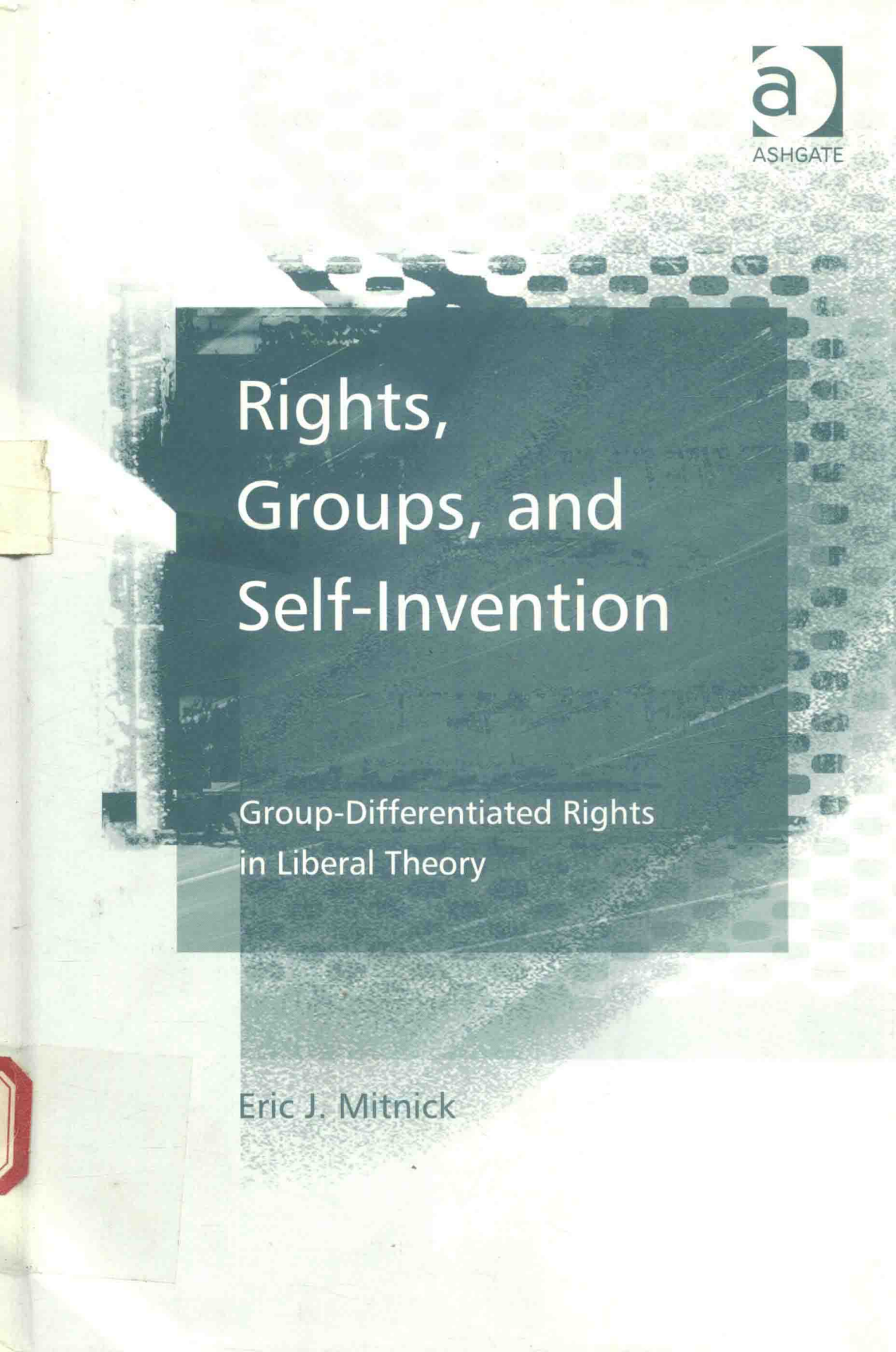
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Rights, Groups, and Self-Invention
Group-Differentiated Rights in Liberal Theory
Eric J. Mitnick

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Published by
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hampshire GU11 3HR
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington, VT 05401-4405
USA

Ashgate website: http://www.ashgate.com

British Library Cataloguing in Publication Data
Mitnick, Eric J., 1966-
Rights, groups, and self-invention : group-differentiated rights in liberal theory
1. Minorities - Legal status, laws, etc. 2.Law - Philosophy
I.Title
342'.087

Library of Congress Cataloging-in-Publication Data
Mitnick, Eric. J., 1966-
Rights, groups, and self-invention : group-differentiated rights in liberal theory / by Eric J. Mitnick.
p. cm.
Includes index.
ISBN 0-7546-4573-8
1. Social groups. 2. Civil rights. I. Title.

HM716.M58 2006
305--dc22

2006007630

ISBN-10: 0 7546 4573 8

Printed and bound by MPG Books Ltd, Bodmin, Cornwall

Preface

Law is a social practice. This is a book about one aspect of that social practice, the practice of affording legal rights to persons on the basis of their social or cultural group membership. Such rights, termed group-differentiated rights, are an increasingly common and controversial feature of modern liberal legal systems. This is the type of right petitioned for by members of religious groups, in order that they might engage in traditional rituals otherwise precluded by generally applicable laws. Group-differentiated claims might be raised, as well, by the members of ethnic or indigenous groups, asserting the need for public recognition of cultural differences, access to public institutions in native languages, or even collective rights to property or self-government. Members of social groups, differentiated according to race, gender, sexual orientation, or disability status, frequently are granted group-differentiated rights as part of an effort to remedy ongoing discrimination or past harms. Indeed, citizenship itself exists as a group-differentiated status, and so the rights pertaining exclusively to members of the political collective fall within this category as well.

Given the critical importance, and the frequently conflictual nature, of the values at stake in these sorts of rights-claims, it should come as no surprise that each of these claims, and all of these groups, has been the subject of numerous studies. The literature in political theory in particular in recent years has served as the setting for an extensive corpus of research concerning race, gender, religion, ethnicity, nationality, and other treatments of multiculturalism and the politics of difference. Yet, to date, there has been no comprehensive critical assessment of the group-differentiated form of right itself. This book is intended to fill this breach. Indeed, a focus on the form of right, rather than on the type of group in question, I shall argue, yields valuable insight into the rather striking constitutive effect group-differentiated rights often have on the construction of human identity.

The chapters below describe the group-differentiated form of right from the perspective of analytical and constitutive theory, delving into both the nature and sources of group-differentiated rights and the connection between this form of legal categorization and social identity. Then, in light of the influence the form of right is determined to have on human identity, the book considers as well the relationship between group-differentiated rights and fundamental principles of liberal theory—principles that privilege the individual capacity for self-invention. To this end, a liberal conception of membership is developed and applied contextually to three primary models of group-differentiated rights. For if we are

indeed partially constituted by our rights, then we need to ask as well what this means for a liberal value system that claims to accord priority to individual constitutive autonomy.

In the course of seeking to understand the nature and effects of the group-differentiated form of right, this work has caused me frequently to encounter, and to attempt to cross, disciplinary boundaries. Group-differentiated rights unmistakably elicit deep questions of law and politics, issues that run to the heart of legal, political, and moral theory. But they also, in virtue of their correlation with social identity, raise questions that have received sustained examination primarily from within the fields of cultural sociology and cognitive and social psychology. In consequence, I owe a debt of gratitude to a number of people, both within my own field, and without, and it is a genuine pleasure to acknowledge these intellectual, institutional, and personal debts here.

This book is a revised version of my doctoral thesis, completed in the Department of Politics at Princeton University. I am grateful to my principal advisors, Robert George and Stephen Macedo, for their sustained commitment to this project. Both Robby and Steve daily set an example of intellectual depth and integrity that their graduate students can only aspire to emulate. Many others at Princeton, including especially Patrick Deneen, Amy Gutmann, George Kateb, Ken Kersch, and Keith Whittington, also served as sources of insight and criticism that have improved the arguments and ideas expressed in this book. I have been fortunate to be able to learn from such brilliant and dedicated scholars, and I thank them for their encouragement and attention to my work. My sincere thanks also to my fellow graduate students in the Political Theory Research Seminar at Princeton, all of whom listened to and commented upon early papers that eventually evolved into portions of the second, third, and fourth chapters in this book. The very earliest seeds of interest in the relationship between law and membership were planted in a seminar on Constitutional Membership in which I participated while still a student (many years ago) at the University of Michigan Law School, and so let me thank as well Alex Aleinikoff for that initial inspiration.

I have had the pleasure of presenting different portions of the material that has grown into this book at a number of academic conferences, colloquia and workshops. Unfortunately, I have neither the space nor the memory adequately to express my genuine appreciation to all of those who participated in these fora, and who commented upon earlier drafts of these chapters, but let me briefly address a few such experiences. An earlier version of the final chapter was the subject of discussion at the Law and Humanities Interdisciplinary Junior Faculty Workshop, held at Columbia Law School in June 2003. I am grateful to Robert Post and Anne Dailey for the illuminating criticism, advice, and encouragement they offered as discussants of that paper, and to Naomi Mezey, Austin Sarat, and Nomi Stolzenberg for their valuable commentary both at the workshop and thereafter. An earlier version of portions of the first and fifth chapters was presented at a conference on Ethno-Religious Cultures, Identities, and Political Philosophy, held

at the University of Amsterdam in July 2002. My gratitude is due to the several participants in that conference who discussed my contribution, and especially to Veit Bader, Joseph Carens, and Roland Pierik, for comments that improved the contextual nature of my research in a number of ways. Most recently, I had the opportunity to present the entire introductory chapter at the University of San Diego Law School's Faculty Colloquium. I am grateful to my cross-town colleagues for generously lending their ears and minds to the betterment of this project.

Outside of formal presentations, a number of friends and colleagues have thoughtfully read and commented upon portions of the manuscript. Jack Nowlin, as a peer at Princeton, and later as a fellow law academic, has been unsparing in offering advice and commentary. Dennis Patterson is a giant in the field of law and philosophy, and I have been humbled by his support and encouragement and helped by his criticism. John Evans, of the Department of Sociology at the University of California San Diego, tolerated endless questions on cultural sociology and cognitive psychology and asked no more than a few pints of good quality ale in return. And no one deserves as generous a colleague as Steve Semeraro, who has read and commented upon virtually every corner of this manuscript.

For financial support, I am thankful to Princeton University and the Mellon Foundation for providing fellowship funds that made possible and helped advance the dissertation that would eventually become this book. I am grateful, as well, to my former Dean, Kenneth Vandevelde, for providing research support and for building such a fine academic home in the Thomas Jefferson School of Law. Ken's dedication to the project of legal education serves as an inspiration to all who come into contact with him. My thanks also to my faculty colleagues at Thomas Jefferson, with whom I have had innumerable informal conversations regarding the arguments contained in this book, and to Dorothy Hampton for her ever skillful research assistance.

Finally, and most profoundly, let me thank the group that is closest to my heart, and most constitutive of my identity. I am deeply grateful to my mother, Susan Mitnick, for her seemingly limitless support and kindness, and to my father, Richard Mitnick, whose love of knowledge and thirst for ideas continue to serve as an inspiration. I am grateful to my children, Rachel and Eli Mitnick, for the joy they bring me daily and for serving as constant reminders of what is most precious in life. And most of all I am grateful to my wife, Cara Ellen Mitnick, for her support, her spirit, and her love. She is with me in all things. I dedicate this book, with love, to her and to our children.

Some of the ideas expressed in this book appeared previously, often in very different form, in a number of journal articles, including: "Taking Rights Spherically: Formal and Collective Aspects of Legal Rights," *Wake Forest Law Review*, Vol. 34 (1999), p. 409; "Constitutive Rights," *Oxford Journal of Legal Studies*, Vol. 20 (2000), p. 185; "Liberalism and Membership," *University of*

Pennsylvania Journal of Constitutional Law, Vol. 4 (2001), p. 533; "Individual Vulnerability and Cultural Transformation," *Michigan Law Review*, Vol. 101 (2003), p. 1635; "Three Models of Group-Differentiated Rights," *Columbia Human Rights Law Review*, Vol. 35 (2004), p. 215; and "Differentiated Citizenship and Contextualized Morality," *Ethical Theory and Moral Practice*, Vol. 7 (2004), p. 163. I am grateful for permission to include in this book revised and extended versions of arguments that originally appeared in these journals.

Contents

Chapter 1

Introduction: Group-Differentiated Rights

Group-Differentiated Rights as a Distinct Form of Right

In a well-known essay, originally published nearly fifty years ago, H.L.A. Hart sought to describe virtually any right as falling within one of two broad categories.[1] Seeking to characterize "the circumstances in which rights are asserted with the typical expression 'I have a right to . . .,'" Hart wrote:

> It is I think the case that this form of words is used in two main types of situations: (A) when the claimant has some special justification for interference with another's freedom which other persons do not have ('I have a right to be paid what you promised for my services'); (B) when the claimant is concerned to resist or object to some interference by another person as having no justification ('I have a right to say what I think').[2]

The first type, Hart labeled "special rights." These are rights that arise in virtue of particular transactions among market participants (e.g., a promise to sell wheat for a certain price), or in virtue of some special relationship in which individuals stand (e.g., the special fiduciary relationship that exists between parent and child).[3] In contrast with special rights, Hart characterized the latter type as "general rights," or those rights (e.g., freedom of speech, due process of law) that arise not from particular transactions or relationships but from, in Hart's words, "the equal right of all men to be free."[4]

It is sometimes thought that Hart's distinction exhausts the universe of rights. Upon closer examination, however, there clearly are rights that fit neatly into neither category. This becomes plain once we consider Hart's categories from the vantage point of the duties they impose and the interests they protect.[5] For the

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[1] See H.L.A. Hart, "Are There Any Natural Rights?," in Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984), pp. 77–90. Hart's essay was originally published in *Philosophical Review* 64 (1955): 175–91.

[2] Hart, "Are There Any Natural Rights?," pp. 83–4.

[3] Ibid., pp. 84–7.

[4] Ibid., p. 88.

[5] That Hart conceptualized rights fundamentally as choices, rather than as benefits or in terms of the advancement of interests, has little bearing in this context. The critical point

critical distinction between Hart's two broad categories of rights lies in their differing scopes, both in terms of the anticipated beneficiaries of the rights and of those in whom the rights place corresponding obligations. Thus, special rights, which derive from particular interpersonal transactions and relationships, protect the interests of, and impose obligations upon, only those particular individuals involved in the specific transactions and relationships at issue. General rights, on the other hand, protect the interests of and impose obligations upon (virtually) everyone.

With this scheme in mind, then, we can see that there will be rights that, having nothing whatsoever to do with interpersonal transactions or relationships, cannot be considered "special," and that, while they may indeed impose obligations generally, yet protect only the interests of some *subset* of individuals in society, and so cannot be considered "general." A right that I intend to discuss at greater length in succeeding chapters, the right against discriminatory treatment on the basis of disability, is one example; the right is general in terms of the obligations it imposes, but protects the interests of just one segment of society, disabled persons.[6] Other prominent examples include rights arising from affirmative governmental action to combat racial discrimination, rights afforded same-sex couples to engage in civil unions, and rights granted to the members of particular religious or cultural groups to engage in traditional practices. Even the right to vote, which imposes duties of non-interference generally, but only benefits citizens, would seem to defy Hart's categories.

This is not to suggest that Hart was unaware of a specifically group-differentiated form of right. For his own part, it is important to recognize, Hart merely described the special and general categories of rights as the "two main types" of rights, leaving open the possibility that other categories might exist. In fact, more than a century before, Jeremy Bentham had noticed that certain rights would benefit only particular classes of persons,[7] and Hart, in his well-known treatment of Bentham's analysis of legal rights, made this plain: "not only individuals have rights; the public and also distinct classes included in it have, according to Bentham, rights in those cases where the persons intended to benefit are what he terms 'unassignable individuals.'"[8] The more interesting question,

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here is not the essence of the constitution of rights but the extent of their applicability. On the choice theory of rights, see H.L.A. Hart, "Legal Rights," in *Essays on Bentham: Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), pp. 162–93. On the interest theory, see, e.g., D.N. MacCormick, "Rights in Legislation," in P.M.S. Hacker and J. Raz, eds., *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford: Clarendon Press, 1977), pp. 192–5; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 166.

[6] See Americans with Disabilities Act, 42 U.S.C. §§12101–12213 (1994).

[7] See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Burns and H.L.A. Hart, eds. (Oxford: Clarendon Press, 1970), ch.XVI, para. 7, p. 189.

[8] Hart, "Legal Rights," p. 168. Further analysis of Bentham's concept of

then, is not whether Hart was aware of this form of right, for surely he was, but why he chose to ignore it.[9]

The timing of Hart's writing makes this question particularly apt, for Hart's essay appeared in the wake of the Second World War. At first glance, one might suspect that at such a time of increased sensitivity to the plight of minority groups a liberal theorist such as Hart might well have noted especially the *need* for rights particularly protecting the interests of members of more vulnerable groups. In fact, however, Hart's strong focus at this time on general rights was shared by most liberal theorists interested in supporting members of at-risk minority groups. Consider, for example, the following depiction of the state of affairs in minority rights in the decade following World War II, a depiction that appeared in a work published the same year as Hart's essay: "The doctrine of human rights has been put forward as a substitute for the concept of minority rights, with the strong implication that minorities whose members enjoy individual equality of treatment cannot legitimately demand facilities for the maintenance of their ethnic particularism."[10] Indeed, not just within liberal rights theory, but more broadly among social scientists of the post World War II era, the sentiment began to take shape that American society was swiftly approaching ethnicity's end.[11]

The thought depicted here, and shared widely, was that by guaranteeing the fundamental rights of all individuals, the interests of members of minority groups necessarily would be protected as well. Had not history demonstrated, the thinking continued, the unique virtue of universal rights? After all, this formally egalitarian model of universal citizenship, grounded in enlightenment ideals, had been the approach used successfully to bring an end to the nightmarish wars of religion in sixteenth-century Europe. Those bloody clashes were resolved, in part, by affording universal rights of religious freedom, not by granting group-based rights to particular religious minorities.[12] Moreover, it had long been legally sanctioned group-differential treatment that had served to *subordinate* minority group members. From the institution of slavery, through categorical restrictions on citizenship rights in the United States, as well as the horrors of the Holocaust in

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unassignability, and his consequent suggestion of class-held rights, appears in the next chapter.

[9] In his essay on Bentham's analysis of legal rights, Hart notes as well that "Bentham [himself] seems to have made very little use of his idea that in the sense explained the public or a class within it have legal rights." Ibid., p. 181, n. 79.

[10] Inis Claude, *National Minorities: An International Problem* (Cambridge, Mass.: Harvard University Press, 1955), p. 211.

[11] See, e.g., Robert Park, *Race and Culture* (Glencoe, Ill.: Free Press, 1950); William J. Wilson, *The Declining Significance of Race* (Chicago: University of Chicago Press, 1967); Joane Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (Oxford: Oxford University Press, 1996), p. 19.

[12] See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), pp. 2–6.

Europe, group-based policy had engendered an appalling legacy. Hart, thus, hardly stood alone in his neglect at mid-century of a third, group-differentiated, form of right. The era in which Hart distinguished general from special rights was an era in which group-differentiated claims were viewed not as a solution but as a long-enduring problem.

Nearly a half-century after Hart invoked his famous typology, however, the universe of rights is a far less tidy place. Rights that vest on the basis of an individual's membership in a particular social or cultural group—rights that in Hart's terms could be described neither as special nor as fully general—are an increasingly common aspect of modern liberal legal systems throughout the world.[13] Such rights have been granted to members of a broad array of social groups to remedy inequities associated with, for example, the members' race, sexual orientation, gender, age, economic or disability status. Rights similarly have been afforded to the members of cultural groups constituted according to nationality, ethnicity or religion, to acknowledge and accommodate particular beliefs or practices, or in recognition of collective claims to self-government or property. Indeed, rights such as these, differentiated as they are according to group membership, might be afforded on the basis of virtually any shared human characteristic deemed socially relevant. Yet, since group-differentiated rights openly distinguish among classes of persons in the distribution of social benefits and burdens, this form of right remains a source of significant controversy.

The Contemporary Debate Over Group-Differentiated Rights

Like so many other ongoing discussions in modern liberal theory, recent debates over group-differentiated rights have their roots in John Rawls's conception of justice, and in particular in the well-known communitarian response to that conception.[14] The thrust of the communitarian critique, relevant for present purposes, contends that Rawls's theory is reliant upon an overly atomistic,

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[13] For a recent assessment of the state of differentiated citizenship policies within western democracies, see Will Kymlicka and Wayne Norman, "Introduction," in Will Kymlicka and Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000), p.4.

[14] See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). Works illustrative of the communitarian critique of Rawlsian liberalism include Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, Ind.: University of Notre Dame Press, 1984); Michael J. Sandel, *Liberalism and the Limits of Justice*, 2d ed. (Cambridge: Cambridge University Press, 1998); Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983); Charles Taylor, "Atomism," in *2 Philosophy and the Human Sciences: Philosophical Papers* (Cambridge: Cambridge University Press, 1985), pp. 187–211. For an overview, see Amy Gutmann, "Communitarian Critics of Liberalism," *Philosophy & Public Affairs* 14 (1985).

unrealistically universalized conception of the self as prior to its ends.[15] The Rawlsian conception of the person, communitarians charge, is both false, because individuals naturally exist encumbered by particular social attachments, and ultimately dangerous, because the radical valorization of individual right threatens the virtues of civic and communal life.[16] There was thus an obvious, though misleading, correlation at the outset of recent debates in liberal and multicultural theory between proponents of group-differentiated rights and communitarian critics of liberalism. For the early proponents of group-differentiated claims, like their communitarian counterparts, were similarly concerned with the affirmation of particular (i.e., cultural or communal group-differentiated) attachments.[17]

This initial correlation between communitarianism and multiculturalism was in part bred of confusion over the nature of group-differentiated claims. At first, both the proponents of group-differentiated rights and their detractors commonly assumed that claims for differential treatment were, in essence, assertions of communal privilege. On this basis, the multicultural debate was originally thought of as yet another front in the broader dispute between individualists and collectivists over the relative priority of the self and its ends. Liberal theorists thus routinely rejected group-differentiated claims for fear of sacrificing individual to collective interests. Even more, group-differentiated rights were (as it happens, correctly) perceived as claims to a formally unequal distribution of benefits and duties among persons in society on the basis of particular attachments. Liberal theorists thus initially also opposed claims for group-differentiated rights in defense of what they took to be liberal neutrality.[18] As a consequence, early proponents of group-differentiated rights faced a dual challenge: first, they needed to dispel the notion that group-differentiated policy is inherently detrimental to individual interests; and second, they needed to establish how it was that official group-differentiated policies and institutions, insofar as they distinguished among categories of persons in the distribution of benefits and duties, were not *prima facie* contrary to justice.[19]

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[15] Rawls, *A Theory of Justice*, p. 560.

[16] See MacIntyre, "Atomism," pp. 204–5; Sandel, *Liberalism and the Limits of Justice*, pp. 152–4; Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: Harvard University Press, 1996), p. 14: "Unless we think of ourselves as encumbered selves, already claimed by certain projects and commitments, we cannot make sense of . . . indispensable aspects of our moral and political experience."

[17] For an overview of the evolution of the debate over cultural rights, see Will Kymlicka, "The New Debate Over Minority Rights," in *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), pp. 17–38.

[18] For a recent articulation of the view that cultural rights contravene liberal principles, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass.: Harvard University Press, 2001).

[19] See, e.g., Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon

Multicultural and rights theorists in particular thus set about the task of explaining that, although rights grounded in social and cultural differences might attach on the basis of group membership, most such rights (e.g., language rights, rights freely to practice one's religion) vest legally in *individuals* rather than in any collective entity.[20] There indeed may be group-differentiated rights that vest in, and can only be asserted by, a group *qua* group (e.g., a right to collective self-determination), but these group rights are exceedingly rare in modern liberal democracies.[21] Moreover, even those rights that logically can be pressed only by a collectivity nonetheless remain grounded, from a liberal perspective, in individual interests. Collective rights, on this view, remain legitimate only insofar as they benefit individuals, albeit on the basis of their membership in the particular group at issue.[22]

Further, the notion that modern liberal states, enduringly composed of a plurality of social and cultural groups, could be truly neutral with respect to group membership has been exposed, persuasively, as fiction.[23] Governments, of necessity, make decisions on a broad range of matters that affect members of social and cultural groups in disparate ways. Public schooling, for example, and the provision of other public services and institutions (e.g., court systems, health and welfare agencies) typically occur in some relatively limited number of languages, and so there inevitably will be members of particular groups placed at a disadvantage by such linguistic choices.[24] Similarly, decisions to close

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Press, 1989); Charles Taylor, "The Politics of Recognition," in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994).

[20] See, e.g., Michael Hartney, "Some Confusions Regarding Collective Rights," in Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995), pp. 202–27; Jan Narveson, "Collective Rights?," *Canadian Journal of Law and Jurisprudence* 4 (1991). For a discussion of the investitive conditions of rights in individuals, see D.N. MacCormick, "Rights in Legislation," pp. 204–5.

[21] See, e.g., Avishai Margalit and Joseph Raz, "National Self-Determination," *Journal of Philosophy* 87 (1990). For a helpful typology of cultural rights, see Jacob T. Levy, "Classifying Cultural Rights," in Ian Shapiro and Will Kymlicka, eds., *NOMOS XXXIX Ethnicity and Group Rights* (New York: New York University Press, 1997), pp. 22–66.

[22] On the relationship between collective rights and individual interests, see especially Raz, *The Morality of Freedom*, pp. 207–9.

[23] See, e.g., Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000), p. 53, suggesting that "cultural neutrality is an illusion." See also Kymlicka, *Multicultural Citizenship*, p. 111, arguing that the idea of cultural neutrality is "patently false," and Kymlicka, *Politics in the Vernacular*, p. 32: "mainstream institutions are not neutral, but rather are implicitly or explicitly tilted towards the interests and identities of the majority group."

[24] Charles Taylor makes this point in "Nationalism and Modernity," in Jeff McMahan and Robert McKim, eds., *The Morality of Nationalism* (Oxford: Oxford University Press,

government offices on particular public holidays, including the structure of the "work week" itself, and decisions with respect to state symbols, rituals and uniforms, will disadvantage some persons on the basis of their group memberships while granting an advantage to others.[25] And it would likely surprise few to learn that most of these decisions have tended to privilege, implicitly or explicitly, the dominant or majority culture. Moreover, even efforts expressly to remedy group-based disadvantages by devolving decision-making authority to more local levels generate certain inequities, for the decisions regarding the drawing of geographical and jurisdictional boundaries themselves then become culturally sensitive. State sanctioned, minority group-differentiated policies thus commonly are defended by liberal theorists today as rational remedies for inevitable state partiality.

Hence, many of the more interesting contemporary debates over group-differentiated policy have tended to accept as an initial premise that official differential treatment is made necessary by state bias toward particular conceptions of the good, and so have focused instead on the appropriate extent of, and occasions for, such differential treatment. Missing from the literature, however, has been any comprehensive critical assessment of the group-differentiated form of right itself. First, what is the structure, and what are the sources, of the group-differentiated form of right? Despite Bentham's limited entrée into the field more than a century ago, relatively little analytical work has been done to describe more particularly the nature of group-differentiated rights.[26]

Second, *in light of their form*, in what sense might group-differentiated rights influence individual identity? Theorists of difference and identity, for the most part, have neglected close scrutiny of the types of rights involved in their analyses, emphasizing instead the character of the group to which differential treatment has or might be afforded. As a result, much of the literature that concerns group-differentiated rights concerns such rights and their constitutive effects only in an oblique way. Relatedly, such treatments largely have been confined narrowly to particular categories of groups, rather than seeking broadly to comprehend the normative implications of group-differentiated claims.[27] This balkanization in the

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1997), p. 34: "a state-sponsored, -inculcated, and -defined language and culture, in which both economy and state function, is obviously an immense advantage to people if this language and culture are theirs."

[25] Kymlicka has suggested that in countries like Canada and the United States, state symbols, public holidays, the work-week and government uniforms tend to "reflect the needs of Christians." Kymlicka, *Multicultural Citizenship*, pp. 114–5. Carens similarly has suggested that public holidays and state symbols "are always culturally laden." Carens, *Culture, Citizenship, and Community*, p. 54.

[26] Raz is an important exception, see *The Morality of Freedom*.

[27] On rights that attach in virtue of an individual's membership in a particular racial, gender, disability or other social category, see, e.g., David M. Engel and Frank W. Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago: University of Chicago Press, 2003); Ruth Rubio-Marin and Beverly Baines,

treatment of group-differentiated rights is hardly surprising, given the extraordinary breadth of interests this form of right might protect. And studies with a narrow focus on particular groups clearly are critical if we are to appreciate the underlying circumstances which give rise to group-differentiated claims. Indeed, a recurrent theme within the present treatment will be that the particular legitimacy of differentiated rights often remains contingent upon the social context within which the right is invoked. Yet, the analogous structure, and the comparable constitutive effects, displayed across the variety of group-differentiated rights, affords a basis for an integrated assessment of this critical form of right. Indeed, a focus on the form of right, rather than on the type of group at issue, I shall argue, yields valuable insight into the rather striking constitutive effect legal categorization often has on the construction of social groups and individual identities.

Third, given their form and their effect on human identity, to what extent are group-differentiated rights consistent with liberal values? One by-product of the segmentation that has characterized the literature on group-differentiated rights is the relative absence of integrated evaluations of differentiated policy according to core liberal principles. The usual starting point in such assessments has been with the question of formal equality, and often we have failed to move very far beyond either disparaging or defending departures from that standard. In particular, too little work has been done assessing group-differentiated rights from the perspective of liberal autonomy. In one segment of the literature, this has not been the case: the autonomy-based benefits of cultural rights have received significant attention from liberal multicultural theorists.[28] Yet, even here, we remain in need of an approach that protects cultural freedom while also safeguarding the autonomy of vulnerable individuals within cultural groups.[29] Moreover, the consequences for personal constitutive autonomy, as opposed to formal and substantive equality, of group-based claims differentiated not according to culture but according to racial,

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Constituting Women (Cambridge: Cambridge University Press, 2004); David A.J. Richards, *Identity and the Case for Gay Rights: Race, Gender, Religion as Analogies* (Chicago: University of Chicago Press, 1999); K. Anthony Appiah and Amy Gutmann, *Color Conscious: The Political Morality of Race* (Princeton, NJ: Princeton University Press, 1996). On group-differentiated rights in the context of religious or cultural pluralism, see, e.g., Kymlicka, *Multicultural Citizenship*; Chandran Kukathas, "Are There Any Cultural Rights?," *Political Theory* 20 (1992); Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, Mass.: Harvard University Press, 2000); Joseph Raz, "Multiculturalism: A Liberal Perspective," in *Ethics in the Public Domain: Essays in The Morality of Law and Politics*, rev. ed. (Oxford: Clarendon Press, 1994), pp. 170–91; Barry, *Culture and Equality*.

[28] See especially Kymlicka, *Multicultural Citizenship*.

[29] See the analysis of Ayelet Shachar's work, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001), below in Chapter 7.