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Edited by Jules L. Coleman and Allen Buchanan

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1

Liberalism and group rights

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I. Challenges to Liberalism

Two recent developments, one theoretical, the other practical, appear to challenge liberal political philosophy at its core. The first is the vigorous, impassioned, and often eloquent critique of Liberalism advanced by communitarian thinkers. The second is a twofold political transformation: the growing spate of secessionist movements from Croatia to Lithuania to Quebec, which highlights the disturbing silence of liberal theorists on the question of secession; and the emergence of the indigenous peoples' rights movement in various contexts of international law, including the United Nations, a movement whose members often claim that liberal theory cannot adequately express their fundamental aspirations.

Communitarians complain that Liberalism fails to take seriously the centrality in human life of participation in groups, and that the liberal preoccupation with justice, understood largely as respect for individual rights, both results from and reinforces this neglect. Advocates of indigenous peoples' rights contend that the individual rights Liberalism champions, including their international expression in the United Nations' Declaration of Human Rights, do not address the special concerns of North, Central, and South American Indians, Southeast Asian Hill Tribes, Saamis (Lapps), and other indigenous peoples who find themselves embedded in existing states. Those who raise the banner of secession typically do so in the name of their group's right of self-determination, not by appealing to individual rights. The communitarians' theoretical onslaught and the political practice of the advocates of secession and of rights for indigenous peoples strike at what is supposed to be the core of Liberalism: an exclusive preoccupation with individual rights and an assumption that the liberal framework of individual rights can accommodate the legitimate interests of all groups.

I have argued in detail elsewhere that Liberalism can and should recognize a limited right to secede.¹ To attempt to summarize briefly those complex arguments here would be to hazard oversimplification. Furthermore, I also believe that a number of its defenders have already shown that Liberalism

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[More information](#)

properly understood can meet most communitarian objections.² Consequently, I will concentrate here on the charge, frequently voiced by those who purport to speak for indigenous peoples, that Liberalism not only has failed to recognize *group rights*, but also is morally or conceptually barred from doing so.³ Focusing on the question of whether Liberalism can accommodate group rights will enable us to see whether Liberalism can respond adequately to the challenge of the indigenous peoples' rights movement. At the same time it will allow us to frame the usually purely negative communitarian challenge to Liberalism in a more constructive way by exploring the hypothesis that a proper appreciation for the good of community requires group rights. For after all, if the complaint is that Liberalism devalues the individual's identification with and participation in the group and that the liberal preoccupation with individual rights both expresses and contributes to this error, then a natural alternative is the idea of group rights. This strategy will not only help us to move beyond the now predictable thrusts and counterthrusts in the war of words between liberals and communitarians and recast the theoretical issues in a fresh way; it will also lend needed concreteness to that suspiciously academic debate by connecting it with matters of great political urgency.

My aim in this investigation is to make a case for three related theses:

1. that Liberalism can and should recognize group rights, including special rights for indigenous peoples and other vulnerable minorities, under certain conditions;
2. that nevertheless Liberalism ought to preserve a strong presumption in favor of individual, rather than group rights, even for purposes of protecting the goods individuals can only attain from participation in groups; and
3. that individual rights are normatively prior to at least one important class of group rights – those with regard to which individuals as such do not have standing but which must instead be exercised collectively by the group or its putative agents. In general such group rights ought to be recognized only when certain individual rights are in place; while in general individual rights ought to be recognized even in the absence of group rights.

II. The compatibility of Liberalism and group rights

The first step in showing that Liberalism can accommodate group rights is to fix on relatively uncontroversial conceptions of what Liberalism is and what group rights are. The second is to dispel the erroneous preconception that Liberalism is wedded to certain discredited ontological, motivational, or valuethoretic assumptions. The third is to provide positive liberal arguments in favor of certain group rights that do not rely upon the discredited ontological, motivational, or value-theoretic assumptions.

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[More information](#)*Liberalism and group rights*

3

For our purposes Liberalism may be given a rather lean definition: It is a normative thesis, a thesis about what the proper role of the state is, namely, first and foremost to uphold the fundamental civil and political individual rights, including the rights to freedom of expression, freedom of religion, of association and assembly, as well as various due process rights, including the right to freedom from arbitrary arrest and seizure, the right to a fair trial.⁴ To repeat: Liberalism is the view that the state is to uphold the priority of these individual civil and political rights. It is neither a world view nor a theory of society or of social relations; nor does it purport to be a comprehensive moral view, much less a complete theory of value.

We can fix a working conception of group rights by contrasting them with individual rights as follows. Individual rights are ascribed to an individual, who can in principle *wield* the right – that is, exercise the right (as with the right to free speech) or invoke it to make a claim (when one's right is interfered with) or waive (as with the right to legal counsel) – independently, in her own name, on her own authority. In addition, except in cases in which the possessor of an individual right is not competent to wield it (as with minors, for example) the right can only be wielded by the possessor.

In contrast, a right is a group right, if it can be wielded – that is, invoked, exercised, or waived – in either of two ways. First, the right can *only* be wielded *nonindividually*. Individuals, as such, have no standing with regard to the right – no individual as such and acting in his own name, can invoke, exercise, or waive the right. Instead, the right can only be wielded (a) by the group through some collective procedure (e.g., majority decision making) or (b) by some agent (or agents) that wields it for the group. Group rights in this first sense may be called nonindividual group rights. Examples of nonindividual group rights are the various rights of internal self-government possessed by American Indian tribes. Such rights of internal self-government may only be wielded nonindividually, either collectively, through some sort of direct majoritarian voting process, or by agents of the group (for example, hereditary or elected leaders). No individual in the group, as an individual, can wield these rights.

Second, some group rights have what may be called *dual standing*: Any individual who is a member of the group can wield the right, either on his own behalf or on that of any other members of the group, or the right may be wielded nonindividually by some collective mechanism or by some agent or agents on behalf of the group. An example of a dual standing group right might include the right to engage in cultural or religious ceremonies or rituals. An individual who is a member of the group might invoke the right if his participation in cultural or religious ceremonies or that of others in the group was being interfered with, or official representatives of the group (say, members of the priesthood) might invoke it on behalf of the group.

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[More information](#)

Among the rights sometimes classified as group rights are language rights. Two types are often distinguished: negative rights not to be interfered with in speaking one's language; and positive rights to subsidies for the teaching of the language. The former can be classified as individual (negative) rights, since individuals have standing with regard to them. (For example, if local government interferes with my speaking the language of the ethnic minority of which I am a member, then I can invoke the right to claim state protection of my speaking the language if there is a right to speak one's language.) However, even though it is true that from the perspective of *standing* (who can wield the right) negative language rights are individual rights, there is perhaps still some point in calling them group rights. The point is that even if the individual has standing as an individual and can invoke the right independently, the interests served by recognizing the right, and hence the ultimate justification for the right, are not his alone. Rather, it is because of the importance of the use of the language for the group, for many individuals, that the negative right to use the language is recognized. Nevertheless, as I shall argue presently, the question of who has standing with regard to a right turns out to be extremely important, and for that reason, I will concentrate more on the distinction between nonindividual standing rights, on the one hand, and individual or dual standing rights on the other.

Positive language rights – rights to subsidies for preserving the language – are usually group rights in the first sense: They are not wielded individually, the subsidies not being granted to individuals as such, but rather to groups, which then exercise some control over how they are used, either by some collective decision process or through agents purporting to act for the group.

To summarize: Individual rights are those with regard to which the individual as such has standing – she can exercise, invoke, or waive the right on her own authority, in her own name. Group rights are those which have either nonindividual standing (as with rights of internal self-government for ethnic minorities), in which case they can only be wielded collectively or by agents of the group, but not by individuals as such; or they have dual standing, in which case they can be wielded either nonindividually or individually (as with rights to participate in cultural ceremonies).

The chief sorts of group rights whose compatibility with Liberalism I shall now explore are these.

1. Group language rights, including rights to government subsidies for teaching the language in question (positive language rights), as well as rights of groups to restrict the use of competing languages (prescriptive language rights, e.g., Bill 101, which prohibits the display of signs in English or any language other than French in public places in Quebec).
2. Group property rights, which empower a group (or its putative agents) to place restrictions on property transactions by individuals (e.g., rights

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[More information](#)

granted by the Federal governments of Canada and the United States to prohibit the sale of lands occupied by Indians to non-Indians).

3. Various limited self-government or political autonomy rights for groups within states. (There is a range of alternatives here, from rights of self-government concerning the group's internal affairs, to the right to control over a portion of the central government revenues, to rights to participate in decision making concerning natural resources and development in the region, to participate in various economic relationships with foreign states).

Limited political autonomy rights confer varying forms and degrees of independence on a group short of the *right to secede*, understood as the right of a group to renounce entirely the jurisdiction of the state in which it now exists and to appropriate a portion of that state's territory. In this essay I shall concentrate mainly on (1) positive group language rights and (2) group property rights, while acknowledging that the distinction between them and limited political autonomy rights is somewhat artificial. (Both group property rights and limited political autonomy rights can serve to further the group's self-determination).

All three of these types of rights are nonindividual standing rights: In all three cases the right is wielded not by individuals, but either collectively or by putative agents of the group. It is precisely because they are characterized by the nonindividual standing feature which makes them dubious candidates for inclusion within a liberal political philosophy. For both the proponents of Liberalism and its detractors have tended to assume that because Liberalism bases its normative conclusions ultimately upon the importance of individuals, it is individuals and only they who should have standing with regard to rights. Consequently, if I can show that Liberalism can accommodate such nonindividual group rights, I will have established a more interesting conclusion than if I limited the claim to dual-standing group rights, which give standing to individuals and are therefore much closer to the individual rights which are the stock and trade of Liberalism.

Now that we have working definitions of 'Liberalism' and of 'group rights' before us, we can address and refute the charge that Liberalism is committed to ontological and/or motivational assumptions, or assumptions about the nature of value, which are implausible in their own right and which preclude it from embracing group rights. Although there may be some who call themselves liberals who espouse these assumptions, the most plausible versions of Liberalism are not committed to them.

First, Liberalism is individualistic in a *moral*, not an ontological sense. As suggested above, liberals hold that what matters ultimately, morally speaking, is individuals. It is true that different thinkers develop different lines of justification for the liberal normative thesis concerning the priority of individual

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Excerpt

[More information](#)

rights, in part because they start with different understandings of what exactly it is about individuals that is of such ultimate moral significance. But generally speaking they locate the ultimate source of value in the individual as a choosing being capable of developing and fulfilling herself through her choices.

In order to develop plausible lines of justification from the starting point of the moral significance of individuals to the liberal normative thesis about individual rights, one need not deny the existence of groups. Nor need one assert that all putative properties of groups can be reduced to properties of individuals. Moreover, there is nothing in Liberalism that requires us to deny that in order to describe the interest that individuals have in participating in groups it is necessary to make reference to institutions and practices, not just to features of individuals. Liberalism can also cheerfully admit that the institutional or social concepts used to describe the interests that individuals have in belonging to groups and pursuing shared ends are not reducible to pre-institutional or presocial concepts. Liberalism, as a normative thesis about the priority of individual civil and political rights, does not entail any such views, nor do the more plausible lines of justification invoked to support that thesis include any such views among their premises.⁵

Similarly, opponents of Liberalism often assume that it is committed to some rather unsavory motivational assumptions: that individuals generate their preferences without benefit of social influences, that persons are by nature exclusively concerned with their own interests, that their interests are exclusively self-regarding and private, and so on. Again, none of these extreme motivational assumptions is entailed by the liberal thesis about the priority of individual civil and political rights, and none need figure in the various strands of argument that can be invoked to support it. Liberalism can and should recognize the fact that our most fundamental preferences are socially shaped, that most human beings take an intrinsic interest in the interest of others, that many have genuine common, as opposed to purely private interests, and that they regard the goods of community as intrinsically good, not merely as instrumentally valuable in pursuit of private, individual goods. In particular, Liberalism can and should acknowledge and accommodate the fact that for most if not all people participation in a community of some sort – and the cooperative pursuit of genuinely shared ends that this involves – is of vital importance, both in their conception of themselves and their conception of the good life.

Finally, there is nothing to prevent a liberal from espousing a value theory that affirms the objectivity of value, nothing to preclude her from acknowledging not only that most, if not all, people do in fact desire the goods of community, but also that these are in fact among the most important elements of the good life.⁶ It is another matter, however, as to whether liberal theories

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have adequately reflected the importance of the goods of community, and in particular, whether their doing so requires the recognition of group rights in addition to the familiar liberal individual rights. And that is the question to which we must turn our attention.

But before we do so it is worth emphasizing a point which several recent defenders of Liberalism have made, but which its detractors still fail to appreciate.⁷ Some of the most important liberal individual rights are valuable in great part because they protect *groups* and allow them to flourish, and it is the “communitarian” value of these rights which provides one of the chief justifications for recognizing them. Historically, the legal and constitutional recognition of the rights to freedom of expression, of religion, of association and assembly was at first the result of compromises of tolerance in the aftermath of the wars of religion of the sixteenth and seventeenth centuries; and these individual rights continue to play a crucial role in preserving not only religious but political and “life style” communities today.

The point is that the core of Liberalism – the fundamental individual civil and political rights – can be seen as an affirmation of the importance of the goods of community, not a denial of them in the name of an implausible, hyper-individualist view, whether moral, ontological, or value-theoretic. Liberalism can and should rest its case for some of the most fundamental individual civil and political rights on their value in protecting groups. Such “communitarian” justifications for individual rights are perfectly consistent with Liberalism’s insistence that what matters ultimately, morally speaking, is individuals. All that is required to render Liberalism’s moral individual consistent with a “communitarian” justification for individual rights is the quite plausible view that the value of groups is the value that membership in groups has *for individuals*.⁸ The question, then, is whether Liberalism, in order to reflect an appropriate appreciation of the significance of community in human life, ought to supplement the individual rights with group rights, and if so, what sorts of group rights and under what conditions?

III. The liberal case for group rights

No attempt can be made here to develop a comprehensive liberal theory of group rights. My aim is more modest: to show that a strong case can be made from a liberal perspective for recognizing some group rights under certain conditions. I begin with group language rights.

As noted earlier, it is important to distinguish between negative and positive language rights. A negative language right is simply a right not to be interfered with in using one’s preferred language. This right, I have suggested, is best understood as an individual, not a group right, just as the right to freedom of expression (of which it may be a specification) is generally

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Excerpt

[More information](#)

understood to be an individual right. A positive language right – a right to public subsidies for the preservation of a language – is more plausibly construed as a group right. And in most cases it will be a group right of the nonindividual standing sort. However, even if the form the public subsidy took was an individual allowance (say for tuition to a French language school for Walloons living in the Flemish part of Belgium), the basic entitlement would be understood as an entitlement of the members of the language community in question *as members of that group*, and the interests (in preserving the language and the associated culture) which justify the ascription of the positive right would be the interests that individuals have in the preservation of the language group and its culture. The entitlement to public subsidies is an entitlement of the group to resources needed to enable its members to continue to enjoy the goods of community which the existence of that group provides.

A third type of language right may also be distinguished: A *prescriptive* language right. A prescriptive language right is the right of a group to restrict the use of competing languages within a certain territory. (An example is Bill 101, which legally prohibits the display of signs in English or any language other than French in public places in Quebec). A prescriptive language right is even more clearly a group right: It is the right of a group – acting through its political mechanisms for collective or delegated decisions – to impose restrictions on the use of competing languages within a specified jurisdiction. The right to prohibit signs in English in Quebec is clearly not an individual right, nor is it a group right of the dual-standing sort.

From a liberal standpoint prescriptive group language rights are obviously more problematic than positive group language rights because in exercising its right to restrict the use of a competing language the members of a group restrict the liberties of others to speak that language. So there is at least an apparent conflict between this group right and the individual right to freedom of expression, if we assume that the right to freedom of expression generally includes the right to use the language of one's choice. The mere fact of such a conflict does not show that Liberalism cannot supplement the individual rights with some group rights, however, since there can be conflicts among individual rights as well. For example, the right to freedom of expression can conflict with the right to a fair trial when media coverage of alleged crimes prejudices prospective jurors.

When such conflicts occur, Liberal theorists develop various strategies for balancing the competing interests which the rights in question protect, sometimes by invoking priority principles, sometimes by pruning back the scope of one or both of the conflicting rights. To make a case for recognizing group rights, then, the liberal need not show that individual and group rights can never conflict. Instead she must show that the case for the group rights in

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Excerpt

[More information](#)

question is sufficiently strong to warrant the kind of complex balancing strategies that are invoked to sort out conflicts among individual rights.

Perhaps the strongest case for recognizing both positive and prescriptive language rights, from a liberal standpoint, is that such rights may, under certain conditions, prove indispensable for preserving minority cultures that are threatened as a result of a long history of unjust treatment at the hands of the majority. Will Kymlicka has argued, quite persuasively in my opinion, that the need to preserve the cultures of Native Americans and other indigenous groups can, under certain circumstances, justify not only positive and prescriptive group language rights but group property rights as well. The argument, which can be strengthened and extended to cover both positive and prescriptive language rights as well,⁹ has two stages.

The first explains the importance of membership in a cultural group for the individual; the second shows how recognizing the group right in question can, under certain circumstances, make an indispensable contribution to the preservation of the culture. Kymlicka notes that cultural membership provides the individual with a *context for meaningful choice*. This point is extremely important and deserves elaboration. The culture not only makes salient a manageably limited range of alternative goals, rescuing the individual from the paralysis of infinite possibilities; it also does so in such a way as to invest certain options with *meanings* that allow the individual to *identify with* and be *motivated* by those options. The culture also *connects* what otherwise would be fragmented goals in a coherent, mutually supporting way, offering ideals of wholeness and continuity, not only across the stages of an individual human life but over generations as well. Without the context for meaningful choice supplied by a culture, the individual may feel either that nothing is worth doing because everything is equally possible or that life is a series of discrete episodes of choice, each of which is impoverished because of its utter unconnectedness with the others. The landscape of choice may seem so flattened and featureless that movement seems pointless, and the sense that one's life is a journey in which milestones can be reached may evaporate.¹⁰ With some simplification we can say that the first source of the value of a culture for the individual who belongs to it, its being a meaningful context for choice, is that the culture provides an appropriate *structure* for the individual's pursuit of the good life. And it is worth emphasizing that there is nothing here that assumes that the content of the individual's goals is egoistic or purely self-regarding. On the contrary, it is characteristic of the value structure provided by a culture that it encourages identification with the cultural group and hence fosters the pursuit of common goals.

A second and equally important source of value for the individual of cultural membership is the fact that for most if not all individuals participation in

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[More information](#)

community is itself an important ingredient in the *content* of the good life, not just a part of its structure. Participation in community is a fundamental intrinsic good, not merely a structural condition for the successful pursuit of other goods or a means toward procuring them. And in many cases the community that is most important in the individual's life will be a cultural (rather than a political, professional, or aesthetic) community. Nothing in Liberalism or its understanding of human good bars it from embracing this basic truth. Given its importance, then, both as a structure for the individual's choices and in supplying some of the main ingredients of the content of her conception of the good, cultural membership warrants protection.

The second stage of the argument is to show how group rights can sometimes provide the needed protection – protection that the traditional liberal individual rights alone may not adequately provide. The case of positive group language rights is relatively straightforward: under certain conditions, public financial support for the teaching of a minority language (e.g., Hopi in the state of Arizona) may be necessary for the preservation of a culture. The group in question may lack the resources, and, in the case of indigenous peoples, the need for special arrangements for sustaining the language and the lack of resources for doing so may have the same source: a history of unjust treatment at the hands of the majority.

The case for prescriptive language rights and group property rights is somewhat more complex. These group rights can be justified as mechanisms for overcoming *collective action problems* that would otherwise prevent the groups in question from doing what is necessary to preserve their cultures. Even though French Canadians understood that the preservation of their culture depends upon the continued use of French, individual members of that group were under strong incentives to use the majority language (English). A prescriptive language right (established by Bill 101) allowed this group, through the agency of the government, to counterbalance these incentives for using English by penalizing the use of English on signs in public places. Similarly, American and Canadian Indian tribes (or bands) may benefit from laws that prescribe the teaching of their languages in tribal schools, as well as the use of those languages in tribal meetings, on tribal ballot forms, and in certain other contexts.

The liberal argument for group property rights has the same structure. If the preservation intact of a minimal contiguous area of territory occupied and controlled exclusively by members of an indigenous group is in fact a necessary condition for the preservation of that group's culture, group property rights can be justified, if it can be shown that they will help prevent incursions into the territory by nonindigenous peoples. Such group property rights can contain any of several elements, including the right of the tribe (or band) to prohibit nonmembers from settling permanently in the territory or the