that they are better off than they would be if their ancestors had remained in Africa. The first is problematic because more white people have received transfer payments than have black people, and certainly many blacks have paid taxes to support nonworking whites, indicating that the system is hardly a just answer to the injustice of slavery. That the second is irrelevant is clear when we consider the following case: a Jewish family in Bratislava loses their liberty, their home, and their business when the National Socialists take power; the children survive the concentration camps and move to New York; they prosper in New York; after the fall of the Communist government in Slovakia there is a debate about the home and business establishment that were confiscated by the National Socialists and then by the Communists. Is it relevant to the proper allocation of the property that those who remained behind in the village, Jew and non-Jew alike, are poorer than those who later prospered in New York? The fact that someone did relatively well after suffering an injustice is a poor argument against compensation for the injustice.

71. Robinson, p. 218. For a meticulous statement of the principle of culture as a foundation for group-differentiated rights claims, see Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford University Press, 1989). Robinson notes that of other terrors visited on peoples, including the Jews, Cambodians under the Khmer Rouge, Native Americans, Rwandan Tutsis, and the peoples of the Belgian Congo under King Leopold II (the period of the so-called Free State), "All of these were unspeakably brutal human rights crimes that occurred over periods ranging from a few weeks to the span of an average lifetime. But in each of these cases, the cultures of those who were killed and persecuted survived the killing spasms." p. 215.

72. Robinson, p. 62.

73. *Ibid.*, p. 206.

74. *Ibid.*, pp. 244, 245–46.

75. Darrell L. Pugh, "Collective Rehabilitation," in *When Sorry Isn't Enough*, p. 373.

76. *Ibid.*, p. 373. As he notes on the same page, "The prospect of reparations to African Americans is an exciting one." If you hope to be on the board of a multi-billion-dollar fund with discretion to award funds, that would certainly be true.

77. Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001), p. 184.

78. Robinson, p. 230.

79. *Ibid.*, p. 16.

80. *Ibid.*, p. 209: "If one leaves aside the question of punitive damages to do a rough reckoning of what might be fair in basic compensation . . ."

81. *Ibid.*, pp. 239–40.

82. See Ralph Horwitz, *The Political Economy of South Africa* (New York: Frederick A. Praeger, 1967), esp. pp. 380–86.

83. James Madison, "Speech in the Virginia Ratifying Convention on the Slave Trade Clause," in *James Madison: Writings*, p. 39. It should be pointed out that Madison goes on to point out that the compromise not only allows for abolition of the slave

trade, but protects the interests of current owners of slaves. Madison argues, again, that the compromise represented an amelioration of the situation, and concluded, "Great as the evil is, a dismemberment of the union would be worse. If those states should disunite from the other states, for not indulging them in the temporary continuance of this traffic, they might solicit and obtain aid from foreign powers." *Ibid.*, p. 392.

84. Such proposals, although dressed up in new language, are hardly new. The idea of special national or confessional privileges has an ancient history, but it is largely *pre-liberal*, rather than liberal. That is to say, the recognition of rights, immunities, and privileges—or of liberties, with the emphasis on the plural—is a step to the recognition of the right to *liberty*, as a general right. But the liberal contribution lay in stepping from a mass of particular rights, privileges, and immunities for particular individuals and groups to an abstract principle of individual liberty for every individual person. One close observer described the results of differential rights based on religion in Europe thusly: "For a confession to secure its position against the oppression by others and through establishment of the sphere of right of every individual to eliminate the occasion for frictions—that was the reason, whereby—as today the particular nationalities, so then the particular confessions—their demands were motivated. In catholic countries the Protestants were allotted particular territories; there were particular forts equipped, which were to serve as fortified places for the religion; the number of churches was determined by law; it was determined, how many individuals for a particular office from which confession were to be allowed to be candidates, what the determinate portion of the city council from these or those communities of belief should be;—and what was the result of all these rules and measures, where the solution of the religious question was sought in this way? What else, than endless frictions between the various confessions, the suppression of those who were in the minority on a particular territory, unbounded intolerance on the side of each of those, to which opportunity was offered, and as result of all of this, a century of continuous bloody struggle, which shook the most powerful states, created in one of the greatest nations of Europe a split that has not yet been filled [healed] and everywhere hindered the progress of civilization! In particular states the struggle was bloodier, in others it led to complete suppression of one confession, but everywhere, where this did not succeed and the reconciliation of the confessions was sought in the determination through law of the spheres of rights and the privileges of each, the result was the same, namely that *the citizens of each such country, split up by confessions, stood in hostility against each other and religious peace and harmony was the less achieved the more numerous and detailed were the laws created to achieve it.*" (Josef Freiherrn von Eötvös, *Die Nationalitätenfrage*, trans. from the Hungarian by Dr. Max Falk [Pest, Hungary: Verlag von Moritz Ráth, 1865], pp. 146–47).

85. Kymlicka, *Liberalism, Community and Culture*, p. 146.

86. For example, he asserts that "because residents of Puerto Rico have special self-governing powers that exempt them from certain federal legislation, they have reduced representation in Washington. They help select presidential candidates in party primaries, but do not vote in presidential elections. And they have only one representative in Congress, a 'commissioner' who has a voice but no vote, except in committees." (*Politics in the Vernacular*, p. 108.) In fact, Puerto Rico has no congressional representation because it is not a state, not because it is exempt from federal legislation. And participation in presidential primaries is entirely a matter of the rules of political parties, not of constitutional law. Puerto Ricans are accorded U.S.

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citizenship, but Puerto Rico is not a political unit of the United States of America. Kymlicka also makes no mention of the treatment of Indian tribes or Indian population in Article I, Section 2 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . excluding Indians not taxed”; this provision was changed by the Fourteenth Amendment, but the exclusion of “Indians not taxed” was retained), Article I, Section 8 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes”), and Article VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”; this clause includes under the “supreme Law of the Land” the treaty rights of Indians under treaties already made or to be made).

87. *Politics in the Vernacular*, p. 101.

88. Kymlicka, *Liberalism, Community and Culture*, p. 164.

89. *Ibid.*, p. 169.

90. Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995), p. 89.

91. See *Ibid.*, pp. 34–48.

92. Kymlicka, *Liberalism, Community and Culture*, p. 167.

93. *Ibid.*, p. 146.

94. Kymlicka, *Multicultural Citizenship*, p. 97. (He also mentions military service and compulsory education of children on p. 177.)

95. Oddly enough, Kymlicka interprets the exemption from compulsory education for the Amish and other Christian sects as a form of an “internal restriction.” He also regards the practice of shunning as putting “severe restrictions on the ability of group members to leave their group.” (*Multicultural Citizenship*, pp. 41–42). It is true that a high cost is borne by those who wish to leave, in the form of the loss of family and friends, but to my knowledge there are no restrictions placed on exit. Indeed, the Amish, Mennonites, and others like them are very clear about the liberty of members to leave the group and embrace the wider world. The term “cost” and “restriction” should not be used interchangeably, as Kymlicka does, for a failure to make such distinctions would require us to say that not returning friendship to friends who betray us is to “restrict” their ability to leave our friendship, rather than to say that they would bear the cost of losing our friendship if they were to betray us. Such distinctions are needed if the variety of human relationships is to be properly understood and grasped.

96. I have dealt with this issue in a far more extensive and thoroughgoing manner in Tom G. Palmer, “Saving Rights Theory from Its Friends,” in *Individual Rights Reconsidered: Are the Truths of the U.S. Declaration of Independence Lasting?*, Tibor Machan, ed. (Stanford: Hoover Institution Press, 2001).

97. *Wall Street Journal*, March 28, 2000, p. B1.

98. See Kymlicka, *Multicultural Citizenship*, p. 43.

99. See Hernando de Soto, *The Mystery of Capital* (New York: Basic Books, 2000), for an explanation of why the ability to alienate is so important to the development of capital and therefore of wealth.

100. R. I. Moore, *The Formation of a Persecuting Society* (Oxford: Basil Blackwell, 1987), p. 40.

101. Cited in *ibid.*, p. 40.

102. They were so denominated by Chief Justice John Marshall, who stated that "Though the Indians are acknowledged to have an unquestionable, and, heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted, whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian." 30 U.S. (5 Pet.) at 17. Cited in William C. Canby Jr., *American Indian Law* (St. Paul, Minn.: West Group, 1998), p. 15.

103. That is not to say that all of the problems or injustices faced by American Indians have been the result of such group-differentiated rights; the story is, at least, a very complicated one. But it should be kept in mind that merely asserting that such rights are intended to benefit the members of a group does not guarantee that they will have beneficial effects. The intention of the lawgiver is irrelevant to the outcome.

104. Kymlicka, *Multicultural Citizenship*, p. 104.

105. Charles Taylor has criticized Kymlicka for not fully understanding the demands implicit in the politics of difference: "Where Kymlicka's interesting argument fails to capture the actual demands made by the groups concerned—say Indian bands in Canada, or French-speaking Canadians—is with respect to their goal of survival. Kymlicka's reasoning is valid (perhaps) for *existing* people who find themselves trapped within a culture under pressure, and can flourish within it or not at all. But it doesn't justify measures designed to ensure survival through indefinite future generations. For the populations concerned, however, that is what is at stake." Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994), p. 41.

106. *Ibid.*, p. 53. Taylor himself, however, tries to have his liberal cake and eat it, too, by asserting "invariant defense of *certain* rights," exemplified by Taylor by the right of habeas corpus, but allowing that these can be distinguished from "the broad range of immunities and presumptions of uniform treatment that have sprung up in modern cultures of judicial review." *Ibid.*, p. 61. His claims seem to be simply drawn from a philosophical hat. And, like Kymlicka, he is sometimes careless with alleged historical facts, such as that "the Americans were the first to write out and entrench a bill of rights" (p. 54), ignoring a remarkably rich history of bills of rights in European and transatlantic jurisprudence, from Magna Carta to the Golden Bull of Hungary to the English Bill of Rights to the various bills of rights of the American states.

107. Michael McDonald, "Reflections on Liberal Individualism," in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, Abdullahi Ahmed An-Na'im, ed. (Philadelphia: University of Pennsylvania Press, 1992), p. 147. McDonald seems to rest his views on an implicit theory of the natural or "undistorted" development of groups in the absence of individual mobility rights.

108. International Labor Organization (ILO No. 169), 72 ILO Official Bull. 59, entered into force Sept. 5, 1991, available at www1.umn.edu/humanrts/instreet/r1cip.htm. See also Section 17, "Traditional forms of ownership and cultural survival: Rights to land, territories and resources," of the Proposed American Declaration on

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the Rights of Indigenous Peoples (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/.II.95 Doc.6 (1997), available at www1.umn.edu/humanrts/instree/indigenoudecl.html. Many other examples can be cited, some of which can be found at www.umn.edu/humanrts.

109. Kymlicka, *Politics in the Vernacular*, p. 50.

110. Kymlicka, *Multicultural Citizenship*, p. 115.

111. *Ibid.*, p. 125.

112. Kymlicka refers to the "Amish and Mennonites who emigrated to the United States and Canada early in [the 20th] century, as well as the Hasidic Jews in New York. For various reasons, when these immigrant groups arrived, they were given exemptions from the usual requirements regarding integration, and were allowed to maintain certain internal restrictions." (*Multicultural Citizenship*, p. 170) The historical claim is an odd one; I am unaware of any collective negotiations by Jews in eastern Europe or Anabaptists in central Europe that resulted in their migration to North America on the condition that they were to be allowed to practice their religions. Further, to my knowledge, no one is forced to be Amish, Mennonite, or Hasidic, and the cost of exit is no greater than is the cost of exit from the Roman Catholic Church, which entails denial of the Beatific Vision, than which no worldly cost could be greater. When an acquaintance of mine had his name struck from the Book of Life by his own father, an Old Order Mennonite minister, on the grounds of the son's homosexuality, the loss of religious companionship and of family relations was enormously painful and certainly imposed a high cost on him. But that does not qualify as some kind of special dispensation "to maintain certain internal restrictions." It's a requirement of the First Amendment to the United States Constitution that the state not interfere with such processes, and the Constitution was not negotiated especially for the groups that Kymlicka mentions, but for all Americans.

113. See, in contrast, John Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge: Cambridge University Press, 2000).

114. Kymlicka, *Multicultural Citizenship*, p. 124.

115. Maintaining liberty and justice is surely more important than recognizing one's membership in a distinct culture, a goal that can be achieved in a multitude of nonpolitical ways. It is not only classical liberals who are unlikely to embrace Kymlicka's view. The redistributionist "egalitarian liberal" Brian Barry subjects such views to withering criticism in his *Culture and Equality* (Cambridge, Mass.: Harvard University Press, 2001).

116. See especially *Multicultural Citizenship*, chap. 5, pp. 75–106.

117. In this Locke and Kant, although in many other ways offering different approaches to political morality and justice, were in agreement: "the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom: For in all the States of created beings capable of Laws, where there is no Law, there is no Freedom. For Liberty is to be free from restraint and violence from others which cannot be, where there is no Law: But Freedom is not, as we are told, A Liberty for every Man to do what he lists: (For who could be free, when every other Man's Humour might domineer over him?) But a Liberty to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance of those Laws under which he is; and therein not to be subjected to the arbitrary Will of another, but freely follow his own." (John Locke, *Two Treatises of Government*, ed. Peter Laslett [Cambridge: Cambridge

University Press, 1988], II, chap VI, §57, p. 306, italics in original); "Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity." (Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd [New York: Macmillan Publishing Co., 1985], pp. 43–44.)

118. Jeremy Waldron, "Multiculturalism and Mélange," in Robert Fullinwider, ed., *Public Education in a Multicultural Society* (Cambridge: Cambridge University Press, 1996), p. 100.

119. Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998), p. 111.

120. *Ibid.*, p. 110.

121. *Ibid.*, p. 113.

122. *Ibid.*, p. 114.

123. James Madison, "Parties," in *James Madison: Writings*, p. 504.

124. See Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981), esp. chap. 3, "The Small Republic," pp. 15–23.

125. Brutus, "To the Citizens of the State of New York, 18 October 1787," in Herbert J. Storing, *The Anti-Federalist: Writings by the Opponents of the Constitution* (Chicago: University of Chicago Press, 1985), p. 113.

126. *Ibid.*

127. *Notes of Debates in the Federal Convention of 1787 Reported by James Madison*, p. 77.

128. As Hillel Steiner notes of such schemes of unequal and incompatible rights claims, "such group rights are highly likely to generate claims incompatible with the rights of other groups, to say nothing of individuals' rights." *An Essay on Rights* (Oxford: Basil Blackwell, 1994), p. 165.

129. Susan Moller Okin with respondents, *Is Multiculturalism Bad for Women?* (Princeton: Princeton University Press, 1999).

130. Will Kymlicka, "Liberal Complacencies," in *Is Multiculturalism Bad for Women?*, pp. 33–34.

131. 31 U.S. (6 Pet.) at 561 (cited in William C. Canby Jr., *American Indian Law*, pp. 16–17).

132. For a full list, see Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1997), pp. 446–502. Prucha appends a list of six agreements that could plausibly be added to the list. William C. Canby Jr., notes that "in 1871, Congress passed a statute providing that no tribe thereafter was to be recognized as an independent nation with which the United States could make treaties. Existing treaties were not affected." *American Indian Law*, p. 18. Reservations created thereafter were created by statute, rather than by treaty. In reading for this paper, I was surprised to find that Indians born within the United States were made citizens only in 1924, by act of Congress (8 U.S.C.A. § 1401(b)).

133. A thorough survey is offered by Jacob Levy in his *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000).

134. *The Federalist* No. 10 (James Madison).

135. John C. Calhoun, *A Disquisition on Government*, in *Union and Liberty: The Political Philosophy of John C. Calhoun*, pp. 23–24.

136. Madison, "Speech in the House of Representatives, June 8, 1789."

137. *Ibid.*

138. Thomas Jefferson, First Inaugural Address (1801), in *Jefferson: Political Writings*, Joyce Appleby, ed. (Cambridge: Cambridge University Press, 1999), p. 174.

