

BOOK REVIEW

MINORITY RIGHTS WITHIN THE LIBERAL TRADITION

WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS*, New York (1995) (280 pages) (\$29.95).

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I

Are liberal values¹ perverted when national and ethnic minorities are afforded group-differentiated rights and remedies? The contentiousness that this hoary question inevitably provokes stems from the pervasive assumption that group rights and individual rights are at loggerheads. A resolution, it is assumed, involves a zero-sum game in which individual rights recede if group rights are realized. The crystallization of this assumption in last term's *Adarand Constructors, Inc. v. Peña*² demonstrates the prevalence of the atomistic vision of rights that regards the individual as paramount. *Adarand*, which elevates to a *a priori* truth the arguable proposition that "the Constitution protect[s] *persons*, not *groups*,"³ illustrates how the rhetoric of individual rights animating liberalism hinders the utility of the collective as a subject of jurisprudence and legislation.⁴ The resultant challenge to postmodern legal and political theory has been to formulate a viable foundation for collective or group-differentiated rights.

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¹ "Liberal values" and "liberalism" are used here to connote the "philosophy or movement that has as its aim the development of individual freedom . . . true liberalism is concerned with liberating the individual." *Liberalism*, THE NEW COLUMBIA ENCYCLOPEDIA 1572-73 (William H. Harris & Judith S. Levey eds., 1975).

² 115 S. Ct. 2097, 2118 (1995) (holding that federal affirmative action programs henceforth must be evaluated under "strict scrutiny" rather than the more lenient "intermediate scrutiny").

³ 115 S. Ct. at 2112.

⁴ See also Danilo Türk, *Protection of Minorities in Europe*, in III COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 143, 151 (Academy of European Law ed. 1994) (noting that "the illusion that international concern for individual human rights would automatically lead to the adequate protection of groups . . . has proved to be one of the major impediments to the development of international norms relating to minorities").

In *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Will Kymlicka of the University of Ottawa attempts to reconceive group-differentiated rights theory in the context of constrictive modern-day individual rights vocabulary. His principal theme is that "liberalism"—loosely defined to mean not left-wing political ideas but the core value in pluralistic, participatory democracies that prize individual freedom and autonomy—remains entirely compatible and consistent with the vigorous promotion of minority rights.⁵ He describes group representation and minority rights as mere extensions of the Western political tradition and as eminently credible and effective tools to ensure the vitality of democratic institutions in multicultural states.

Kymlicka's multiculturalism does not encompass all the "multiply ambiguous"⁶ connotations of this highly charged word. He instead narrows his ambit to two categories: (1) "national minorities," defined as distinct cultural groups bonded together by certain identifiers such as language, history, a homeland, and shared social and political institutions; and (2) "ethnic groups," defined as immigrants who have left one national community for another. These parameters explicitly exclude "lifestyle enclaves, social movements, . . . voluntary associations"⁷ and, due to what Kymlicka views as a unique congruence of historical and cultural factors, African-Americans.⁸

II

A historical digression succinctly summarizes the intellectual and political reception afforded minority rights.⁹ Kymlicka concludes that the post-World War II indifference to minority rights ignores liberalism's pedigree as a source of (if not wholehearted acceptance, then at least respectful consideration of) minority rights. Kymlicka describes how the growth of colonial empires in Asia and Africa placed the issue of minority rights at the forefront of political theory and analysis, and how the harsh reality of gov-

⁵ WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 75 (1995) (arguing that "[m]inority rights are not only consistent with individual freedom, but can actually promote it").

⁶ Susan Haack, *Multiculturalism and Objectivity*, 62 *PARTISAN REV.* 397, 397-98 (1995) (discussing various conceptions of the term "multiculturalism").

⁷ KYMLICKA, *supra* note 5, at 18.

⁸ *Id.* at 24-25 (arguing that "we should not expect policies which are appropriate for either voluntary immigrants or national minorities to be appropriate for African-Americans, or vice-versa").

⁹ *Id.* at 50-58.

erning unwieldy colonial outposts served to quicken the intensity of the debate regarding the nature of minority rights.¹⁰ In the British colonial system, liberal thinkers (with, as Kymlicka notes, the exception of John Stuart Mill) provided a theoretical context for group-specific rights that "led to a wealth of experimentation regarding communal representation, language rights, treaties and other historical agreements between national groups, federalism, land rights, and immigration policy."¹¹

Great Britain's hesitant endorsement of minority rights within its imperialistic designs, then, represents one of the roots of the arguable link between liberalism and minority rights. By the same token, however, it could be argued that France's very different colonial policies were an antecedent to today's assimilationist view that regards rights for national minorities and ethnic groups as destructive of the predominant national identity. For example, the French, unlike the British, insisted on the use of the French language at all educational levels; the goal was to assimilate Africans into French culture as part of France's "civilizing mission."¹²

Between the World Wars, international protection of European minorities flourished under elaborate treaty guarantees of the League of Nations.¹³ The rights afforded German-speaking minorities in Czechoslovakia and Poland, however, gave Nazi Germany a pretext for pursuing irredentist claims. Kymlicka argues that as a result minority rights lost legitimacy in the eyes of the post-war international community.¹⁴ Thus, Kymlicka glumly notes

¹⁰ *Id.* at 54-56.

¹¹ *Id.* at 55.

¹² See IMMANUEL WALLERSTEIN, *AFTER LIBERALISM* 161 (1995). See also Ali Mazrui, *Francophone Nations and English Speaking States: Imperial Ethnicity and State Formation*, in *STATE VERSUS ETHNIC CLAIMS: AFRICAN POLICY DILEMMAS* 28-29 (Donald Rothchild & Victor Olorunsola eds., 1983).

¹³ See also Louis B. Sohn, *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM. J. INT'L L. 540, 540-43 (1995) (reporting that "[p]rior to 1940, international lawyers were seldom interested in protecting human rights as such . . . [but] in the 1920-1939 period, they . . . became interested in the rights of minorities").

¹⁴ KYMLICKA, *supra* note 5, at 57-58. Danilo Türk has reached a similar conclusion:

The issue of the German minorities in Poland and Czechoslovakia became a major factor in the preparation and realization of Nazi plans for expansion, resulting in the destruction of Czechoslovakia in 1938-39 and the aggression against Poland in 1939. The consequence was that minorities were henceforth looked upon as a major threat to international peace and security. This explains a great part of the suspicion and resentment which characterized the Post-World War II approach to minorities.

Türk, *supra* note 4, at 159.

that references to the rights of ethnic and national minorities were deleted from the magisterial Universal Declaration of Human Rights.¹⁵

III

The rights rhetoric that has dominated postwar discourse regards the individual as the sole bearer of rights. In the United States, "the Constitution's focus upon the individual"¹⁶ sounds the death knell for race-based remedies.¹⁷ Kymlicka, however, casts his argument not in terms of "the individual" versus "the community," but rather in terms of the necessity and means of ensuring justice among a multiplicity of ethnic and minority groups.¹⁸

Thus, minority rights enhance "equality,"¹⁹ and this sense of equality in turn promotes the umbrella-like concept of nationhood. As citizens' irrevocable attachments to particular ethnic or minority group identities are validated and protected by the state, the ties between citizen and state are fostered.²⁰ Therefore, if liberalism values stability and unity as much as individual autonomy, group-differentiated rights are both comprehensible and justifiable on standard liberal grounds. Minority rights vindicate liberalism's overarching goal of enhancing individual fulfillment by cementing the relationship between the individual and the state.

The resulting quid pro quo between the individual and the state legitimizes the existence and authority of the state and accordingly obligates the state to extend its aura of legitimacy to na-

¹⁵ KYMLICKA, *supra* note 5, at 3 (describing this as indicative of "[t]he shift from group-specific minority rights to universal human rights").

¹⁶ *Adarand Constructors*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment).

¹⁷ The promise of liberation has been described as an illusory by-product of liberalism's embrace of individual rights:

[R]ights may also be one of the cruelest social objects of desire dangled above those who lack them. For in the very same gesture with which they draw a circle around the individual, in the very same act with which they grant her sovereign selfhood, they turn back upon the individual all responsibility for her failures, her condition, her poverty, her madness—they privatize her situation and mystify the powers that construct, position, and buffet her. . . . [W]hat rights promise may be as unattainable as that offered by any other political myth.

WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 128 (1995).

¹⁸ KYMLICKA, *supra* note 5, at 108-15.

¹⁹ *Id.*

²⁰ *Id.* at 92-93, 176-92.

tional minorities and ethnic groups. This is most effectively implemented, Kymlicka argues, through varying levels of citizenship rights attuned to the integrative requirements of each minority. The first of three forms of group-specific rights—"self-government rights"—often appears in the context of federalism and apports political power to entities controlled by members of a national minority within a specific geographical area.²¹ In the United States and Canada, as Kymlicka notes, self-government rights have been granted to national minorities such as Indians, Inuits, French Canadians, native Hawaiians, and Puerto Ricans.²²

Kymlicka also recognizes the potentially disintegrative effects of affording self-government rights to national minorities. At what point, he asks, does the impulse for self-government within a state become secessionist?²³ This almost mystical question of the sources of national unity, however, does not overly trouble Kymlicka because he regards the denial of self-government rights as perhaps more potentially destabilizing. This somewhat panglossian take on the viability of self-government rights for national minorities thus advocates self-government rights as an instrument to enhance the legitimacy and durability of the state.²⁴ Kymlicka, however, consciously avoids the issue of determining the instances where "the state" may not be worth preserving.

Second, "polyethnic rights" are intended to be exercised by voluntary immigrants as opposed to national minorities.²⁵ Changes in the educational curriculum, public funding of ethnic groups' activities, and other group-specific measures are thus designed to foster cultural pride within the context of allegiance to the greater political entity. Such rights are justified as enhancing diversity, equality, and stability. The potentially destabilizing effects of officially sanctioned polyethnic rights are dismissed because the motivating impulse is inclusion within the national unit, not exclusion or isolation. Thus, Sikhs join the Royal Canadian Mounted Police (the desire for inclusion) but are permitted an exemption from headgear regulations to wear the turban. Polyethnic rights are thus required in order to allow ethnic groups to achieve

²¹ *Id.* at 27-30.

²² *Id.* at 27-30, 183.

²³ *Id.* at 186.

²⁴ *Id.* at 189 (arguing that "if there is a viable way to promote a sense of solidarity and common purpose in a multinational state, it will involve accommodating, rather than subordinating, national identities").

²⁵ *Id.* at 30-31.

full membership in the national unit.²⁶

Finally, "special representation rights" respond to systemic barriers to political participation by overtly reconfiguring the electoral process to roughly mirror the composition of the citizenry.²⁷ The argument in favor of proportional representation as a credible realization of the liberal tradition will sound rather pedestrian to most Canadians and Europeans. In the United States, however, as Kymlicka notes, electoral redistricting designed to remedy historical underrepresentation has been branded by the Supreme Court as "political apartheid."²⁸ Thus, his harmonization of the common-sense basis behind proportional representation with traditional liberal democratic values deserves recognition.

IV

The continuity of the nation-state is at the core of Kymlicka's vision of the liberal ideal. Indeed, Kymlicka's commitment to the nation-state as the appropriate vehicle for the promotion of minority rights appeals precisely because it is unthreatening, almost bland.²⁹ In the end, Kymlicka's emphasis on national legislatures and policies, and his commitment to achieving a voice for national minorities within a multiethnic national political entity, serves to underscore the inevitability of the state in the Western liberal tradition. Kymlicka portrays the state—which relentlessly demands allegiance from the people, who are transformed by nationhood into "citizens"—as an entity that potentially deserves allegiance not only from individual citizens, but from constituent ethnic groups as well.³⁰

Minorities frequently assert group rights in the context of national politics, which to Kymlicka indicates yearnings for some de-

²⁶ *Id.* at 177-78.

²⁷ *Id.* at 31-33, 131-51.

²⁸ *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1992).

²⁹ Kymlicka's state-centered vantage point sees a role for international tribunals in monitoring and enforcing group-differentiated rights, although in general he de-emphasizes the role of international instruments (Article 27 of the Covenant on Civil and Political Rights, dealing with minority rights, is mentioned only in passing). Kymlicka, *supra* note 5, at 21, 169. Kymlicka's aim, though, is to connect group-differentiated rights with the tradition of liberalism; he is less concerned with the more internationalist "Modernism" that spawned the League of Nations' minority protection framework. See Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, in *AFTER IDENTITY: A READER IN LAW AND CULTURE* 229-250 (Dan Danielson & Karen Engle eds., 1995) (arguing "cultural Modernism" that sprang from fertile cultural and intellectual milieu of interwar decades shaped the promise and pitfalls of the League's minority protection scheme).

³⁰ Kymlicka, *supra* note 5, at 181-83, 191-92.

gree of integration and assimilation.³¹ Since group-differentiated rights represent calculated responses by the state to minority groups' pleas for inclusion and integration, refusing demands for group rights aggravates alienation among national minorities and in the end encourages secessionism. The state should reciprocate citizens' allegiance by promoting minority rights; otherwise, the individual's identification with the state crumbles. In this fashion, liberalism's ideal of free and equal individuals reaches fruition.

This dialectic between the individual and the state distinguishes Kymlicka's vision from communitarianism, another prominent theory of group rights. Communitarianism posits that an individual's identity is constituted by the various communities in which she participates. The link to one's "community" is described as more vital and immutable than the connection with the state; community, as opposed to national, identity predominates.

Kymlicka's allegiance to the liberal tradition leads to his rejection of communitarianism, which he regards as a threat to the liberal conception of the self as free to accept or reject subnational communities.³² Kymlicka values instead a "common national identity"³³ within which individuals make informed assessments about participation in subnational communities. Thus, by surrendering authority to the state, the opportunity for individual fulfillment emerges. This almost symbiotic relationship between the "self" and the state compels policies of group-differentiated rights in order to realize individual freedom and autonomy.

V

Kymlicka acknowledges the argument that group-differentiated policies are the very antithesis of individual freedom, and that group-differentiation fosters disunity, divisiveness, balkanization, and hatred.³⁴ As Justice Scalia bellows in *Adarand*, "[w]e are just one race here. It is American."³⁵ Race-neutral policies, referred to

³¹ *Id.* at 176-81 (arguing that "there is strikingly little evidence that immigrants pose any sort of threat to the unity and stability of a country").

³² *Id.* at 91-92.

³³ *Id.* at 92.

³⁴ *Id.* at 173.

³⁵ *Adarand*, 115 S. Ct. at 2119 (Scalia, J., concurring in part and concurring in the judgment). One commentator described this statement as "a Freudian slip disguised as a constitutional principle: the image of an 'American race' conjures up images of late-nineteenth century imperialists . . . that should not trip easily off the tongue of an American conservative." Jeffrey Rosen, *The Color-Blind Court*, THE NEW REPUBLIC, July 31, 1995, at 23. See also Charles Fried, *The Supreme Court, 1995 Term—Forward: Revolutions?*, 109 HARV. L. REV. 1, 61 n.317 (1995) ("I would have preferred that [Justice

as "benign neglect,"³⁶ have gained credence across a broad spectrum of political and intellectual leaders who regard the liberal tradition as inexorably leading to a color-blind public policy. Indeed, the individual now reigns supreme among many commentators who harken back to the halcyon days of unalloyed liberalism.³⁷

Kymlicka patiently responds that a government that ignores group differences in the name of colorblindness or impartiality inevitably makes choices and distributes resources in a way that favors the majority and concomitantly disenfranchises and alienates the minority.³⁸ A democracy that fails to recognize group-differentiated rights is inherently unstable. Unfortunately, Kymlicka provides little support for this key element of his argument. Statistical or other evidence detailing disenfranchisement and marginalization in states without group-differentiated rights might have buttressed his argument considerably.³⁹

Kymlicka in part sustains his optimistic faith in the capacity of group-differentiated rights to foster social order by insisting that the struggle of African-Americans is wholly distinct from that of more geographically and culturally cohesive minority and ethnic groups.⁴⁰ He describes the leaps from *Plessy* to *Brown* to the Civil Rights Act of 1964 as indicative of a new model of integration that may be inappropriate for voluntary immigrants and national minorities.⁴¹ Minority rights are distinguished from affirmative action policies because minority rights require the permanent institutionalization of race and ethnicity-based measures, rather than (referring to affirmative action) temporary measures designed to achieve a colorblind society.⁴²

Fierce adherence to the colorblindness principle is at a zenith in the United States. Kymlicka, however, fails to satisfactorily come to grips with colorblindness as a pervasive—and misleading—foun-

Scalia] had said 'human.' 'American' does not designate a race but an allegiance, ideally an allegiance freely chosen (or maintained) by persons sharing a common humanity.").

³⁶ Kymlicka, *supra* note 5, at 3-4, 108-09 (the term is attributed to Nathan Glazer).

³⁷ See Andrew Sullivan, *Let Affirmative Action Die*, N.Y. TIMES, July 23, 1995, at E15 ("Liberalism was once the creed that said you were equal before the law. Parentage, gender, race, religion: none of that mattered. The individual was what counted.").

³⁸ Kymlicka, *supra* note 5, at 110-14.

³⁹ For example, African-Americans make up only 3.2% of doctors, 4.4% of college and university teachers, 2.7% of lawyers and judges, and 1.6% of architects. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995 411-12 (115th ed. 1995).

⁴⁰ Kymlicka, *supra* note 5, at 58-60.

⁴¹ *Id.* at 24-25.

⁴² *Id.* at 4.

dation of modern liberalism. If even the mildest affirmative action constitutes an intolerable affront to individual freedom, then Kymlicka fails to persuasively explain why his much more expansive collective rights doctrine, conceived as a "*permanent* differentiation in the rights or status of the members of certain groups,"⁴³ is not similarly undermined.

By underestimating the appeal of the colorblindness argument as a rejoinder to his theory of minority rights, Kymlicka weakens the utility of his argument as political and legal theory. For example, Kymlicka's policy of "special representation rights"⁴⁴ would certainly be found unconstitutional by the present Supreme Court,⁴⁵ which has questioned the constitutional distinction between race-based policies designed to perpetuate discrimination and those designed to alleviate discrimination.⁴⁶ He nevertheless suggests a promising path forward in his interesting discussion of citizenship as "an inherently group-differentiated notion"⁴⁷ that may justify a system of national rights by reconciling these rights with international norms.

Ultimately, Kymlicka's deeply felt commitment to liberalism as a political tradition prevents him from more fully exploring the conflicts inherent in his argument. Appeals to "justice" and "equality" as bases for group rights seem pallid when the majority cries injustice in response to every piecemeal benefit or advantage accorded disenfranchised groups. A more compelling justification must be formulated, one that transcends rather than reinforces liberalism.

VI

Kymlicka nevertheless convincingly succeeds in his more limited goal of squaring certain group rights with the Western liberal tradition. Moreover, *Multicultural Citizenship's* emphasis on issues

⁴³ *Id.*

⁴⁴ *Id.* at 31-33, 138-44.

⁴⁵ See *Miller v. Johnson*, 115 S. Ct. 2475, 2482 (1995) (holding congressional redistricting plan designed to remedy underrepresentation of African-Americans unconstitutional; "central mandate [of the Fourteenth Amendment] is racial neutrality in governmental decisionmaking").

⁴⁶ *Adarand Constructors*, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in the judgment) (asserting that "[i]n my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice"). See also Fried, *supra* note 35, at 77 (describing *Adarand* as embodying "the affirmation that the duty to govern impartially is so fundamental as to apply equally to all levels of government").

⁴⁷ Kymlicka, *supra* note 5, at 124.

of political expediency and stability bring the book out of the realm of abstract theory and imbue it with a refreshing sense of viability. In addition, Kymlicka writes plainly and persuasively; his book is marvelously well-researched, replete with illustrative examples, and generally is attentive to nuance and detail throughout. At a time when multiculturalism increasingly is portrayed as an outlandish and irresponsible undertaking, Kymlicka takes us back to first principles and demonstrates why group-differentiated rights deserve universal recognition and respect.