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From Natural Rights to Human Rights— And Beyond

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Abstract

The idea of rights is central to our moral vocabulary. Over the past century, however, the concept of rights has changed significantly: the original faculties-based natural rights doctrine is being replaced by a needs-based and dependency-based human rights doctrine. This change is best represented in the sharp contrast between rights claims expressed in the Declaration of Independence and the United Nations Declaration of Human Rights. This shift in theory has and will continue to have broad practical consequences. The human rights view, in understanding human beings as needy and dependent rather than as distinctively capable of responsible liberty, leads to the endless proliferation of rights claims, which become self-negating. In a situation where everyone has a right to everything, there can be no justice. If the idea that we possess rights by virtue of our rational nature is to remain viable as the core of our understanding of justice, the identification of those rights must be grounded in a defensible account of our morally distinctive nature and subject to a sound limiting principle.

Introduction

The idea of rights is central to our moral vocabulary. In particular, the idea that certain rights belong to human beings simply by virtue of our humanity is a core element of the understanding of justice now prevalent throughout the modern world. In the classic American exposition of this idea, the Declaration of Independence holds that “certain unalienable rights” are the possessions of “all men,” meaning all human beings. The Declaration enumerates in a concise triad the primary unalienable rights with which we are endowed by our Creator: rights to “life, liberty, and the pursuit of happiness.”

Over roughly the past century, however, the concept of rights has changed significantly. Beginning in the 20th century, a global human rights regime has arisen whose foundational document is not the Declaration of Independence but instead the United

Nations’ Universal Declaration of Human Rights (UDHR), adopted in 1948 without a single dissenting vote.¹ Via its adoption, official recognition of the rights idea has spread to virtually all countries in the world, although in many its influence appears more in rhetoric than in practice.

Still more significantly, the adoption of the UDHR has yielded a great proliferation of human rights—or at least of claims now officially recognized as such. In the U.N. Declaration, in contrast to the American Declaration, rights are specified in a full 30 articles, many of which contain multiple proclaimed rights. Rights therein proclaimed to be “fundamental human rights” include the core rights of “life, liberty, and security of person”; a set of civil and political rights resembling those specified in the U.S. Constitution’s Bill of Rights; and beyond those, an array of proclaimed “economic, social and cultural rights”

that includes, among others, rights to work, just remuneration, rest and leisure, social security, marriage, education, and participation in cultural life.

The roster of U.N. legal instruments interpreting and augmenting the original declaration of human rights, and with it the roster of proclaimed rights themselves, continues to lengthen. As of 2013, U.N. agencies had produced 27 binding human rights legal instruments pursuant to the UDHR, yielding 667 total provisions requiring states' compliance. U.N. agencies have declared human rights to such basic goods as food, water, clothing, housing, health, and peace—along with a vast and diverse array of more specialized goods including child care, Internet access, publicly funded higher education, protection against climate change, internationally assisted economic development, and many more.² “Over the past generation,” political scientist Francis Fukuyama comments portentously, “the rights industry has grown faster than an Internet IPO in the late 1990s.”³

The transition has also been called the “rights revolution” of the 20th and 21st centuries, and so, too, it is aptly named: “Natural” and “human rights” may appear synonymous, but the transition from one to the other signifies a radical change in our understanding of rights.

What can explain this transition from the compact enumeration of rights in the Declaration of Independence to the continually expanding roster of rights proclaimed in the UDHR and its progeny?⁴ Can it be justified? The pertinent documents themselves describe this transition as a movement from *natural rights* to *human rights*. The transition has also been called the “rights revolution”⁵ of the 20th and 21st centuries, and so, too, it is aptly named: “Natural” and “human rights” may appear synonymous, but the transition from one to the other signifies a radical change in our understanding of rights.

The purpose of the present report is to explain and assess this change. Here is a preliminary overview of the argument.

The doctrine affirmed by the American Founders and epitomized in the Declaration of Independence is a classical-liberal doctrine of natural rights

grounded in a specific account of human nature.⁶ According to that account, human beings by nature possess certain specific faculties that entitle us to rights because they render us capable of responsible action—of rational liberty. *Human* rights at first sight appear to be similarly grounded in a concept of human dignity, or of the distinctive worth of human personality, but the appearance of similarity is misleading. In the latter understanding, human rights are conceived not as the exercise of human faculties but rather as the fulfillment of human needs. The transition from natural rights to human rights is a transition from a *faculties*-based to a *needs*-based account of the basis of rights, and from this transition arise serious difficulties in the human rights argument.

The fundamental difficulty is that the conception of human beings as needy and dependent rather than as distinctively capable of responsible liberty renders unclear the basis of our claims to rights or to moral respect. Moreover, in the human rights argument, human needs are conceived as relative to an indefinite, open-ended concept of human dignity, the effect of which is to remove any limiting principle from the identification of human rights. Human rights so conceived become capable of endless proliferation—and so they have proliferated with no end in sight. The difficulty is that rights claims cannot proliferate indefinitely without at some point becoming self-negating. In a situation in which everyone has a right to everything, as political philosopher Thomas Hobbes reasoned, there can be no justice.⁷

If the idea that we possess rights by virtue of our humanity is to remain viable as the core of our understanding of justice, the identification of those rights must be grounded in a defensible account of our morally distinctive nature and subject to a sound limiting principle. Properly understood, the natural rights doctrine that informed the American Founding contains such an account and such a principle, whereas the 20th-century and 21st-century doctrine of human rights does not.

This report's argument proceeds in four main sections. The first three of those are primarily expository, explaining in succession the three main generations of the rights idea.⁸ The exposition begins with the Founders' natural rights argument, then addresses the development of human rights doctrine concerning economic and social rights (the second section) and rights that grow out of the

antidiscrimination principle (the third section). This survey of the three main iterations of the rights idea reveals a progressively sharpening contrast between the faculties-based natural rights doctrine and the needs-based and dependency-based human rights doctrine. Taking that contrast as its point of departure, the fourth section presents a series of critical reflections on the transition in thinking from natural rights to human rights.

The First Generation: Natural Rights and the American Founding

The term *right*, in the sense specific to the Founders' understanding and to the later understandings to be considered here, can be defined simply as an entitlement to a given thing. More precisely, a right is a morally or legally justified and enforceable claim to a given action or object—as in, for instance, a claim to exclusive ownership of one's home or a claim to the freedom of speech, unobstructed by others.

Rights in general, in other words, are about what we are owed—what is properly *ours*, what we cannot be deprived of or denied without injustice. To say that we possess a given right, by nature or by law, is not to say we are secure in the actual exercise or enjoyment of that right; it is only to say we may justly demand such security. This is what it means to say a right is an *enforceable* claim. To label something my right is to declare the securing of that right a moral or legal imperative and thus to imply that others—individuals, society, or government—have a corresponding duty to respect, to protect, or even to provide for my enjoyment of it.

For the American Founders, the primary and most important rights we possess are natural rights. Specific formulations vary, but affirmations of the natural rights idea pervade the Founding, appearing implicitly in the Declaration of Independence (as dictates of “the Laws of Nature and of Nature's God”) and explicitly in numerous state constitutions, along with the writings of particular Founders. The Massachusetts Constitution of 1780 holds the securing of our “natural, essential, and unalienable rights” to be the end of government, and the Pennsylvania Constitution of 1776 refers to “natural, inherent, and inalienable rights,” while the Virginia Declaration of Rights refers to our “inherent rights”—but in all these cases the meaning is the same.

For the American Founders, the primary and most important rights we possess are natural rights.

In the affirmation of natural rights there was broad consensus among the Founders. In the elder Jefferson's recollection, the Declaration was conceived simply as “an expression of the American mind.”⁹

Given their broad agreement in affirming the natural rights doctrine, the Founders saw no need to explain and defend it systematically. Understanding their position will require reconstructing it out of their occasional and fragmentary statements on the subject, consulting where necessary the works of political philosophy that most strongly influenced them.

To understand the Founders' position on natural rights, we need to understand their answers to a series of basic questions:

- What does it mean to say that certain basic rights are natural to us, i.e., that we possess them by nature?
- Why do we possess natural rights, i.e., what is it about us that makes us rights-possessors?
- Why do we possess *these specific* natural rights—the rights proclaimed in the Founders' public and private statements—and not any of the other rights we might want to claim?

Natural Rights: Their Meaning, Basis, and Extent. To clarify what the Founders affirm when they claim certain basic rights are natural to us, it helps to consider first what they deny. When they say that a right is natural, they mean first that it is not a product of human making. A natural right exists via a dispensation beyond human art or convention. Civil and political rights are products of government; natural rights are not. The doctrines of William Blackstone and Edmund Burke are to be rejected, argued one of the preeminent students of law among the Founders, Pennsylvania's James Wilson, precisely because they left rights to depend “on the precarious and fluctuating basis of human institution.”¹⁰

What then does it mean to derive rights from “the stable foundation of nature,” as Wilson put it?¹¹ The Declaration says we are “endowed” with these rights “by [our] Creator,” and also that our natural rights are dictates of “the Laws of Nature and of Nature's God.” That does not mean, of course, that the fact of our creation by God in itself endows us with rights. The multitudinous nonhuman living beings are no less God's creatures than we are, but they are not possessors of rights in the proper sense.

When the Declaration says that God endows us with rights, it means that God endows us with a distinctive, unchanging, rights-bearing nature. In other words, the laws of nature, as conceived in the Declaration and by the Founders generally, are the laws of human nature. The “sacred rights of mankind,” Alexander Hamilton remarked, “are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself.” For James Wilson likewise, natural rights are “founded on the constitution of mankind.”¹²

This understanding of the source of natural rights carries a crucial corollary. To say that our most basic rights are given us by God as revealed in our specific nature is to say they are given to all human beings. Unlike the rights created by human governments, natural rights do not differ from person to person or society to society. Whereas a citizen of the U.S. possesses by U.S. law a different set of rights from those a citizen of Canada possesses by Canadian law, the Declaration affirms the existence of a universal set of rights, possessed by all human beings in common, regardless of any more particular identifications such as national or ethnic affiliation, color, sex, religious creed, social class, and the like.¹³

Having established the meaning of natural rights as the rights proper to human nature, we come to the deeper questions concerning their basis and extent: Why—by virtue of what quality or qualities in human nature—do human beings possess natural rights? Why do we possess the specific natural rights identified by the Founders?

The general answer, for the Founders, consists in a combination of natural human desires and natural human faculties. Explaining his position in an 1816 letter, Jefferson identified the basis of the natural right to acquire property by reference to simple elements of human nature that constitute the basis of any natural right. The property right (like others) “is founded,” he says, “in our natural wants [and] in the means with which we are endowed to satisfy these wants.”¹⁴ By “natural wants” Jefferson referred to the core natural desires whose objects are necessary to a well lived, properly human life. By “the means” for satisfying those wants he referred to the distinctive human powers or faculties, primarily reason and responsible action.

Our natural wants might seem to be innumerable, but when the Founders conceived of those wants that give shape to our natural rights, they identified

two overarching desires that comprehend our particular desires: the desires for “Safety and Happiness.” According to the Declaration of Independence and prominent state constitutions, these are our two primary motives for forming political societies, because they represent the two constant objects of human desire and the two natural poles of human action.¹⁵ “Nature,” wrote Wilson, “has implanted in man the desire of his own happiness.” As for safety or security, the naturalness and power of this desire seemed to Wilson too obvious to require demonstration: “I shall certainly be excused from adducing any formal arguments to evince, that life, and whatever is necessary for the safety of life, are the natural rights of man. Some things are...so plain, that they cannot be proved.”¹⁶

We claim rights to impose obligations on others—duties to govern their desires so as to render them respectful of our own.

Conceived as inferences from our natural wants, natural rights appear as broad rights to pursue our safety and happiness. As Jefferson’s formulation indicates, however, natural rights cannot be properly conceived as derived solely or even primarily from our desires. They are not, as Hobbes and others have mistakenly held, mere inferences from the passions.¹⁷ The most obvious reason they cannot be derived from our wants or desires alone is that those desires are not uniformly benign; among our natural inclinations are desires to gain advantage over others, to be superior in wealth, honor, and power, even “to vex and oppress” one another.¹⁸ Such desires cannot, then, be the basis of rights in the proper sense of the term, because they cannot generate any moral obligation in others. It makes no more sense to claim a moral obligation to respect or submit to the predatory desires of a fellow human being than it would to claim such an obligation in relation to any other predatory animal.

“If men were angels,” Madison remarked famously, “no government would be necessary.”¹⁹ On the same premise, no rights would be necessary. If human desires and inclinations were only benign, never antisocial or predatory and never in conflict

with others' desires, there would be no purpose in claiming rights. We claim rights to impose obligations on others—duties to govern their desires so as to render them respectful of our own. We claim rights, therefore, only against beings who *need* to be obliged, and likewise only against those who are *capable* of being obliged. A creature ruled entirely by passions of one sort or another is not by that fact alone a bearer of rights, just as other, lower animals, impelled by desires no less powerful or indefeasible than our own, are not rights-bearers. A rights-bearer is capable of obligation, which presupposes the ability to govern the passions.

This is why Jefferson held that natural wants are not the sole basis of natural rights, but it is also why his designation of the faculty of reason as the “means” for satisfying those wants is in need of refinement. Jefferson’s lapse notwithstanding, the Founders conceived of reason, a basic requisite of natural rights, not as a mere means to the fulfillment of wants but as the faculty whereby we govern those wants. This power to govern our passions in turn comprehends the more specific powers to distinguish just from unjust, or benign from harmful desires, and to regulate our actions in accordance with that distinction. In short, in the Founders’ conception, natural rights can be properties only of beings naturally capable of self-government—which is to say, capable of virtue.

Considering the distinctive human faculties with which we are endowed that allow us to identify and satisfy our rightful desires, James Wilson brought to light a further point of great importance:

Nature...has endowed [man] with intellectual and with active powers; she has furnished him with a natural impulse to exercise his powers for his own happiness, and the happiness of those for whom he entertains such tender affections. If all this be true, the undeniable consequence is, that he has a right to exert those powers for the accomplishment of those purposes, in such a manner, and upon such objects, as his inclination and judgment shall direct; provided he does no injury to others; and provided some publick [sic] interests do not demand his labours. This right is natural liberty.²⁰

When rights are construed as relative to the objects of fundamental human desires, those rights

center on the ends of safety and happiness, with safety signifying our primary and happiness our ultimate end. The status of liberty, however, the central right in the Declaration’s triad of our natural, unalienable rights, remains unclear in that conception. Yet when rights are viewed as grounded in our distinctive intellectual and moral faculties, the liberty right assumes a position of priority in relation to the other rights: All our rights are conceived as liberty rights. The right to liberty reflects both our natural capacity and our natural desire to exercise our powers, as James Wilson says, unobstructed by and independent of others, in pursuance of our own non-injurious ends. The natural right to life is then the right freely to deploy our faculties to the end of protecting our life or securing our safety, and the right to the pursuit of happiness is the right freely to deploy our faculties to the end of securing our happiness.

The conception of natural rights as faculties-based yields a further modification in the order of priority among those rights. Given that the natural right to liberty is a right to the free use of *our* faculties, that liberty right necessarily rests on a prior property right—a right of property in ourselves and thus in the faculties that enable our freedom. James Madison grasped the point perfectly: “In its larger and juster meaning,” he explained, property “embraces everything to which a man may attach a value and have a right.” We have fundamental properties in our “persons” and our “faculties” such that each “has a property very dear to him in the safety and liberty of his person” and “an equal property in the free use of his faculties and free choice of the objects on which to employ them. In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.”²¹

The Founders’ understanding of natural rights as faculties-based liberty and property rights has two crucial implications. The Founders do not maintain that human beings have natural rights to the objects of our basic wants or needs. In their understanding, we have a natural right to the exercise of liberty, not to its fruitful, effective exercise. We have rights to the pursuit, not to the guaranteed successful pursuit, of security and happiness.

If the latter were the case, then a person who lacks any of the goods necessary to human happiness by that fact alone suffers a deprivation of rights and is thereby entitled to demand that others provide

those goods to him. The Founders' argument licenses no such generalized demand.²²

The second implication is that natural rights as understood by the Founders do impose obligations on others—obligations that are primarily negative in character. Having no natural right to command another, we have a natural duty to refrain from doing so, just as we have a duty to avoid harming others or obstructing them in their rightful pursuits. In the same letter in which he summarized the basis of our natural rights, Jefferson added, “no one has a right to obstruct another, exercising his faculties innocently for the relief of sensibilities made a part of his nature.”²³

Having no natural right to command another, we have a natural duty to refrain from doing so, just as we have a duty to avoid harming others or obstructing them in their rightful pursuits.

As we see below, these two main implications of the idea of natural rights as liberty rights illustrate the basic differences between the understanding of rights prevalent at the Founding and the later understanding of human rights. The Founders' idea of rights as faculties-based begins from a premise of natural independence and yields mainly negative obligations, whereas the later, needs-based conception begins from a premise of personal dependence and gives rise to an expansive set of positive obligations.

Before turning to those later ideas, however, it is important to consider a fuller account of the relevant faculties—the “intellectual” and “active” powers to which James Wilson referred—and how those faculties serve as the basis for natural rights. That account can be found in the work of John Locke, the political philosopher to whom the Founders are most indebted for their understanding of natural rights.

The Lockean Foundation. In virtually all the elements of their account of natural rights, the Founders restate the political philosophy of John Locke, whose “little book on government,” the *Second Treatise of Government* (1689), Jefferson held

to be “perfect as far as it goes.”²⁴ A brief review of Locke's argument in the *Second Treatise* and his more overtly philosophic work, *An Essay Concerning Human Understanding* (1690), provides a fuller explanation of the ideas of natural liberty and natural self-ownership, of the desires that give shape to our natural rights, and of the faculties on which those rights are grounded.²⁵

In the *Second Treatise*, Locke's account of natural rights begins with an account of the “state all men are naturally in,” which he calls the “state of nature.”²⁶ Beginning with that condition allows Locke to present natural rights in their purest manifestation and to clarify the understanding of human nature upon which natural rights are based.

The state of nature, Locke says, is a state of “perfect freedom” and also of “equality.” People in that state are naturally free “to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature,” and they are naturally equal, existing “one amongst another without subordination or subjection.”²⁷ In the natural condition as Locke conceives of it, natural freedom and natural equality are virtually interchangeable ideas. Human beings are at once naturally free and naturally equal in that there is no natural political authority.

Critics from the Founding era onward have objected to this idea of a state of nature as an arbitrary contrivance, lacking any solid basis in human experience.²⁸ Their objection, however, reflects a misunderstanding of the Lockean argument, which neither makes nor depends on a claim that the generality of human beings ever existed for any significant period of time in a condition free of governmental or other human authority. In saying that human beings are naturally free and naturally equal, Locke simply means that as rational beings, we are not divided by nature into rulers and subjects.²⁹ In accord with this Lockean reasoning, the Virginia Declaration of Rights (1776) states in its first article that “all men are by nature equally free and independent.”³⁰

We are by nature independent of others, Locke continues, because we are the creatures, the “workmanship” of “one omnipotent and infinitely wise maker,” and being God's “property,” we are not the property of any other human being. In Locke's argument as in those of the Founders, however, not all God's creatures can be understood to be naturally, rightfully independent of others. Human beings are

so, says Locke, by virtue of our distinctive “species and rank,” marked by the possession of certain “like faculties” that constitute “advantages of nature.” Foremost among those advantageous faculties is reason, which enables us to rise above the “inferior ranks of creatures” and so to live, in contrast to the lower animals, by rules of “common equity” or justice rather than by mere appetite and force.³¹

In saying that human beings are naturally free and naturally equal, Locke simply means that as rational beings, we are not divided by nature into rulers and subjects.

Those rules begin with the law of nature—a term whereby Locke and the Founders referred to a moral (not merely physical) law, signifying a moral order in nature that is discoverable by natural human reason unassisted by divine (Scriptural) revelation. “The state of nature,” Locke maintains, “has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that ... no one ought to harm another in his life, health, liberty, or possessions.” Thus commanding us not to harm others, the law of nature commands us, as Locke proceeds to make clear, to respect others’ natural rights. Reason “is that law,” as Locke says, in the twofold sense that reason is the faculty whereby we are able to know the law of nature, and it is also the faculty that entitles us to natural rights.³²

Just as Locke’s doctrine of the law of nature yields a doctrine of natural rights, so his principle of divine ownership yields a principle of human self-ownership as the immediate basis of our natural rights. In the state of nature, human beings are at once God’s property, subject to God’s law, “sent into the world by his order, and about his business,” and we are naturally free, self-owning persons. God, our maker and owner, has made us in such manner as to enable and entitle us to own ourselves. So Locke goes on to declare that “every man has a property in his own person”—and later, still more strongly, that man by nature is “*Proprietor of his own Person*, and the Actions or Labour of it.”³³ We are God’s property by the *fact* that He made us, and we are our own

property by virtue of the *manner* or the specific design in which He made us—as beings capable of moral responsibility.

To say we have a natural property in our own persons is to say we have a natural *right*, not merely a natural power, to “dispose” of our persons, as Locke put it, or to the free exercise of our powers or faculties, as James Wilson put it. So far as it is grounded in a principle of divine ownership, however, the natural right to liberty or free self-disposal as Locke conceives it stops short of a radical libertarianism; the obligation not to harm applies to self as well as to others. “Every one,” Locke says, “is bound to preserve himself, and not to quit his station wilfully.”³⁴

Locke clarifies the basis of this claim to self-ownership and its relation to natural rights in a crucial chapter of *An Essay Concerning Human Understanding*, where he sets forth the specific qualities that make us bearers of rights by nature. The term “person,” he explains, is “a forensic term, appropriating actions and their merit; and so belongs only to intelligent agents, capable of a law, and happiness, and misery.”³⁵

We are self-owning, Locke argues, by virtue of our capacity for owning (“appropriating”), thus taking responsibility for, our actions. More specifically, we are self-owning by virtue of our capacities for obeying law and pursuing happiness—capacities that belong only to intelligent agents. Those capacities in turn are rooted in two mental powers distinctive to human beings: the power of “abstraction,” as Locke calls it, which is our power to form general ideas, and the power “to suspend the execution and satisfaction of any of [our] desires,” which enables us “to examine, view, and judge of the good or evil of what we are going to do.”³⁶

As human beings are more than creatures of momentary, present sensation, according to Locke, the capacity for happiness is more than a capacity to feel momentary pleasure. We are able to conceive of happiness in a fuller, more comprehensive sense by virtue of the same power whereby we possess self-consciousness, indeed whereby we are able to *be* a self at all. This is the power of abstraction, the most fundamental operation of which is to extend our consciousness beyond our present experience, thus forming the idea of our own person or self. By extending our consciousness beyond our present experience, we are able to form the distinctively human idea of happiness, by which we transcend the

pleasures or pains of the present moment to envision our securing of future goods. Likewise, by the power to suspend the pursuit of objects of present desire, we are able to regulate our actions in accordance with the general idea of happiness that the power of abstraction enables us to form. In that latter power in particular, Locke observes, inheres “the source of all liberty.”³⁷

By the same powers that enable us to conceive of and to pursue happiness, we are capable also of moral responsibility and of living in accordance with law. To recognize ourselves, by the power of abstraction, as selves or persons is to conceive of the idea of our own identity—in the literal sense, the idea of our sameness over time—whereby the “I” existing today can identify itself as the same “I” who committed a given action yesterday. In turn, our actions are rendered distinct from mere reflexive or impulsive behaviors by the suspensory power that enables us to choose between good and ill, right and wrong, and to act on our choice. In this way, by exercising the powers of abstraction and suspension, we become self-owning, morally responsible persons, capable of the rightful, lawful pursuit of happiness.

For Locke as for the Founders, natural rights are grounded in a distinctively human combination of desires and faculties.

Here, in sum, is the Lockean teaching concerning the basis of natural rights. For Locke as for the Founders, natural rights are grounded in a distinctively human combination of desires and faculties. “Nature,” Locke observes, “has put into man a desire of happiness, and an aversion to misery: these indeed are innate practical principles, which... do continue constantly to operate and influence all our actions without ceasing: these may be observed in all persons and all ages, steady and universal.”³⁸ The desire for happiness is natural and immutable in human beings, and it supplies the basis of natural rights, in Locke’s argument, by virtue of our possession of the essential attributes of human personhood, including specifically our powers of owning responsibility for actions and thus of freely submitting to law.³⁹

In the Lockean understanding, then, the combination of divine ownership and self-ownership yields the doctrine of natural rights, with their correlative obligations, as the content of the moral law of nature. Each person, upon reaching the age of maturity, is presumed capable of rational liberty. As a self-owning person under God’s natural law, each of us has the right to act or to employ our labor in pursuance of our preservation and happiness, and none of us has a right, except in cases of extreme need, to command the person or labor of any innocent other without that person’s consent.⁴⁰

As noted above, to say our fundamental rights are natural is to say they are the properties of all human beings, always and everywhere. So far as those rights are unalienable, they belong to us no less in political society than in the state of nature. According to both Locke and the Declaration of Independence, however, our natural rights are insecure in the state of nature, and the primary purpose of political society is to render them more secure.⁴¹ As we will see, this fact presents potential complications for Locke’s and the Founders’ understanding of natural rights. We need next to consider their account of the status of natural rights in political society.

Rights by Nature and Rights by Compact.

According to the Founders and Locke, the premises of the natural rights argument also entail the proper method for instituting political society and government. If each person is naturally self-owning, then the rule by one or some human beings over others can only be authorized by the consent of those subject to it. As the Declaration expresses it, “[G]overnments are instituted among men, deriving their just powers from the consent of the governed.” In other words, the origin of government is a compact among all prospective members of political society. “The body politic...is a social compact,” states the 1780 Massachusetts Constitution, “by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good.” The “charters of government” are “compacts,” Madison explained, “superior in obligation to all others, because they give effect to all others.”⁴²

Pursuant to the natural rights theory, the parties to the original social compact may not establish political society on simply any set of terms they find momentarily agreeable. The principle that just government derives from the consent of the governed is intelligible only on the premise that the parties are

rational, so that their consent qualifies as a rational act. Here arises the principle of unalienable rights. No valid compact could prescribe a total, unconditional surrender of rights, because no such surrender could qualify as the act of a rational person. In the original, fundamental compact, reason dictates that we surrender only some of the rights we hold in the condition of natural freedom. “Each individual,” John Dickinson explained, “must contribute such a share of his rights, as is necessary for attaining that *security* that is essential to freedom,” or for attaining “a capacity of enjoying his undelegated [i.e., unalienable] rights to the best advantage.”⁴³

If each person is naturally self-owning, then the rule by one or some human beings over others can only be authorized by the consent of those subject to it.

The proper design of that compact can best be understood with reference to the sources of the natural insecurity of rights that the compact is conceived to remedy. Natural rights are naturally insecure, according to Locke and the Founders, for two main reasons. Due to the influence of passion, interest, and partisanship, human beings suffer deficiencies in both reason and will: We naturally divide in our understanding of the law of nature and its particular applications, and even where we properly understand the dictates of that law, we are sometimes unwilling to submit to it.⁴⁴ For our rights to be effectually secured, therefore, they need to undergo two kinds of modifications in the transition from the state of nature to political society: Rights must be more clearly and specifically defined than they are in their natural condition, and they must be supplemented or augmented by new rights, conceived as civil corollaries of the pre-existing natural rights.

Pursuant to the compact that establishes political society, there are two main classes of rights: the pre-existing natural rights whose substance and boundaries are clarified by compact or constitutional provision, and the supplemental rights—not natural in themselves—that are needed to render the natural rights properly secure. Both classes are present in the declarations of rights incorporated into many of

the early state constitutions, as well as in the Bill of Rights and other provisions of the U.S. Constitution.

Typical of the first class, the natural rights specified and clarified by compact, are the various constitutions’ guarantees of religious liberty, the right to bear arms, freedom of the press, the rights of petition and assembly, and some of the guarantees against arbitrary power in the administering of criminal justice. These are variations of the natural liberty right, requiring for their security only the forbearance of others. The fact that they are framed as limitations on government indicates that they are merely redefined or reconceptualized natural rights. They are pre-existing rights, neither conferred by government nor surrendered to government, upon which government may not infringe.

Thus the First Amendment to the U.S. Constitution, guaranteeing rights of speech, religion, press, assembly, and petition, begins with the words, “Congress shall make no law,” and subsequent amendments follow in the same vein: “the right of the people to keep and bear arms, shall not be infringed”; “the right of the people to be secure against unreasonable searches and seizures...shall not be violated”; “nor [shall] cruel and unusual punishments [be] inflicted”; and so on. Similarly formulated guarantees appear in state constitutions of the period.⁴⁵

The second class of rights, required to supplement the first, comes into being because the securing of the natural rights we retain requires more from government than mere constitutional restraint and more, also, than the legislative and judicial clarification of rights. Because dangers to our rights precede governments, government must not only forbear infringing rights but also take positive measures to protect them. The problem of constituting government is twofold, as Madison writes in *The Federalist*: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first *enable* the government to control the governed; and in the next place oblige it to control itself.”⁴⁶

In the act of constituting government, we create a new kind of right. To the class of rights that entail only negative obligations on others, we add a class entailing positive obligations, or positive claims on others’ labor. To the class of civil corollaries of purely natural rights, rights that entail protection *from* others, including government, we add a class of supplemental rights to protection *by* government.

A generalized reference to this new class of rights appears in the Massachusetts Constitution of 1780 (Article X): “Each individual of the society has a *right to be protected* by it in the enjoyment of his life, liberty and property, according to standing laws.”⁴⁷

By a comparison of particular rights drawn from each class, we see the pertinent distinction. The constitutional right to bear arms is, like all natural rights, a claim of personal freedom and a claim upon others’ (society’s and government’s) forbearance. By contrast, the general right to societal protection entails various particular claims on the labor or agency of one’s fellow members of society to provide institutionalized security for the rights of all. The right of the accused to trial by a jury of one’s peers is a claim on the agency of others; so, too, is the right to vote, so far as it requires a societal commitment of resources to operate regular elections. Such rights are merely particular instances of the general claim upon one’s fellow members of society to establish the legislative, executive, and judicial institutions required for the protection of rights.⁴⁸

By nature we hold rights only to our own persons, but by positive compact we can establish rights to assistance by others to secure or effectuate our rights.

In sum, according to this exposition of the logic of natural rights as the Founders understood it, the members of a properly constituted political society have rights that derive from nature and rights that derive from societal compact. (In today’s usage

we refer to the latter class of rights as civil rights, although the Founders would have regarded that usage as less precise than their conception of rights by compact.) By nature we hold rights only to our own persons, but by positive compact we can establish rights to assistance by others to secure or effectuate our rights.

With this distinction arise challenging questions. From this first expansion of rights, yielding a right by compact to be protected from harm by others, what other expansions might follow? What are the scope and limits of the claims to protection a political society can justly establish by positive compact?

As noted above, in addition to the positive right to protection against harm by others, the Founders judged a right to assistance in cases of extreme material necessity to be a legitimate provision of the societal compact. In this judgment we can find a broad regulating principle for the establishment of positive rights by compact. The aforementioned right to assistance did not conflict with natural rights principles, in the Founders’ understanding, so far as the activating condition of extreme necessity were considered to be exceptional, leaving intact the normative presumption of personal independence in the exercise of liberty rights.

In a criticism of a French practice of disfranchising those without landed property, Jefferson provided a memorably pointed expression of this normative presumption of independence and competence in the exercise of rights: “[Y]ou,” he wrote to the Frenchman Samuel DuPont de Nemours, “love [the people] as infants whom you are afraid to trust without nurses; and I as adults whom I freely leave to self-government.”⁴⁹ It is precisely this presumption that is discarded in the 20th-century transition from natural rights to human rights.

The Second Wave: Progressivism and Economic and Social Rights

In the post-World War II era, the idea that certain rights are properties of our basic humanity received renewed and intensified attention. Newly expanded and rechristened as human rights, the idea gained international authority as the nations of the world endeavored to fashion a unified response to the unprecedented atrocities of the World War II experience.

This rethinking originated in the revisionist arguments conceived by Progressive liberals around the turn of the 20th century and, on the international stage, also drew significant inspiration from the domestic American context, wherein an expanded idea of rights began to inform public policy through Franklin Delano Roosevelt's (FDR's) New Deal program.

The Redefinition of Rights. In his now-famous 1932 campaign speech at San Francisco's Commonwealth Club, FDR proposed a bold rereading of the logic that informed the rights argument in the Declaration of Independence. According to the Declaration, Roosevelt suggested,

Government is a relation of give and take, a contract, perforce, if we would follow the thinking out of which it grew. Under such a contract rulers were accorded power, and the people consented to that power on consideration that they be accorded certain rights. *The task of statesmanship has always been the re-definition of these rights* in terms of a changing and growing social order. New conditions impose new requirements upon Government and those who conduct Government.... The terms of [the fundamental societal] contract are as old as the Republic, and as new as the new economic order.⁵⁰

Why, according to Roosevelt and his Progressive-era forbears, did rights require redefining, and what specific redefinition of rights did they have in mind? As we will see, the explanations offered by elected officials differ from those presented by Progressive theorists. Expressed in general terms, however, their contentions are, first, that rights must be understood in terms of outcomes—not as mere liberties, but as the fruitful, effective exercise of liberties—and second, that the Founders underestimated the scope of dangers or obstacles to the effective

exercise of individual rights and overestimated the ability of purportedly self-reliant individuals to provide against them.

In the Founders' understanding, the main dangers to rights are criminal actions—harms to person or property intentionally inflicted by other persons. Rights in this view are made insecure, in Jefferson's simplified summation, by actions that pick my pocket or break my leg.⁵¹ Pursuant to this faculties-based understanding of rights, the corollary supposition is that secured against such harms the unobstructed exercise of liberty rights will prove effective for the generality of persons in obtaining the goods requisite to happiness. In economic terms, the supposition is that, as a general rule, individuals secure in their liberty rights, thus free to develop their own labor power and free to employ themselves or to contract for employment with others, will succeed in providing a standard of living adequate to their needs for themselves and their families.

In the Founders' understanding, the main dangers to rights are criminal actions—harms to person or property intentionally inflicted by other persons.

According to the argument of Progressive politicians, therein lay a primary error in the Founders' thinking. Explaining the need to redefine Americans' basic rights, Roosevelt reprised an argument set forth by the Progressive historian Frederick Jackson Turner, who contended that the closing of America's western frontier and the rise of the industrial corporation marked a turning point in American political-economic development. "Clear-sighted men" saw the danger that, with no more free land available, "opportunity would no longer be equal; that the growing corporation, like the feudal baron of old, might threaten the economic freedom of individuals to earn a living."⁵²

The most clear-sighted of all such men, in Roosevelt's estimation, was President Woodrow Wilson, who "saw, in the highly centralized economic system, the despot of the twentieth century."⁵³ For Wilson and other Progressives, the primary man-made

barriers to the meaningful exercise of individual rights are systemic or structural, not individual or personal in their origin. “What we have to discuss,” Wilson declared in a 1912 campaign speech, “is, not wrongs which individuals intentionally do...but the wrongs of a system.... The truth is, we are all caught in a great economic system which is heartless. The modern corporation is not engaged in business as an individual. When we deal with it, we deal with an impersonal element, an immaterial piece of society” but one of formidable power, such that “the laws of this country,” designed for the governance of individual persons rather than of powerful associations, “do not prevent the strong from crushing the weak.”⁵⁴

Two decades later, the situation appeared to Roosevelt even more dire. At stake, he believed, was nothing less than the survival of the republic. “We are steering a steady course toward economic oligarchy,” he warned his Commonwealth Club audience in 1932, “if we are not there already.”⁵⁵ The World War II experience moved him to push the argument still further. “Necessitous men are not freemen,” he warned, suggesting a parallel between Depression-era America and Weimar Germany. “People who are hungry and out of a job are the stuff of which dictatorships are made.”⁵⁶

Progressive Radicalism and the New Rights.

In his public arguments, Roosevelt suggested that the new understanding of basic rights signified a merely prudential adjustment to changing historical conditions; Wilson at times did likewise. Wilson was, however, a political scientist prior to his career in electoral politics, and in his more foundational arguments as well as in those of other Progressive theoreticians, the new understanding reflects no merely prudential adjustment. To the contrary, their reconception of our basic rights signifies a change in fundamental principles.

In an 1887 essay, “The Study of Public Administration,” Wilson asserted, “[T]he philosophy of any time is, as [German philosopher Georg W. F.] Hegel says, ‘nothing but the spirit of that time expressed in abstract thought’; and political philosophy, like philosophy of every other kind, has only held up the mirror to contemporary affairs.”⁵⁷ The implication, as Wilson was quick to see, is that there can be no permanent political or philosophical truths; political principles, including principles of justice, are grounded not in the nature of things but only in particular and transient historical conditions.

On that premise Wilson in a later work discerned what was, to his mind, the fundamental limitation of the Founders’ understanding of constitutional government. Whereas the “government of the United States was constructed upon the Whig theory of political dynamics, an unconscious copy of the Newtonian theory of the universe,” he confidently affirmed, “in our day...we consciously or unconsciously follow Mr. Darwin.... [L]iving political constitutions must be Darwinian in structure and in practice.” According to Wilson, political constitutions do and should undergo “a natural evolution,” such that they “are one thing in one age, another in another.”⁵⁸

[O]nce-dominant ideas were to be dispatched as relics of a bygone era, Progressives contended, on the premise that they were not only outdated and thus “false,” but also pernicious.

As with constitutions, in the arguments of Wilson and his fellow Progressives, so, too, with rights. “Some citizens of this country,” Wilson complained in the campaign speech cited above, “have never got beyond the Declaration of Independence, signed in Philadelphia, July 4, 1776.” What was needed, he believed, was a “new declaration of independence” fashioned for a new era in American politics, one no longer confined by the Founders’ ideas of negative liberty rights and limited constitutional government.⁵⁹ Political scientist Charles Merriam, Wilson’s younger contemporary, observed approvingly that the “present tendency...in American political theory is to disregard the once dominant ideas of natural rights and the social contract.”⁶⁰

Those once-dominant ideas were to be dispatched as relics of a bygone era, Progressives contended, on the premise that they were not only outdated and thus “false,” but also pernicious. The “earlier explanation and philosophy of the state,” Merriam asserted, “was ‘dangerous and misleading.’”⁶¹ The earlier form of liberalism “rendered valiant service” in its day, Progressive philosopher John Dewey explained, but in its “absolutism” it had become a reactionary force. In its presumption of “the immutable and eternal character” of its principles, it had come to

function “as a means of preventing further social change.”⁶² Of “all perverted conceptions of democracy,” *New Republic* founder Herbert Croly added, “one of the most perverted and dangerous is that which identifies it exclusively with a system of natural rights.”⁶³

The danger, as Croly perceived it, was that adherence to the natural rights doctrine would effect a “tearing at the fabric of American nationality”⁶⁴—would, in other words, operate to disable the socially beneficial exercise of national power. Quoting Wilson, Merriam observed that in the Progressive view, the “proper function of government,” indeed “the great end” of society itself, is “mutual aid to self-development.” Thus Merriam summarized the constitutional import of Progressives’ critique of the Founders’ natural rights liberalism: “[T]he modern idea [of] the purpose of the state has radically changed since the days of the ‘Fathers’.... The ‘protection’ theory of the state is on the decline; that of the *general welfare* is in the ascendant.” In the ascendant, Progressive view, the powers and duties of government extend “in almost any direction where the general welfare may be advanced,” and “the only limitations on governmental action are those dictated by experience or the needs of the time.”⁶⁵

Underlying this radical revision in the idea of constitutional government is a no less radical change in the conception of individual rights and liberty. Dewey clarified the basic issue by his distinction between “formal” and “real” or “effective” rights and freedoms. “The freedom of an agent who is merely released from direct external obstructions,” he remarked, “is formal and empty.” Such freedom is necessary but not sufficient for “effective freedom,” by which he meant the possession, not merely of the free use of one’s faculties to acquire, certain substantive goods.

Dewey’s distinction between formal and effective rights is a corollary of the distinction between faculties-based and needs-based rights, thus of the fundamental difference between first-wave and subsequent understandings of rights. In rejecting what he considered merely formal rights in favor of effective ones, Dewey was rejecting the faculties-based natural rights idea held by the Founders. As explained above, faculties-based rights are liberty rights that contain in themselves no guarantee of any specific distributive outcome.

By contrast, Dewey’s “effective” rights are claims to specific substantive, mainly material goods

deemed necessary for the satisfying use of one’s freedom. The effective right to life, for instance, signifies in Dewey’s conception a right not only to personal security against criminal assault but also to various other goods “requisite to secure assured, permanent, and properly stimulating conditions of life,” including housing, health care, and employment amid safe working conditions at a level of compensation sufficient for security against poverty.⁶⁶ As Merriam observed, just government in the Progressives’ conception was in its main function more than merely protective; it was actively providential.

[F]aculties-based rights are liberty rights that contain in themselves no guarantee of any specific distributive outcome.

FDR’s Second Bill of Rights. When Roosevelt called in 1932 for a redefinition of rights, he called specifically for “the development of an economic declaration of rights, an economic constitutional order.” He regarded such a development as “the minimum requirement of a more permanently safe order of things.”⁶⁷ Later in his presidency, he substantiated that “economic declaration of rights” in two wartime speeches.

FDR’s January 1941 State of the Union address to Congress, which would be remembered as his “Four Freedoms” speech, proclaimed his vision of “a world founded upon four essential human freedoms.” These included the “freedom of speech and expression” and the “freedom of every person to worship God in his own way,” followed by two innovations that reflected Roosevelt’s Progressive liberalism: “freedom from want,” which he defined only vaguely as “economic understandings which will secure to every nation a healthy peacetime life for its inhabitants,” and “freedom from fear,” which embodied a call for the nations of the world to reduce their armaments.⁶⁸

Three years later, FDR’s 1944 State of the Union speech provided his fullest articulation of the economic declaration of rights he called for in 1932. It began with a more forthright statement of his view of the limitations of the original Declaration. “This Republic had its beginning, and grew to its present strength,” Roosevelt remarked, “under the

protection of certain inalienable political rights,” but as the nation grew and developed, “these political rights proved inadequate to assure us either of liberty or of equality in the pursuit of happiness.” Additional rights were needed—rights that would guarantee “a decent standard of living for all individual men and women and children.”⁶⁹

Hence FDR proceeded to rewrite both the original Declaration and the Bill of Rights. “In our day,” he contended, “these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all.” He specified as follows:

- The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;
- The right of every family to a decent home;
- The right to adequate medical care and the opportunity to achieve and enjoy good health;
- The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and
- The right to a good education.⁷⁰

In both State of the Union addresses, FDR made clear that he conceived of these economic and social rights as universal human rights, not as rights specific to the U.S. or to nations in the Western alliance. In the 1944 address, he declared a decent standard of living “in all nations” to be an essential condition of peace. In the “Four Freedoms” speech, he punctuated his declaration of each essential freedom with the

words, “everywhere in the world.” Not only peace but also freedom, he insisted, “means the supremacy of human rights everywhere.”⁷¹ Shortly thereafter, at the behest of his own and his successor’s administrations, the United Nations would agree.

The U.N. Universal Declaration of Human Rights. In 1946, the United Nations formed its Commission on Human Rights. With FDR’s widow Eleanor Roosevelt serving as chair, the commission undertook to draft a declaration of rights. Two years later, the U.N. “Universal Declaration of Human Rights,” now considered by scholars “the foundational document of the global human rights regime,”⁷² was ratified by a vote of 48–0, with 8 nations abstaining.

In keeping with FDR’s “Four Freedoms” vision, the UDHR affirms as universal human rights both an array of civil and political rights derived from the classical-liberal account and a new class of rights mainly reflective of the Progressive liberal account. That new class includes:

- The right to social security (Article 22);
- The right of each member of society to the realization of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality (Article 22);
- The right to work, including rights to free choice of employment; to just and favorable conditions of work; to protection against unemployment; to equal pay for equal work; to just and favorable remuneration; and to form and to join trade unions (Article 23);
- The right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Article 24);
- The right to a standard of living adequate for the health and well-being of oneself and of one’s family, including food, clothing, housing, medical care, and necessary social services (Article 25);
- The right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control (Article 25);

- The right of mothers and children to special care, assistance, and social protection (Article 25);
- The right to “free” education, at least at the elementary levels (Article 26); and
- The right freely to participate in the cultural life of the community, including rights to enjoy the arts and to share in scientific advancement and its benefits (Article 27).⁷³

It is quite an expansive array of rights. Speaking to the General Assembly on December 10, 1948, Eleanor Roosevelt extolled the UDHR’s adoption that day in terms reminiscent of Jefferson’s valedictory on the Declaration of Independence. “We stand today,” she enthused, “at the threshold of a great event both in the life of the United Nations and in the life of mankind.... This Declaration may well become the international Magna Carta of all men everywhere.”⁷⁴

The Third Wave: The Expansive Logic of Antidiscrimination

The expansion of rights did not cease with the economic and social rights affirmed in the Progressive liberal vision. As the second-generation conception of rights reflects Progressives' expanded conception of the main dangers or obstructions to human freedom and well-being, so a further generation of rights claims reflects a still broader understanding of such dangers or obstructions. In the transitions from the first to the second and third generations, these successive broadenings of the estimation of human neediness and vulnerability produce corresponding expansions in rights claims, both negative and affirmative in character—new demands for others' forbearance along with new claims upon others to provide goods deemed vital to human freedom and dignity.

Rights claims in this latest generation are too numerous and varied to treat comprehensively here, and not all have (yet) received authoritative recognition by the U.N. or by particular governments as human rights.⁷⁵ Third-generation human rights claims are commonly characterized as “group” rights, including rights ascribed to collectivities such as nations or subnational ethnic or racial groups and rights ascribed to individuals due to their membership in such groups.⁷⁶ That characterization rests mainly on the premise that what motivates this latest generation of rights claims is an emergent recognition that we are vulnerable to injustice not simply as individuals but also as members of groups. We are both subject and prone to the exercise of power that harms others based on their group identity, whether by colonial domination or domestic discrimination.

For purposes of the present discussion, both the international and the domestic forms of such wrongful power are subsumed under the concept of arbitrary discrimination. So conceived, the now almost universally endorsed antidiscrimination principle supplies the primary and predominant energy for the emergence of third-wave rights claims.

The Antidiscrimination Principle: A Preliminary Overview. The United Nations' commitment to the antidiscrimination principle appears first in Chapter 1 of the U.N. Charter, declaring the organization's purpose to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” That directive quickly hardened into a specific right, articulated in Article 2 of the UDHR:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.”⁷⁷

The expansion of rights did not cease with the economic and social rights affirmed in the Progressive liberal vision.

It may seem a simple principle: Equal rights for all, based on our common humanity. Yet the antidiscrimination principle is fraught with difficult questions, the most important of which, for the present purpose of elucidating third-generation rights claims, can be framed in general terms as follows:

- Which groups or sorts of groups are to be designated for protection against unjust discrimination?
- What sorts of actions, committed by what sorts of actors, encroaching upon what specific rights or liberties and inflicting what sorts of harms, constitute unjust discrimination?
- What are the proper remedies for unjust discrimination, and what specific measures are required to enforce them?

Strictly conceived, the antidiscrimination principle represents a corollary of the classical, natural rights argument that informs the first wave. To say that we are equal in the possession of certain fundamental rights is to say that those rights should be secured equally for all, without unjust discrimination. Like second-wave claims, however—and in some cases building upon those claims—the rights proclaimed in the third wave have expanded and proliferated well beyond the confines of the natural rights conception. In sum, in the development of this latest generation of rights claims in the pertinent U.N. instruments and in human rights codifications by various other governments:

- The number and range of protected group classifications have expanded;

- The range of actions identified as violations of the antidiscrimination principle has broadened significantly, now including discrimination in voluntary associations and contractual relations among private as well as public actors, and including actions that yield differential effects even where no discriminatory intention is discernible;
- The harms inflicted by such discrimination have been identified as cultural and psychological as well as political and material; and
- The remedies have been extended to comprehend a set of rights claims specific to group identities and at odds with some of the core individual rights affirmed in the original understanding.

The rights proclaimed in the third wave have expanded and proliferated well beyond the confines of the natural rights conception.

The Expansion of Antidiscrimination Classifications. Given the vast scope of injustice within and among human societies, and given, too, the expanded sensitivities to injustice (actual or perceived) in the era of equality and rights, it was predictable that claims and categories of unjust discrimination would expand, and indeed they have. As we will see, however, they have expanded in an unpredictable manner such that the claims and categories of unjust discrimination now turn against one another in profoundly significant ways.

In Chapter 1 of its fundamental charter, the U.N. declares its purpose to promote respect for human rights and basic freedoms for all “without distinction as to race, sex, language, or religion.” That list of classifications or differentiating qualities declared to be impermissible bases for discrimination was expanded in the UDHR, Article 2, which proclaims “everyone” entitled to human rights and freedoms without distinction based on any quality “such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷⁸ Lately the list of antidiscrimination classifications has grown still further, as recent human rights codifications have designated sexual

orientation and gender identity as impermissible bases for discrimination, and the U.N. has adopted preparatory measures for doing so.⁷⁹ Like rights claims themselves, the types of identity groups, the charges of unjust discrimination, and, consequently, the categories of proscribed discrimination in rights have proliferated in the era of human rights.

The antidiscrimination principle, strictly conceived, is rooted in the first-wave, natural rights understanding, but its expanded iterations diverge significantly from that understanding.

In the first-wave argument as we have seen, natural rights are properties of a common human nature. They are grounded in faculties and desires constitutive of human personhood, by virtue of which we are naturally qualified for the exercise of certain basic rights and their correlative obligations. We possess natural rights to life, liberty, property, the pursuit of happiness, and the numerous more specific derivations of those rights due to the facts that we are by nature reasoning and speaking beings, naturally inclined toward the pursuits of security and happiness, and naturally capable of their rational pursuit.

From this premise, we can infer the core, first-wave version of the antidiscrimination principle: Discrimination in our recognition of basic natural rights is permissible when applied against beings lacking the common human qualities that render us natural rights-bearers, and it is impermissible when applied against beings possessing those qualities. According to the first-wave argument, such discrimination against the various species of nonhuman animals, lacking reason and speech, is proper, and it is unjust when applied against human beings on account of their particular color, sex, parentage, language, social class, and the like, because those differentiating qualities are generally irrelevant to our fitness for the exercise of natural rights.

The points to be stressed are that a faculties-based understanding of rights, as exemplified in the first-wave, natural rights argument, is also a *competencies*-based or *fitness*-based understanding of rights and that this conception sheds critical light on the significance of the expansion in the categories of proscribed discrimination in rights in the human rights era.

When the categories deemed impermissible as bases for discrimination in rights are expanded, it generally means that an injustice regarding equal treatment has been recognized that was formerly

regarded as permissible.⁸⁰ In such cases, the emergent recognition of injustice means either that we have come newly to recognize that a given class of persons possesses the requisite competencies for the exercise of rights, or that we have adopted a lowered or narrowed conception of the competencies required for the possession of the rights in question. In simpler terms, either the group in question has risen in our estimation or the rights in question, i.e., the qualifications for possessing them, have fallen. Either we have reaffirmed and renewed our adherence to the faculties-based, competencies-based idea of rights characteristic of the first wave, or we have weakened our adherence to that idea and thereby aligned ourselves more closely with the needs-based, vulnerabilities-based ideas of rights characteristic of the second and third waves.

Ready examples of the first alternative, involving new appreciations of the competencies of previously disfavored groups, appear in the cases of discriminatory classifications by race or sex. When the U.S. adopted a series of measures, beginning with the Civil Rights Act of 1866, that proscribed discrimination in basic rights on grounds of race, color, or previous condition of servitude, its actions reflected an expanding recognition among white Americans of African Americans' competencies for the exercise of those rights. A class of persons previously thought unfit for liberty was, over time, increasingly recognized as fit for liberty, and accordingly anti-black discrimination in the protection of a core set of civil and political rights was increasingly recognized as unjust. Comparably, the ratification of the Nineteenth Amendment to the U.S. Constitution reflected an emergent public consensus that differences in sex had no bearing on women's competence to exercise the suffrage right.

In certain particular respects, the inclusion of sex among the classifications designated as sources of unjust discrimination may also exemplify the distinctiveness of the antidiscrimination principle characteristic of the third wave—and thus its divergence from the antidiscrimination principle implicit in the first wave.⁸¹ The clearest cases of that divergence, however, appear in the inclusion among those classifications of sexual orientation and gender identity.

Although no U.N. body has yet declared same-sex marriage to be a human right, U.N. Secretary-General Ban Ki-moon in 2015 declared the U.S. Supreme

Court's *Obergefell* ruling (affirming a constitutional right to same-sex marriage) to be "a great step forward for human rights,"⁸² and as noted above, numerous recent codifications of human rights proscribe discrimination by sexual orientation. With respect to the particular right of marriage, proponents of the treatment of sexual orientation as a protected class could argue that this newly recognized right reflects a broadened general-public recognition of same-sex couples' competencies relative to marriage—including the capacities for love, fidelity, and childrearing, to cite a few of the most important.

Even so, the recognition of same-sex marriage depends, at minimum, upon a discarding of the general presumption of a couple's (past or present) fitness for natural procreation as a requisite of marriage. The discarding of that presumption means that the extension of the antidiscrimination principle to this particular right comes at the cost of a narrowing of the competencies previously considered requisite to the exercise—hence the possession—of the right.

The recognition of same-sex marriage depends, at minimum, upon a discarding of the general presumption of a couple's (past or present) fitness for natural procreation as a requisite of marriage.

The most radical expansion of the antidiscrimination principle, however—and with it, the most radical challenge to previous understandings of the requisites for rights—comes with the inclusion of gender identity as a protected category. With the proscription of discrimination on account of sex, many (but not all) public classifications by sex have been eliminated; a few such classifications remain, mostly pertaining to such hitherto-noncontroversial matters as the designation of sex-specific, sex-exclusive restrooms, locker rooms, sports teams, and categories of athletic competition. With the inclusion of gender identity as a protected category, those designations have come under attack as impermissible discriminations.

Beyond these controversies, the profound and far-reaching significance of the designation of

gender identity as a protected antidiscrimination category derives from the sheer subjectivity whereby the concept is defined. The Human Rights Campaign, an organization strongly supportive of gender-identity rights claims, defines gender identity as follows: “One’s innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves. One’s gender identity can be the same [as] or different from their sex assigned at birth.”⁸³

In the gender-identity claim as it pertains to the assignment of certain rights, a purely subjective self-image or self-description is allowed by law to override the objective biological fact of sexual identification. By the logic of this claim, a biological male may be a gendered female and thus, by presently evolving human rights law, entitled to all rights or privileges specific to females. If generalized, this principle would mean that one’s self-attested, “innermost concept of [one]self” must be allowed to override natural, objectively knowable facts about one’s identity. The implication would be that anyone’s claim to any given quality, faculty, or competency deemed requisite to any given right must be affirmed.

For this reason, the expansion of the antidiscrimination principle, above all by the inclusion of gender identity as a protected category, holds unsettling implications for the bases of both natural rights and human rights in general, as well as for rights that issue from the antidiscrimination principle in particular.⁸⁴

The same expansive pattern is evident when it comes to defining the substantive wrongs, rights, and remedies pursuant to the antidiscrimination principle. Those wrongs, rights, and remedies could be conceived strictly, in accord with the natural rights argument that informs the first wave, but in the U.N.’s codifications of that principle in various human rights–related documents, they have instead been conceived expansively, in a manner distinctive to the third wave of rights claims and divergent from the first wave. To see this, it is first necessary to explain the status of the antidiscrimination principle in the natural rights argument more fully.

The Expansion of Antidiscrimination Rights: Equal Protection and Private Discrimination. Pursuant to the classical natural rights argument, the antidiscrimination principle entails the securing of rights by public policies of equal treatment and equal protection under law. This understanding

of the principle is exemplified in particular by the Equal Protection Clause of the U.S. Constitution’s Fourteenth Amendment, whose authors designed it to render the Constitution a more perfect instrument for effectuating its own original purpose to secure the natural rights of all.⁸⁵ The UDHR begins its antidiscrimination provisions with a statement of the same general corollary: “All are equal before the law and are entitled without any discrimination to the equal protection of the law.”⁸⁶

This right to equal protection operates primarily as an obligation on governments. It means, in its strictest construction, that governments have a positive duty to provide for all persons within their jurisdiction the core protections of person and property—a duty whose performance entails also the negative duty to forbear any arbitrary or unreasonable discrimination. A statute, for instance, that defined the crime of murder as the intentional killing of an innocent white person (thus leaving the lives of non-whites unprotected by law from murderous assailants) would constitute an obvious violation of the equal-protection obligation, as would an executive or judicial practice of applying a facially neutral law in a racially biased manner.

In a slightly less strict construction, the equal-protection principle would also prohibit governments from arbitrary discrimination in the distribution of benefits or burdens even where no core rights of person or property were at stake—as, for instance, in the determination of students’ eligibility to attend particular public schools or of companies’ eligibility to compete for government contracts.⁸⁷

This understanding of the core equal-protection principle is uncontroversial: Governmental authorities must themselves refrain from arbitrary discrimination and must protect all persons from violations against basic rights of life, liberty, or property, including violence perpetrated by private actors that proceeds from bigotry against the group identity of their victims.

Beyond such basic applications, the meaning of the equal-protection, antidiscrimination principle becomes controversial, particularly in cases in which arbitrary discrimination appears in acts of exclusion by private parties in the formation of voluntary contracts or associations. Even here, however, in special sorts of cases the equal-protection principle licenses prohibitions of such discrimination without departing from the first-wave, natural rights argument.

In the logic of that first-wave argument, the equal-protection or antidiscrimination principle licenses the regulation of discrimination in private associations or contractual relations only in special cases, because the liberties of association and contract are themselves natural rights, close corollaries of the primary natural rights of liberty and self-ownership. In the first-wave, natural rights argument, there is therefore a strong presumption favoring the liberties of contract and association, unconstrained by antidiscrimination regulations.⁸⁸ No reasonable adherent of the natural rights argument would maintain, for instance, that governments may or must police the formation of marriage contracts—the most private or intimate of all contracts—to ensure that the individual parties are innocent of arbitrary discrimination in their choice of spouses. A similar logic applies in most cases to the contractual (hiring, firing, promoting, or buying, selling, or leasing) decisions of private commercial enterprises or housing proprietors.

Pursuant to the same argument, however, that strong presumption in favor of liberty cannot amount to an absolute, ironclad rule. Liberties of contract and association, like all other liberties, are only rightful insofar as their exercise avoids creating a public nuisance or encroaching upon others in the exercise of their own natural rights. More specifically, exceptions warranting antidiscrimination regulations of those liberties appear in two types of cases: those involving private enterprises that qualify as public accommodations, and those in which private acts of discrimination are sufficiently pervasive and severe so as to constitute violations of natural and unalienable rights.

In the common law meaning, a “public accommodation” is a privately owned commercial enterprise granted special privileges by government charter and thereby obligated to serve the public without arbitrary discrimination.⁸⁹ Over this sort of enterprise, the justification for antidiscrimination regulation is again twofold.

First, even though such enterprises may be privately owned, the fact that they operate under special governmental charter means that they operate in effect as government agencies, under the same obligations as do governments, and are thus subject to the equal-protection obligation to refrain from arbitrary discrimination.

Second, on the premise that the pertinent government charters confer upon such enterprises special competitive advantages akin to monopoly privileges, the inference is warranted that customers have little or no readily available alternative to the services of those enterprises, and the withholding of those services in acts of arbitrary discrimination would therefore constitute significant governmentally abetted infringements on rights.

Liberties of contract and association, like all other liberties, are only rightful insofar as their exercise avoids creating a public nuisance or encroaching upon others in the exercise of their own natural rights.

The further exception to the presumption in favor of liberty of association and contract appears in cases in which more purely private agencies (those not qualifying as public accommodations) nevertheless conspire to commit pervasive and severe violations of the natural rights of the members of a disfavored class. The primary example in the American experience is of course the long history of systemic anti-black discrimination, in the form of both slavery and its successor regime of Jim Crow-era black subordination. It was that paradigmatic species of unjust discrimination that prompted the two great surges of federal civil rights legislation, first in the 1860s and 1870s in response to the Black Codes and the terrorist villainy of the Ku Klux Klan, and then again in the 1950s and 1960s to bring an end to the segregationist Jim Crow regime.⁹⁰ Both sets of federal civil rights laws, beginning with the Civil Rights Act of 1866 and including the Civil Rights Acts of 1964 and 1968, proscribe race-based or color-based discrimination in at least some private contractual relations, and both were supported and enacted by professed adherents of the natural rights argument.

Those and like measures are justifiable on natural rights grounds so far as they are adopted not in response to a scattering of particular instances of private discrimination in civil relations but instead to correct an entrenched regime of deeply and systemically unjust discrimination, irremediable by any

lesser measures. Such discrimination constitutes a violation of natural rights, thus warranting governmental intervention, so far as it reflects a conspiracy among members of a dominant class to withhold from the members of a disfavored class fair opportunity to exercise their own contract and property rights. Such a regime of discrimination operates as a criminal conspiracy against the rights of others. As law professor Richard Epstein points out, systemic discrimination of this sort is akin to a monopoly or cartel, an organized restraint of trade the likes of which the Founders held to be properly subject to legal redress.⁹¹

Considering these exceptions to the presumption in favor of liberty admitted by the first-wave, natural rights argument, we can see a further departure from that argument in the transition to the third wave. In the first-wave argument, as informed by common-law tradition, only special classes of private enterprises (primarily common carriers and inns) qualify as public accommodations and are thus subject to a generalized antidiscrimination requirement.⁹²

The language of the pertinent U.N. documents indicates expansive conceptions of antidiscrimination rights and wrongs, supportive of a long-lived regime of perpetual group-based redistribution.

In the Civil Rights Act of 1964, however, although the definition of public accommodations remains relatively confined in keeping with the common-law tradition, Title VII greatly expands the application of antidiscrimination regulations to private enterprises, prohibiting various forms of discrimination in employment practices by any enterprise employing at least 25 people.⁹³ It does so without specific reference to the presence or history of systemic unjust discrimination. Although the law, as noted, was prompted by a determination to correct a long-standing practice of anti-black discrimination, it subjects all medium-to large-sized private enterprises in the U.S.—those employing a majority of the U.S. workforce—to an array of antidiscrimination prohibitions that extend beyond anti-black discrimination and also beyond discrimination based on race or color.

The pertinent U.N. declarations do likewise. Seminal among those instruments is the U.N. Declaration on the Elimination of All Forms of Racial Discrimination (1963), which provides: “No State, *institution, group or individual* shall make *any discrimination whatsoever* in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin” [emphasis added].⁹⁴ Other U.N. instruments impose similarly sweeping prohibitions of discrimination against indigenous peoples, various types of minority groups, persons with disabilities, women, religious groups, and LGBT persons.⁹⁵

These two developments in conjunction with one another (the expanded application of antidiscrimination regulations to many private enterprises as well as to public agencies and the proliferation of categories proscribed as impermissible bases of discrimination) have the effect of expanding the third-wave antidiscrimination imperative well beyond the boundaries of the first-wave argument. Their specific effect is to weaken significantly, if not to reverse outright, the first-wave presumption in favor of private liberties of association and contract.

The Expansion of Antidiscrimination Rights: Intention Versus Effect. Beyond the proliferation of proscribed categories of discrimination and the extended reach of antidiscrimination regulations into the private sphere, it remains to consider the sorts of actions or policies that are held to constitute unjust discrimination, along with the policies prescribed for its correction. A careful analysis will show that, despite its ambiguities, the language of the pertinent U.N. documents indicates expansive conceptions of antidiscrimination rights and wrongs, supportive of a long-lived regime of perpetual group-based redistribution.

“Solemnly affirm[ing] the necessity of speedily eliminating racial discrimination throughout the world, in *all its forms and manifestations,*” the U.N. Declaration on the Elimination of All Forms of Racial Discrimination requires states to enact a comprehensive array of measures for the prevention and remediation of all such discrimination. Of particular interest is Article 2, Section 3, which states:

Special concrete measures shall be taken...to secure adequate development or protection of individuals belonging to certain racial groups

with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms.

This command is followed by the assurance that such “measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.”⁹⁶

That assurance belies the logic of the Declaration’s remedial imperative. The implication of its demand for “special concrete measures,” understood in relation to other portions of the Declaration, is to call for a regime of potential permanent, race- or ethnicity-based group rights. Two related provisions yield this implication. Article 4 commits states to rescind or revise not only all laws and policies that directly discriminate but also those that have “the effect of...perpetuating” discrimination.⁹⁷ Unjust discrimination is thus conceived not only with reference to the *intention* underlying a given law, policy, or practice, but also by its *effect* in differentiating people by racial identity. Further, that discriminatory effect is conceived, as in Article 2, Section 3 (previously quoted), as the impairment of opportunities not only for the *exercise* of rights by members of a disfavored group but also for their “full enjoyment” [emphasis added] of the rights in question, i.e., their exercise of rights so as to produce fully satisfactory outcomes.

In this distinction between the mere exercise and the enjoyment of rights, we see again, now incorporated into the U.N.’s antidiscrimination regime, the distinction between formal and effective rights noted above as characteristic of the Progressive, second-generation conception of rights. Invoking the same distinction to the end of promoting an expansive antidiscrimination agenda closely akin to that of the U.N., Martin Luther King Jr. asked, “How can we make freedom *real* and *substantial* for our colored citizens?... Of what advantage is it to [a black man] to establish that he can be served in integrated restaurants, or accommodated in integrated hotels, if he is bound to the kind of financial servitude which will not allow him to take a vacation or even to take his wife out to dine?”⁹⁸

Note, too, that the mandate in Article 2, Section 3 establishes the policy objective of ensuring not the mere enjoyment of rights by members of previously or presently disfavored groups but instead their *full* enjoyment. The Declaration does not explicitly

define what would constitute the full enjoyment of rights, regardless of racial (or other morally arbitrary) group differences, but it is difficult to conceive how, in practice, anything less than a proportional equality in group outcomes could serve as the measure.⁹⁹

The upshot of the U.N.’s antidiscrimination provisions is thus to conceive of disparities in the “enjoyment” of rights between favored and disfavored groups—primarily disparities in socioeconomic goods—as effects of discrimination, and therefore to conceive of the elimination of those disparities as the ultimate objective and measure of a properly designed protective and remedial antidiscrimination regime.¹⁰⁰ The upshot, in other words, is that the “disparate-impact” conception of race discrimination that informs U.S. civil rights law and policy in the post-Civil Rights era is present by implication in the U.N.’s anti-racism declaration.¹⁰¹

Here is the connection between the antidiscrimination imperative so conceived and a regime of group rights. Leaving aside the feasibility, by any means, of the speedy elimination of the separation and stratification that often accompany chronic racial or ethnic discrimination, it is clear that no speedy elimination of such disparities would be possible by means of so-called “color-blind,” or race-neutral or ethnicity-neutral policies. If it were possible at all, a quick repairing of the harms of unjust discrimination, thus conceived in terms of its material effects on victimized groups, would only be possible by means of “special concrete measures,” as indicated in Article 2, i.e., measures targeting specific racial or ethnic groups for uplift. Those measures would inevitably involve the creation of identity-specific group rights, whether in the form of direct redistributions of wealth or income, group entitlements to specified percentages of jobs or educational attainments, or group preferences in the competitions for those goods, with corresponding exemptions from generally applied employment or academic standards—in the U.S. context, the practices commonly called “affirmative action.”

As a general matter, those group-specific rights are unlikely to prove merely temporary and exceptional. Their longevity is suggested partly by experience, as group-specific remedial and protective policies have persisted in the U.S. for a full half-century after the conclusion of the Civil Rights Era and show no present sign of ending. It is suggested also

by reason and logic, beginning with the premise that even profound and chronic unjust discrimination cannot fully explain group disparities.

There can be no doubt that such discrimination constitutes a background cause of much of the socioeconomic disparity between (to cite the clearest and most familiar example) black and white Americans as racially aggregated groups. Yet, however powerful that background cause, in this case as in others, more proximate causal factors are also at work, the most significant of which are differences in group cultural practices. So far as that remains true, and so far as antidiscrimination remedies ignore such factors, group disparities to one degree or another are likely to persist and to be taken as continuing justification for the perpetuation of remedies targeted at group discrimination. In sum, by misdiagnosing the cause and misdirecting the remedy for group disparities, the disparate-impact principle functions as a rationale for the perpetuation of group rights.¹⁰²

The U.N., however, is no less committed to the preservation of cultures than to the eradication of unjust discrimination. In fact, it treats support for cultural diversity as a vital element of the antidiscrimination cause, as it treats cultural identity itself as a vital source and object of human rights claims. Along with the affirmation of group rights will come the cultivation of group identities—a result at odds with the U.N.’s own affirmation of the principle of integration. Here we see the third-wave expansion of rights claims in another of its most distinctive aspects, along with another area of serious tension between third-wave and first-wave principles.

The Antidiscrimination Principle and Cultural Identity Rights. In its Convention on the Elimination of All Forms of Racial Discrimination (1965), the U.N. takes a seemingly firm stand in favor of the principle of interracial integration: “Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”¹⁰³

In this design to encourage integration, this antidiscrimination convention may seem to stake out a common ground between first-wave and third-wave understandings of rights. That common ground might be taken also to signify a sensible middle ground, best understood in light of the U.N.’s overall commitment to the self-determining nation-state:

an endeavor, via a common commitment to human rights and antidiscrimination, to preserve and perfect the integrity of nations by resisting the disintegrating forces of racial or other group-identity politics, while stopping short of an endorsement of a utopian cosmopolitanism. Viewed in light of this encouragement of integration, the U.N. in this antidiscrimination convention might even seem to recommend to all member states an emulation of the U.S. model, grounding an allegiance to a particular nation in citizens’ commitment to universal principles of natural or human rights.

As the foregoing discussion has shown, however, by lending support for a regime of group-based remedial rights likely to endure in perpetuity, the U.N.’s vision of integration is at odds with itself. It signifies an attempt to achieve the end of integration by disintegrative means—“to cast out Satan by Beelzebub,” as Frederick Douglass put it.¹⁰⁴ What remains is to show how its endorsement of integration is also at odds with its endorsements of other principles pertinent to the third-wave antidiscrimination imperative—above all, the principle of cultural identity.

The emergence of cultural rights claims distinctive to the third generation reflects the emergence of a distinctive conception of human personhood, according to which some of the essential elements of personhood are qualities that differentiate us from one another, such as national and cultural identity.

As noted above, Article 27 of the UDHR declares that “everyone has the right freely to participate in the cultural life of the community.”¹⁰⁵ So far so good: That claim comprehends rights of access and expression that exemplify the liberty rights constitutive of the first wave. Less than two decades later, in the International Covenant on Civil and Political Rights (ICCPR, 1966), the cultural rights idea received a fuller expression, one that more clearly incorporated the antidiscrimination principle and yet remained in conformity with first-wave principles of liberty rights and governmental forbearance: “In

those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹⁰⁶

A more emphatic affirmation of cultural rights, however, entailing not only liberty rights but also potentially expansive demands upon others, appears in Article 5 of the U.N. Universal Declaration on Cultural Diversity (UDCD, 2001):

Cultural rights are an integral part of human rights.... All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.¹⁰⁷

The crucial point here is that cultural rights are conceived in this later declaration as much more than guarantees of self-expression for use mainly in our incidental, leisure-time pursuits. Note the appearance of a new word in the 2001 Declaration: What is at stake in the securing of cultural rights, in this understanding, is something essential to one’s *identity* as a free, rights-bearing person. The UDCD Preamble defines culture as follows: “the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”¹⁰⁸

It is on this premise that Article 4 of the UDCD proclaims, “The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity.” The emergence of cultural rights claims distinctive to the third generation reflects the emergence of a distinctive conception of human personhood, according to which some of the essential elements of personhood are qualities that differentiate us from one another, such as national and cultural identity. In this view, although common human faculties such as reason and speech remain indispensable constituents of human personhood,

the relation between those faculties and cultural expression is one of mutual interdependency: Culture represents the actualization of our capacities for reason and speech, and thus of our personhood, even as it also supplies the formative conditions for our development of those capacities.

As Canadian scholar Charles Taylor explains in an influential essay, several interrelated ideas are at work here. First, identity is taken to mean a given person’s “understanding of who they are [sic], of their fundamental defining characteristics as a human being.” Second, personal identity is conceived as necessarily “dialogical,” as socially and culturally conditioned, so that one’s particular, formative culture is taken to be an integral, indispensable element of one’s personal identity. Third, these premises entail expanded conceptions of the specific modes of human vulnerability, thus of the specific harms and wrongs, that rights are conceived to remediate. Here appears the idea of *recognition*—of the human need for others’ acknowledgment or affirmation of oneself and one’s distinctive worth—central to the third-wave understanding of rights. Again Taylor explains:

The thesis is that identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or a group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.¹⁰⁹

Arbitrary, group-identity-based discrimination harms its victims, in this argument, not only by depriving them of civil, political, social, or economic rights as affirmed in the first two waves of rights claims but also by inflicting on them more internalized cultural and psychological damages. As Taylor proceeds to notice, in the identity-focused arguments of blacks, feminists, and various indigenous peoples—to which we may now add those of non-heterosexuals and people claiming transgender identities—a common thread is the contention that an oppressive majority (in numbers or in power) has projected onto the subordinated group a demeaning self-image, to the effect that the group’s “own

self-depreciation...becomes one of the most potent instruments of their own oppression.”¹¹⁰

In this way the concern with cultural and psychological harms, distinctive to third-generation rights thinking, produces broader and deeper claims on others than are presented in either of the two previous generations. Pursuant to that concern, the antidiscrimination principle is extended beyond the realm of discriminatory actions to that of adversely biased opinions and sentiments. Group self-affirmation, in tandem with a reformation of the majority-group’s opinion, becomes an urgent moral imperative. “Due recognition,” in Taylor’s summary, “is not just a courtesy we owe people. It is a vital human need.”¹¹¹ Respect for one’s *self* as a rights-bearer entails, or is conditioned on, respect for one’s particular culture. Thus a claim to societal recognition of one’s cultural or group-based identity is elevated to the status of a fundamental human right.

Respect for one’s *self* as a rights-bearer entails, or is conditioned on, respect for one’s particular culture.

What sort of right is this proclaimed right to societal recognition? That is, is it more akin to first-wave liberty rights, conferring primarily negative obligations on others, or to second-wave rights, conferring positive obligations to provide needed goods to others? Does the proclaimed right to recognition confer only a negative obligation to refrain from denigrating this or that (previously disfavored) group identity, or does it confer also a positive obligation to affirm the equal or superior worth of the group identity in question?

The answer is that it is akin to both sorts of rights-claim, even as it surpasses both. It confers both negative and positive obligations, and in doing so it confers more extensive obligations in both directions than those conferred by the two previous classes of rights claims. In conferring those obligations, moreover, this distinctive third-wave claim shows itself to be in significant conflict with first-wave rights and principles.

Expanding Third-Wave Rights, Contracting First-Wave Rights. The proclaimed right to recognition of one or more group identities deemed integral to personal identity confers on the larger society

a basic negative obligation to forbear denigrating or otherwise disrespecting any protected-group identities. As noted above, instances of this obligation appear in Article 27 of the ICCPR (discussed above), requiring states and societal majorities to accord to minority groups the rights to group cultural expression, to the profession and practice of religion, and to the use of their languages of origin in community with members of their own group. A further instance appears in the anti-segregation provision of the U.N.’s declaration against race discrimination.¹¹²

Those provisions involve in themselves relatively minimal claims on others. They reduce ultimately to demands only for societal tolerance, consisting in societal noninterference with groups’ private exercise of such basic rights as speech, expression, and religious worship, and societal forbearance of public actions stigmatizing or otherwise subordinating such groups. The obligation to forbear is not in all cases minimal, however, nor does it apply only to states and societies in their collective actions. Although they can be conceived in terms of demands only for forbearance, efforts pursuant to the antidiscrimination principle to combat prejudice or to enforce the proclaimed right to recognition of group or cultural identity have come into sharp conflict with fundamental first-wave rights including—foremost—the freedom of speech and the free exercise of religion.

In the U.N. Declaration Against All Forms of Racial Discrimination, Article 4 provides that states “should take all appropriate measures to combat those prejudices which lead to racial discrimination,” while Article 9 mandates that states “shall take immediate and positive measures...to prosecute and/or outlaw organizations which promote or incite to racial discrimination.”¹¹³ Broadly construed, those provisions lend support to an emerging zeal in Europe and the U.S. for the suppression of speech on the ground that the speech itself constitutes discriminatory harassment—that it constitutes “hate speech,” in the current designation, and for that reason falls outside the protection of standard free-speech guarantees.

Accordingly, the U.N. High Commissioner for Human Rights has recently called upon states “to adopt legislation expressly prohibiting racist hate speech.”¹¹⁴ Such prohibitions are already widespread in Europe and have received support from European courts.¹¹⁵ In the U.S., where constitutional protection of free speech is stronger than in Europe,

prohibitions of speech designated “hate speech” are present in a substantial percentage (at this writing, nearly half) of the nation’s institutions of higher education, with significant numbers of students sympathetic to them.¹¹⁶

As recent cases of speaking events shut down by campus mobs illustrate, what is deemed “hate speech” by those who advocate or enforce its suppression is not limited to speech that incites to actual violence or even to discriminatory action based on group identity. To the contrary, it can extend to speech that is intentionally *anti*-discrimination and merely expresses a partisan opinion about matters of race or group identity that student protesters and some campus authorities find disagreeable, as in the recent cases involving Charles Murray and Heather MacDonald.¹¹⁷

Finally, the antidiscrimination logic informing third-generation rights claims yields positive as well as negative claims upon others; it imposes not only expansive obligations to forbear offending but also duties to supply positive affirmation of others’ group identities. We noted above the right to “free” elementary education proclaimed in the UDHR Article 26. In keeping with the third-wave conception of psychological self-affirmation as a human need, that second-wave claim of a right to education is amended in the UDCD to become a proclaimed entitlement of everyone to an education “that fully respect[s] their cultural identity.”¹¹⁸

Among the “Guiding Principles” in the UNESCO Convention on the Protection and Promotion of Diversity in Cultural Expressions (2005) is the following: “The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.”¹¹⁹ The mandate to recognize equal dignity and render equal respect can only mean a mandate of approval—to recognize each culture as equally worthy, marked by equal merit or virtue, relative to the culture most favored in the eyes of the observer.

That mandate carries implications beyond the realm of education, as is exemplified in the narrowing of the right to the free exercise of religion when that first-wave right conflicts with allegations of a proscribed form of discrimination. In the U.S., a notorious early example is the case of Aaron and Melissa Klein, former proprietors of a Portland bakery, who declined to provide a wedding cake for a same-sex marriage ceremony, due to their belief that providing the cake would signify their endorsement of same-sex marriage, in violation of their Christian faith. They thereby ran afoul of a state antidiscrimination law that in effect required of them a positive expression of approval for a ceremony of which they disapproved on religious grounds.¹²⁰

In sum, in the expansive, radicalized reading of the antidiscrimination principle that the third-wave human rights argument has fostered, an initially reasonable acknowledgment of the emotional and psychological harm wrought by state-sanctioned arbitrary discrimination has given way to an assessment of the vulnerability of those thus victimized so expansive as to deny their capacity for freedom amid the mere presence of discomfiting opinions. An initially reasonable demand to forbear discriminatory actions has thus mutated into sweeping demands to refrain from speech that conflicts with self-proclaimed progressive opinions with respect to group identity—and then into even more sweeping claims of a human right, putatively assigned to all cultural groups but affirmed with special emphasis for cultural minorities and other historically disfavored identity groups, to an *a priori* favorable judgment of one’s group identity by others.

Critical Reflections

For many observers, the story of globally spreading authoritative recognition of an expanding array of human rights is one to be celebrated—a story of remarkable (though unfinished) and urgently needed progress in justice, civilization, and simple human decency within and among the nations of the world. Amid the successes, however, serious difficulties appear at both conceptual and practical levels.

A critical analysis yields two main summary judgments. First, the relation between the older and newer classes of rights claims is not a logical continuity but rather a disjunction. The different classes rest on distinct and mutually incompatible premises. Second, for reasons both theoretical and practical, only the rights characterized here as first-generation rights rest on a solid foundation. The proliferation of human rights claims in the various U.N. declarations is indicative of the infirmity, not the vitality, of the human rights idea in its second-generation and third-generation iterations.

The Disparate Foundations of Natural Rights and Human Rights. The UDHR declares human rights to be “universal, indivisible, and interdependent.” Affirming their universality, the U.N. and its defenders hold them to be properties of all human beings in all societies at all times. Affirming the indivisibility and interdependence of human rights, they hold that the various classes, including the economic, social, and cultural rights of the second and third waves, as well as the civil and political rights of the first, are equally valid and equally binding as rights. In this view there is a logical continuity between the classical natural rights of the 17th and 18th centuries and the human rights of the 20th and 21st centuries.¹²¹

Nonetheless, doubts as to the coherence of the different iterations of rights are well-founded. As explained above, in the classical-liberal, Lockean argument that informs the American Founding, the fundamental natural rights claim is a faculties-based claim to property in oneself—and oneself only. On this classical premise of self-ownership, carrying within it a presumption of personal independence and responsibility, the rights of life, liberty, property, and the pursuit of happiness are easily recognizable as natural rights. By contrast, the new rights claims distinctive to the second and third generations of human rights—resting on presumptions of human

neediness and dependence and entailing positive claims on the labor of others—clearly are not.

On the premise of the classical natural rights argument, the economic, social, and cultural rights proclaimed in the second-generation and third-generation arguments could exist only by compact, not by nature. A coherent, sound understanding of human rights requires either that those later rights claims be excised from the category of human rights or that they be justified as natural or human rights on a foundation other than the classical principle of personal self-ownership.

The proliferation of human rights claims in the various U.N. declarations is indicative of the infirmity, not the vitality, of the human rights idea in its second-generation and third-generation iterations.

Human Rights as Provisions of a Universal Social Compact. Defenders of the more expansive iterations of human rights insist that the various classes of rights do cohere logically with one another and do rest on a solid foundation. That foundation is not the classical-liberal premise of self-ownership, which in their view yields a needlessly and harmfully restrictive conception of rights and their attendant obligations, but rather a social compact conceived to secure specified human needs.

To establish the logical coherence and continuity of the older and newer iterations of human rights, defenders of the rights regime erected by the U.N. begin by rejecting the distinction of rights that confer positive obligations from those that confer only negative obligations. All rights, they observe, including the liberty rights affirmed in the classical conception no less than the second-generation and third-generation rights, are naturally insecure and ineffectual. To exist in any practically meaningful, effectual sense, all rights claims require societal protection and enforcement, and all confer positive obligations upon others.¹²²

It follows that the proper task of the human rights theorist is not to distinguish rights claims that

confer positive obligations from those that confer only negative obligations. It is instead to determine which rights claims merit incorporation into a rationally designed social compact.

The argument in this response is not that human rights derive their existence from contractual agreements. Even if a given compact represented a universal consensus among the nations of the world, such a consensus would still require a compelling account of the foundation of rights in human nature or the natural human condition. If it lacked such an account, the nations of the world could no less justly legislate rights out of existence than into existence.

The UDHR and its progeny do not claim that the rights they declare become human rights simply because the governments or nations of the world so designate them. Article 22 of the UDHR states, “Everyone...is entitled to realization...of the economic, social, and cultural rights indispensable for [one’s] dignity and the free development of [one’s] personality.”¹²³

Human rights specific to the second-generation and third generation of rights claims are thus conceived as “indispensables.” They are claims not to what I can innocently *do* to secure my safety or happiness but instead are claims to what I *need*. They are claims, that is, not only or primarily to the exercise of our distinctive faculties but instead claims to the various goods whose possession is thought to be the precondition for the fruitful or meaningful exercise of those faculties. The right to life, for instance, signifies in this expansive conception more than a right to employ my faculties so as best to secure my life; it consists also in a right to enjoy a minimum material standard of living, provided by the labors of others if not by my own, as a precondition of a proper human life.

For proponents of this justification of rights, as legal theorist Jeremy Waldron comments, “the language of needs,” in contrast to that of mere wants or desires, “is an objective language.”¹²⁴ Of this claim, however, Waldron is rightly skeptical: The meaning of the idea of needs is inherently relative to the object for which the satisfaction of a given need is required. If the object is our survival as biological organisms, we do not need periodic paid holidays or a culturally sensitive education. Beyond mere biological preservation, most of the needs represented in human rights claims are relative to a certain refined idea of human well-being, which the U.N.’s human rights declarations denominate by the term “dignity.”

The U.N.’s expansive accounting of human rights claims therefore requires for its justification a clear, definite, well-grounded idea of human dignity or a dignified human life, to which end the various specific goods proclaimed as rights could be objectively identified as necessary means. Only such an idea could serve as the foundation for a social compact on the basis of which rational persons could agree to regard those specific goods as rights. The great difficulty is that no such idea is present in the pertinent U.N. documents. As French philosopher and UDHR drafter Jacques Maritain reported, the Universal Declaration of Human Rights represents a “practical agreement among men who are theoretically opposed to one another.”¹²⁵

Human Dignity and the Problem of Limits. The UDHR affirms, “All human beings are born free and equal in dignity and rights.” It then adds, “They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹²⁶

At first sight, the sense seems to be that human beings are bearers of distinctive dignity or moral worth, thus bearers of rights, by virtue of being distinctively endowed with reason and conscience. The crucial fact, however, is that those faculties, along with the objects of need to which we are said to have rights, are conceived as instrumental to the “free development of [one’s] personality,” and the form and substance of that personality, the orderings of desires or aspirations proper to it, remain unclear. This failing, as political theorist Michael Zuckert observes, poses “a serious hindrance to identifying what follows from or is properly implied by such dignity.”¹²⁷

Of the enumerations of rights in the UDHR and its successor documents, one may properly ask: Why these rights and not others?

Zuckert’s conclusion might be stated more emphatically: The failure to define the idea of human dignity seems fatal to the enterprise of specifying and delimiting rights proper to human persons. Absent any definite account of human personality, there can be no definite understanding of the needs proper to it. So far as we hold rights to be

grounded in needs, a specific accounting of human rights is lacking, making it impossible to distinguish claims of rights proper from mere subjective assertions of desire. Absent any such limiting principle, the predictable result is the indefinite proliferation of rights claims.

Of the enumerations of rights in the UDHR and its successor documents, one may properly ask: Why these rights and not others? If everyone has a right to rest and leisure,¹²⁸ why not a right to a 20-hour maximum workweek? If everyone has a right to “free” (taxpayer-funded) education, why not a right to free childcare? If we have a right to paid vacations, why not a right to publicly funded world travel? If we have rights to the material and cultural prerequisites of a well-formed personality, why not also to the emotional prerequisites? Why not rights to friendship, love, fulfilling work? Why, in general, would we not have rights to a kaleidoscopic diversity of goods or pleasures, limited only by the boundaries of the human imagination?

As Thomas Pangle and Clifford Orwin have remarked, rights claims conceived on so infirm a basis would hold no more moral authority than a barrel of “letters to Santa Claus.”¹²⁹ For this reason, to reconceive our basic rights as requisites of an ill-defined idea of personal dignity is to introduce a confusion fatal to the fundamental idea of natural or human rights.

Antidiscrimination and Gender Identity: A Further Problem of Limits. Along with the confusion attendant on the indefinite idea of human dignity, one must consider the parallel, yet much more radical confusion that has lately arisen via the third-wave development of the antidiscrimination principle. The source of this new confusion is the emerging inclusion of gender identity among the proscribed bases of discrimination. As noted above, in the gender-identity claim, a person’s subjective self-image or self-description as male or female is treated as superseding the objective biological fact of sexual identification; anyone who claims to identify as male, female, or other must be recognized as such. The implications of this claim, developed in full, would prove destructive both of the antidiscrimination principle in particular and of the idea of natural or human rights in general.

The gender-identity claim, if generalized, would have the practical effect of nullifying the categories of proscribed discrimination to which it is applied.

How would it be it possible to protect against or remediate a given species of unjust discrimination in a situation wherein anyone can qualify, simply on one’s own testimony, as a member of the hitherto-victimized, now-protected class? As critics have been quick to observe, the design of Title IX in U.S. law, for instance, to secure educational and athletic opportunities for girls and women, is implicitly nullified by a rule that requires honoring any biological male’s claim to be a female.¹³⁰

Sex and gender are only the tip of the iceberg. Following the logic of the gender-identity claim, one must ask further: If one’s subjective perception (or imagination, or even mere assertion) must be taken to override biological fact in cases of sex identity, why should it not also override the fact of inherited racial or ethnic identity—or of any other natural or inherited element of identity? Supposing that we must accept claims to transgender identities, on what basis could we deny claims by those (such as Rachel Dolezal) who self-identify as “transracial?” How could a society prevent or remediate, say, anti-black discrimination, on a principle that allows anyone by self-attestation to be black?

The fundamental difficulty with the gender-identity claim, once again, lies in its pure subjectivity.

On the same premise, how could we deny the claim of someone who self-identifies as older or younger than his natural age, so that a natural 55-year-old might become eligible by subjective identity for full Social Security benefits, or a natural 16-year-old might become eligible to compete athletically against 14-year-olds?

Such examples could be multiplied, but those mentioned suffice to show the fatal damage the gender-identity claim inflicts on the antidiscrimination principle and indeed on any scheme that employs a group classification for the distribution of differential benefits or burdens. Yet there is more. Pursuant to a further line of questioning, that claim if taken seriously would undermine the idea of natural or human rights altogether.

The fundamental difficulty with the gender-identity claim, once again, lies in its pure subjectivity. On what grounds should one’s “innermost concept of

self” be regarded as authentic and salutary, rather than as erroneous or pathological, in cases wherein it conflicts with natural facts? Moreover, so far as my self-conception is taken to override natural facts about myself, why should it not be taken to override natural facts about others—including not only the fact of another’s biological sex identity but even the fact of another’s membership in the human species? Again pursuant to the gender-identity claim, on what grounds are we to believe that our innermost self-conceptions are mutually compatible with those of others—that one person’s self-conception will not prove antagonistic to another’s?

So long as the gender-identity claim is made in purely subjective terms, thus admitting of no objective or impartial verification, there can be no satisfactory answers to such questions. Whereas the difficulty in the second-wave understanding of rights consists in its failure to substantiate the idea of human dignity, the difficulty in the third-wave understanding is that it now verges on incorporating, via the gender-identity claim as currently formulated, a denial of the very possibility of substantiating that foundational idea.

The Problem of Dependency. Suppose, however, the advocate of all three generations of human rights were to retreat from this abyss of radical subjectivity and at the same time to relinquish the ambition, at least for now, of establishing a solid theoretical foundation for human rights in a defensible idea of human nature. Suppose that advocate were to recur to the practical ground of broad international consensus in favor of those rights. Does there not remain an argument for the inclusion of those same rights, relabeled civil or conventional rights, in a rationally framed social compact?

Pursuant to such an argument, the objection that expansive rights claims amount to a litany of fanciful demands upon some grandly providential Santa Claus might elicit the response: So what? If the rational parties to a compact wished to commit their societal resources and labors to the end of effectuating such claims, would they not have a perfect right to do so? Better still, would it not accord with dictates of elementary humanity and decency to do so?

Expressed in those general terms, the argument carries moral force. Much depends, however, on the degree of prudence with which it is conceived and applied. The argument loses much or all of its moral power to the degree that promulgating an expansive account of rights has the effect of degrading rather

than uplifting the character of the putative bearers and beneficiaries of those rights.

In the expansive, needs-based idea, human rights confer upon others or upon society the obligation not only to *protect* individuals’ persons and liberties against harm by others but also to *provide* for them an array of material and psychological goods deemed indispensable to human dignity. Underlying this expansion of rights and obligations is a progressively expanding conception of the dangers to human dignity or human personality against which rights are claimed as securities.

Here appears a potentially self-destructive moral hazard in the rights idea propagated by Progressives and their successors. Recall that in the Founders’ natural rights reasoning we are presumed to be insecure (thus unfree and in need of others’ protection to exercise our liberty rights effectively) only in our exposure to force or fraud—criminal actions—by others. By contrast, for Progressives and their successors in the second-generation and third-generation iterations of rights claims, we are presumed to be also materially and culturally insecure, exposed both to others’ wrongful acts and to impersonal, systemic socioeconomic and cultural forces that make us unable to exercise our rights effectively.

The upshot is that in the transition from first-generation to second-generation and third-generation rights claims, the presumption of personal independence or of responsible, effectual agency characteristic of the Founders’ classical view increasingly gives way to a presumption of neediness, disability, and dependence that conflicts with the presumption of responsible liberty upon which any intelligible account of natural or human rights depends.

The danger appears in potential corruptions of both opinion and practice: A confusion of opinion about the basis of rights is likely to be accompanied by a degradation of habit and sentiment similar, in at least one decisive respect, to that envisioned by Alexis de Tocqueville in his forebodings about democracy in its degenerate form:

I want to imagine with what new features despotism could be produced in the world: I see...an immense tutelary power... It would resemble paternal power if, like that, it had for its object to prepare men for manhood; but on the contrary, it seeks only to keep them fixed irrevocably in childhood.¹³¹

Describing the subjects of such a power as a mass of passive, self-absorbed, diverted if not satiated, progressively incapacitated dependents, Tocqueville’s vision of paternalist degradation presciently captures one dimension of the danger inherent in the human rights (as distinct from the natural rights) regime. It vividly renders the specific dimension of childhood likely to be fostered by the second-generation rights regime, centered as it is on providing material security. It neglects, however, the dimension of childhood likely to be fostered by the third-wave regime, animated by the antidiscrimination imperative: the factious, querulous, importunate qualities of children, demanding from the putatively all-powerful parent immediate satisfaction of the child’s professed desires for fairness.

Whereas the most revealing image of second-wave degradation in our time is of a young man, living into his 30s like an adolescent in his parents’ home, working irregularly, absorbed in video games, or narcotics-addicted and living on disability insurance, the image of third-wave degradation is of the “social justice warrior” lately prominent on the nation’s campuses, obsessed with the unearned privileges of others while oblivious to her own, prone to fits of screaming in her sensitivity to the most microscopic of micro-aggressions against favored identity groups, yet zealous to abet genuine aggressions against designated “oppressors.”¹³²

If the culture of rights is to be preserved in good health, the presumption of individual independence must remain the prevailing norm.

Whether the expanded understanding of rights proves in its practical effects virtuously humane or viciously degrading is a question of degree. Viewed from the classical-liberal perspective, there is nothing necessarily unreasonable in the second-wave and third-wave claims that such ills as unemployment, disease, accident, old age and its attendant ills, along with exposure to widespread bias against one’s cultural identity, can effectively constrain individuals in the pursuit of security and happiness. Nonetheless, such claims can be pressed to self-corrupting excess. A regime structured upon an ever-increasing

estimation of one’s own needs and an ever-diminishing estimation of one’s powers to meet those needs—hence by an ever-contracting realm of responsibility for oneself and an ever-expanding realm of subjective claims on the providential labors of others—must eventually prove corrosive of the idea of rights.

In sum, although a stable, viable rights regime can and indeed must recognize a measure of interpersonal dependence, with its attendant claims on others to assist in effectuating one’s liberty rights, this imperative carries a crucial proviso: Such dependence must be understood to be exceptional. If the culture of rights is to be preserved in good health, the presumption of individual independence must remain the prevailing norm. “Needs-talk is the language of supplicants,” Waldron observes, whereas “rights are the rights of persons,” or of beings capable of agency and moral responsibility.¹³³ A notion of needs-based rights may be accommodated within, but must not be allowed to replace or fundamentally transform, the regime of faculties-based rights that embodies the only cogent justification of the idea of natural or human rights.

The Problem of Limited, Constitutional Government. Finally, coincident with the danger the proliferation of positive rights poses to individuals’ moral constitutions is the closely related danger it poses to the constitution of government. Consider again the observation of James Madison. A properly framed constitution must both *enable* and *oblige*, rendering a government both vigorous and limited in the exercise of its delegated powers.¹³⁴

Defenders of the more expansive conceptions of rights correctly maintain that because all rights require protection, all rights in a functioning political society confer positive obligations on others. Even so, there remains a significant difference between the natural rights affirmed in the classical-liberal argument and the expansive roster of human rights affirmed in the various U.N. instruments. The former rights confer, via social compact, only a positive duty to assist in the enforcement of negative duties—the duties to forbear violating the rights of others. The U.N.’s second-generation and third-generation human rights, by contrast, confer positive duties to assist in the enforcement of both negative and positive duties, both those requiring forbearance (e.g., the duty not to murder or to steal) and those requiring the provision of objects of need (e.g., the duty to provide education or health care).

Those societal duties will normally be performed via the agency of government. It follows that as rights-violations accorded recognition in criminal codes must proliferate correspondingly, and so too must expand the protective powers of government. Still further, as rights reflective of positive needs proliferate, the powers of government must again expand commensurately.

As government's protective functions expand in scope and are joined by providential functions, they generate a vast, by-now-familiar array of regulatory and redistributive powers along with further expansions of the investigative, prosecutorial, and punitive powers inherent in the regime of rights protection. To cite only a few telling examples:

- The right to property, FDR declared, “means a right to be assured, to the fullest extent attainable, in the safety of [one’s] savings”—a “paramount” right to which “all other property rights must yield,”¹³⁵ to be administered by a variety of bureaucratic agencies including the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and above all, the Federal Reserve System, now tasked with promoting “maximum employment” as well as “stable prices, and moderate long-term interest rates.”¹³⁶
- The right to life, wrote John Dewey, entails among other claims a right to health care, affirmed in FDR’s Second Bill of Rights as well as in the UDHR—a right that brought forth a series of federal administrative bodies culminating in the current Department of Health and Human Services, a behemoth of a federal agency housing 115 specific programs across 11 operating divisions, with a budget allocation as of 2015 exceeding \$1 trillion.
- The right to enjoy all our other rights free from unjust discrimination, as affirmed in repeated U.N. Declarations as well as in U.S. civil rights law, has called into existence a number of federal enforcement agencies including, above all, the Equal Employment Opportunity Commission, which in fiscal year 2016 received 91,503 filings of discrimination charges; resolved 97,443 complaints (including some backlogged cases); and found reasonable cause in 3,113 cases.¹³⁷

To all such expansions of power must correspond expanded dangers to the theory and practice of constitutionally limited government. Those dangers include, but are not limited to, the paternalism Tocqueville feared. They include despotic government in its harsher no less than its milder forms. As noted above, for the transgression of declining to provide a cake for a same-sex wedding, the Oregon Bureau of Labor and Industries fined the Kleins \$135,000—thereby forcing them to close their public business. “Power,” as Madison observed, “is of an encroaching nature.”¹³⁸

In light of this consideration it appears dangerously naïve to suppose, as FDR announced in 1932, “the day of enlightened administration has come.”¹³⁹ Taking a more realistic view of the nature and motivations of public officials, Madison advised: “It is in vain to say, that enlightened statesmen will be able to adjust [our] clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm.”¹⁴⁰ To empower government excessively is to endanger the very rights government is constituted to secure.

Conclusion

It is “the glory of this country,” James Madison remarked, “that here the rights of mankind are known and established on a basis more certain, and I trust, more durable, than any heretofore recorded in history.”¹⁴¹ To a degree, it is likewise the glory of the various U.N. declarations, above all the Universal Declaration of Human Rights, to extend across the globe the project of enlightenment about human rights. “The UDHR is irreplaceable and invaluable,” Elliot Abrams, former U.S. Undersecretary of State for Human Rights, has commented, “because it makes [the] precise claim [of the universality of human rights] and every government in the world has signed on.”¹⁴²

The achievement of the degree of universal consensus the UDHR embodies constitutes a remarkable work of statecraft, but like most such works, it comes at the cost of significant compromise. In this case, the specific cost is the forgoing of a defensible theoretical rationale for the full range of rights proclaimed. As he noted the lack of consensus among the UDHR’s drafters and subscribers with respect to the theoretical foundations of human rights, Jacques Maritain observed that although the agreement itself holds great value, the cost of that failure of consensus

is substantial. Although “rational justifications” are often “powerless to create agreement among men,” he remarked, they remain “indispensable.”¹⁴³

As the foregoing discussion has shown, of the three classes of rights affirmed in the various U.N. instruments, only the first—the civil and political rights rooted in the natural rights tradition—rests on a cogent philosophic foundation. We would do well to consider how far that philosophic problem might also pose a political problem. In view of the history of rights claims, we may classify rights among the many good things that, taken to excess, become self-negating.

It may be a dictate of prudence, as Maritain, Abrams, and others suggest, to endeavor to advance the enforcement of solidly grounded rights by according recognition also to classes of rights less solidly grounded. Yet it cannot be altogether prudent to propagate an idea of rights that confuses the distinction between rights and goods, much less between rights and objects of subjective desire. Nor can it be wholly prudent to represent rights claims as resting on an idea of human dignity that highlights an ever-expanding class of proclaimed needs rather than our distinctive faculties and virtues. As we consider the UDHR and its progeny, we may note with gratitude the good work it does in the world, even as we remain attentive to the various ways in which the proliferation of rights claims endangers the overall cause of rights.

Endnotes

1. Jack Donnelly and Daniel J. Whelan, "The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight," *Human Rights Quarterly*, Vol. 29, No. 4 (November 2007), p. 914. See also Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Ithaca, NY: Cornell University Press, 2003), p. 1.
2. See Jacob Mchangama and Guglielmo Verdirame, "Human Rights Inflation," Freedom Rights Project, July 2013, <http://www.freedomrights.info/wp-content/uploads/2013/07/HR-Inflation.pdf> (accessed September 18, 2017).
3. Francis Fukuyama, "Natural Rights and Human History," *The National Interest*, No. 64 (Summer 2001), pp. 19–30. See also Jacob Mchangama and Guglielmo Verdirame, "The Danger of Human Rights Proliferation," *Foreign Affairs*, July 24, 2013, <https://www.foreignaffairs.com/articles/europe/2013-07-24/danger-human-rights-proliferation> (accessed September 18, 2017).
4. A "non-exhaustive selection" of U.N. "universal instruments relating to human rights" is available at United Nations, Office of the High Commissioner for Human Rights, "Universal Human Rights Instruments," <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx> (accessed September 18, 2017).
5. Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000), pp. 1–2.
6. The term "classical liberalism" is used here to denote liberalism in its classic form as exemplified in the political thought of John Locke, the Baron de Montesquieu, and the American Founders, among others. It signifies a doctrine of constitutionally limited government, authorized by the consent of the governed to secure the natural rights of its individual constituents. It is to be sharply distinguished from what has commonly been called "liberalism" in American politics since the New Deal, referred to here as "Progressive liberalism," which is characterized by the construction of a constitutionally unlimited and ever-expanding welfare and antidiscrimination state.
7. Thomas Hobbes, *Leviathan*, C. B. Macpherson, ed. (London: Penguin Classics 1985, 1968), pp. 188–190.
8. The distinction of types of rights claims into three generations is conventional in human rights discussions and is adopted here to avoid potential confusion.
9. Thomas Jefferson, "Letter to Henry Lee," May 8, 1825, in John Dewey, ed., *The Essential Jefferson* (Mineola, NY: Dover Publications, 2008), p. 267. Texts of Founding-era state constitutions can be found at Constitution Society, "Early State Constitutions," http://www.constitution.org/cons/early_state_cons.htm (accessed September 18, 2017). For further evidence on this point, see especially Thomas G. West, *The Political Theory of the American Founding: Natural Rights, Public Policy, and the Moral Conditions of Freedom* (New York: Cambridge University Press, 2017), Chapters 1 and 4.
10. James Wilson, *Lectures on Law*, in Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson*, (Indianapolis: Liberty Fund, 2007), Vol. 2, p. 1056, http://lf-oll.s3.amazonaws.com/titles/2074/Wilson_4140.02_LFeBk.pdf (accessed September 18, 2017).
11. *Ibid.*
12. Alexander Hamilton, "The Farmer Refuted," in Henry Cabot Lodge, ed., *The Works of Alexander Hamilton* (New York: G. P. Putnam's Sons, 1904), Vol. 1, p. 113 [emphasis in original]; James Wilson, "Lectures on Law," in Kermit L. Hall and Mark David Hall, eds., *Collected Works of James Wilson* (Indianapolis: Liberty Fund, 2007), Vol. 1, p. 692, http://lf-oll.s3.amazonaws.com/titles/2072/Wilson_4140.01_LFeBk.pdf (accessed September 18, 2017).
13. To this position one might object that a common authority (God or nature) over all humankind could yet assign differential rights to different classes of people—a right of the naturally wise or virtuous, for instance, to rule over the naturally nonwise or nonvirtuous, or perhaps a right of a divine elect to rule the nonelect. When the Declaration affirms that "all men are created equal and endowed by their Creator with certain unalienable rights," it rejects any such differential assignment of rights. It does not thereby deny the existence of significant natural differences among individuals; it only maintains that whatever such differences might be, they do not warrant any inequality in fundamental natural rights. The underlying premise seems to be the one that informed James Madison's "reflection on human nature" in *The Federalist*: that as men are not angels, no person or class is so virtuous as to be trustworthy to rule others without those others' consent. As Jefferson put it, "Because Sir Isaac Newton was superior to others in understanding, he was not therefore lord of the person or property of others." James Madison, *Federalist* No. 51, in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, George W. Carey and James McClellan, eds. (Indianapolis: Liberty Fund, 2001), pp. 268–269, http://lf-oll.s3.amazonaws.com/titles/788/0084_LFeBk.pdf (accessed September 18, 2017); Thomas Jefferson, "Letter to Henri Gregoire," February 25, 1809, in *The Essential Jefferson*, p. 205. Cf. John Locke, "Second Treatise of Government," in Peter Laslett, ed., *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), Chapter VI, §§ 54, p. 304.
14. Thomas Jefferson, "Letter to Samuel DuPont de Nemours," April 24, 1816, in *The Essential Jefferson*, p. 231.
15. The 1780 Massachusetts Constitution thus summarizes our "natural, essential, and unalienable rights" of life, liberty, and property: "in fine, that of seeking and obtaining their safety and happiness." Cf. Section 3 of the Virginia Bill of Rights, June 12, 1776: "[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration." Constitution Society, "Early State Constitutions," Constitution of Virginia, Bill of Rights, Section 3, June 12, 1776, http://www.constitution.org/cons/early_state/virginia1776.html (accessed September 20, 2017).
16. Wilson, "Lectures on Law," in *Collected Works of James Wilson*, Vol. 2, pp. 1055–1056 and 1066.
17. Hobbes, *Leviathan*, p. 186.

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18. James Madison, *Federalist* No. 10, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 44.
 19. Madison, *Federalist* No. 51, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 269.
 20. Wilson, "Lectures on Law," in *Collected Works of James Wilson*, Vol. 2, pp. 1055-1056.
 21. James Madison, "Property," 1792, in *Madison: Writings, 1772-1836* (New York: Library of America, 1999), pp. 515-517. Cf. Thomas Jefferson, "Argument in the Case of Howell v. Netherland," April 1770, in Paul Leicester Ford, ed., *The Works of Thomas Jefferson* (New York: G. P. Putnam's Sons, 1904), Vol. 1, p. 474: "Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will."
 22. The Founders did recognize obligations to provide for those who were in conditions of extreme material need through no fault of their own. Such indigent people were to receive public support as well as private charity, but where possible, they were subject to a reciprocal obligation to work for their sustenance. In any event, such conditions of dependence were understood to be exceptional; the normative presumption was personal independence in the exercise of liberty rights and familial responsibility to care for those in need. For details, see West, *The Political Theory of the American Founding*, pp. 393-400.
 23. Jefferson, "Letter to Samuel DuPont de Nemours," April 24, 1816, in *The Essential Jefferson*, p. 231.
 24. Thomas Jefferson, "To Thomas Mann Randolph, Jr." May 30, 1790, Founders Online, <https://founders.archives.gov/documents/Jefferson/01-16-02-0264> (accessed September 18, 2017).
 25. Locke's argument for natural rights is a deeply involved exercise in philosophical reasoning, the full elaboration of which is impossible within the confines of this essay. For thorough expositions of it, see Peter C. Myers, *Our Only Star and Compass: Locke and the Struggle for Political Rationality* (Lanham, MD: Rowman & Littlefield, 1998), and Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton, NJ: Princeton University Press, 1994), Chapters 7-9. See also Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence: University Press of Kansas, 2002).
 26. John Locke, "Second Treatise of Government," Chapter II, § 4, in *Two Treatises of Government*, p. 269.
 27. *Ibid.*
 28. Thus, David Hume argued, against "philosophers" who held "that all men are still born equal, and owe allegiance to no prince or government" until they have voluntarily subjected themselves, that should such "reasoners look abroad into the world, they would meet with nothing that, in the least, corresponds to their ideas." David Hume, "Of the Original Contract," in David Hume, *Essays Moral, Political, and Literary*, Eugene F. Miller, ed. (Indianapolis: Liberty Fund, 1987), p. 469, http://lf-oll.s3.amazonaws.com/titles/704/0059_Bk.pdf (accessed September 18, 2017). Similar objections to the ideas of the state of nature and natural equality appear in the American political tradition in arguments advanced by 19th-century defenders of slavery and 20th-century Progressives. See, for example, John C. Calhoun, "Speech on the Oregon Bill," June 27, 1848, in Ross M. Lence, ed., *Union and Liberty: The Political Philosophy of John C. Calhoun* (Indianapolis: Liberty Fund, 1992), pp. 565-570, http://lf-oll.s3.amazonaws.com/titles/683/0007_Bk.pdf (accessed September 18, 2017), and Charles Merriam, *A History of American Political Theories* (New Brunswick, NJ: Transaction Publishers, 2008), p. 311.
 29. It warrants emphasis that Locke holds there are no natural *political* rulers or governments. Natural authority does exist, according to Locke, in the offices of fathers and mothers in relation to their children, but such authority is not political authority. See Locke, "Second Treatise of Government," Chapter VI, §§ 55-61, and Chapter XV, § 170, in *Two Treatises of Government*, pp. 304-309 and 381, respectively.
 30. Constitution Society, "Early State Constitutions," Constitution of Virginia, Bill of Rights, Section 1, June 12, 1776, http://www.constitution.org/cons/early_state/virginia1776.html (accessed November 26, 2017).
 31. *Ibid.*, Chapter II, §§ 4, 6, 8, and 10-11, pp. 269, 271, and 272-274, respectively.
 32. *Ibid.*, Chapter II, § 6, p. 271 [emphasis added].
 33. *Ibid.*, Chapter II, § 6, Chapter V, §§ 27 and 44, and Chapter IX, § 123, pp. 271, 287, 298, and 350, respectively [emphasis in original].
 34. *Ibid.*, Chapter II, § 6.
 35. John Locke, *An Essay Concerning Human Understanding*, Peter Nidditch, ed. (Oxford, U.K.: Clarendon Press, 1976), Book II, Chapter XXVII, § 26, p. 346.
 36. *Ibid.*, Chapter XI, § 9, and Chapter XXI, § 47, pp. 159 and 263, respectively.
 37. *Ibid.*, Chapter XI, §§ 9-11, and Chapter XXI, § 47, pp. 159-160 and 263, respectively.
 38. *Ibid.*, Book I, Chapter III, § 3, p. 67.
 39. *Ibid.*, Book II, Chapter XXVII, § 26, pp. 346-347. See also Michael Zuckert, "Thomas Jefferson on Nature and Natural Rights," in Robert Licht, ed., *The Framers and Fundamental Rights* (Washington: AEI Press, 1991), pp. 152-163, https://www.aei.org/wp-content/uploads/2014/07/-the-framers-and-fundamental-rights_153654530615.pdf (accessed September 18, 2017).
 40. Like the Founders, Locke acknowledges a right to charity and a corresponding duty on the part of those with means to care for persons in extreme need: "AsEdition: current; Page: justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has no means to subsist otherwise" [emphasis added]. Locke, "First Treatise of Government," Chapter I, § IV, in *Two Treatises of Government*, p. 170. It deserves to be emphasized, however, that like the Founders, Locke also acknowledges this positive claim on others' labor only in exceptional, closely circumscribed cases of extreme need; the normative presumption is personal independence and efficacy.
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41. The state of nature, Locke says, is “full of fears and continual dangers,” for which “civil government is the proper remedy.” Locke, “Second Treatise of Government,” Chapter IX, § 123, and Chapter I, §13, in *Two Treatises of Government*, pp. 350 and 275, respectively. In stating that “to secure these rights, governments are instituted among men,” the Declaration likewise implies that our natural rights are naturally insecure.
42. James Madison, “Charters,” January 19, 1792, in *Madison: Writings, 1772–1836*, p. 503. See Locke, “Second Treatise of Government,” Chapter II, Section §14, Chapter VIII, §§ 95–122, in *Two Treatises of Government*, pp. 278 and 331–349, respectively.
43. John Dickinson, “Fabius No. III,” in *The Letters of Fabius in 1788 on the Federal Constitution* (Whitefish, MT: Kessinger Publishing, 2004), p. 14 [emphasis in original].
44. See Locke, “Second Treatise of Government,” Chapter II, § 13, and Chapter IX, §§ 124–127, in *Two Treatises of Government*, pp. 275–276 and 350–352, respectively. Cf. Madison, *Federalist* No. 10, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 44, on the reasons why “no man is allowed to be a judge in his own cause.”
45. The Virginia Declaration of Rights, for example, specifies that a power of suspending laws without popular consent “ought not to be exercised,” “excessive bail ought not to be required,” “general warrants...ought not to be granted,” and “the freedom of the press...can never be restrained.” Constitution Society, “Early State Constitutions,” Constitution of Virginia, Bill of Rights, Sections 7, 9, 10, and 12.
46. Madison, *Federalist* No. 51, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 269 [emphasis added].
47. Constitution Society, “Early State Constitutions,” Constitution of Massachusetts, 1780, Article X, http://www.constitution.org/cons/early_state_cons.htm (accessed September 21, 2017) [emphasis added]. Similar provisions appear in the Pennsylvania and Delaware constitutions, both of which were adopted in 1776 and both of which may also be found at the Constitution Society’s “Early State Constitutions” website, *supra*.
48. Thus Madison, “Speech in Congress,” June 8, 1789: “Trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.” *Madison: Writings, 1772–1836*, pp. 445–446.
49. Jefferson, “Letter to Samuel DuPont de Nemours,” April 24, 1816, in *The Essential Jefferson*, p. 230.
50. Franklin D. Roosevelt, “Campaign Address on Progressive Government at the Commonwealth Club in San Francisco, California,” September 23, 1932, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=88391> (accessed September 19, 2017) [emphasis added].
51. Thomas Jefferson, *Notes on the State of Virginia*, “Query XVII,” in *The Essential Jefferson*, pp. 125–129. Cf. Locke, arguing that a state of war or a violation of the law of nature requires a “sedate, settled design” to “harm another in life, health, liberty, or possessions.” Locke, “Second Treatise of Government,” Chapter III, § 16, and Chapter II, § 6, in *Two Treatises of Government*, pp. 278 and 271, respectively.
52. Roosevelt, “Campaign Address on Progressive Government.” See also Frederick Jackson Turner, *The Frontier in American History* (Mineola, NY: Dover Publications, 1996), especially Chapter 1.
53. Roosevelt, “Campaign Address on Progressive Government.”
54. Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* (New York: Doubleday, Page, and Company, 1913), pp. 13–15.
55. Roosevelt, “Campaign Address on Progressive Government.”
56. Franklin D. Roosevelt, “State of the Union Message to Congress,” January 11, 1944, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=16518> (accessed September 21, 2017).
57. Woodrow Wilson, “The Study of Public Administration,” in Ronald J. Pestritto and William J. Atto, eds., *American Progressivism: A Reader* (Lanham, MD: Lexington Books, 2008), p. 193.
58. Woodrow Wilson, *Constitutional Government in the United States* (1907), excerpted in *American Progressivism: A Reader*, p. 154.
59. Wilson, *The New Freedom*, pp. 27–28.
60. Charles Edward Merriam, *A History of American Political Theories* (New Brunswick, NJ: Transaction Publishers, 2008), p. 311.
61. *Ibid.*
62. John Dewey, “The Future of Liberalism,” *The Journal of Philosophy*, Vol. 32, No. 9 (April 1935), p. 227.
63. Herbert Croly, *The Promise of American Life* (Princeton, NJ: Princeton University Press, 2014), p. 100.
64. *Ibid.*
65. Merriam, *A History of American Political Theories*, pp. 317, 322, 333, and 316 [emphasis added].
66. John Dewey, *Ethics* (Reidditch, U.K.: Read Books, 2013), pp. 582–588.
67. Roosevelt, “Campaign Address on Progressive Government.”
68. Franklin D. Roosevelt, “Annual Message to Congress on the State of the Union,” January 6, 1941, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=16092> (accessed September 21, 2017).
69. Roosevelt, “State of the Union Message to Congress,” January 11, 1944.
70. *Ibid.*
71. *Ibid.*

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72. Donnelly and Whelan, "The West, Economic and Social Rights, and the Global Human Rights Regime," p. 914.
 73. United Nations, Universal Declaration of Human Rights, December 10, 1948, <http://www.un.org/en/universal-declaration-human-rights/index.html> (accessed September 21, 2017).
 74. Eleanor Roosevelt, "Statement by Mrs. Franklin D. Roosevelt," *Department of State Bulletin*, December 19, 1948, quoted in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), p. 166.
 75. A full discussion of third-wave innovations in rights thinking would include also individual autonomy rights claims, including claims in the areas of abortion and sexual autonomy, narcotics usage, and assisted suicide, among others, on a track parallel to claims attendant upon group identities. The confines of this essay permit a discussion only of the central category, not the entire array, of third-wave claims.
 76. Natsu Taylor Saito, "Beyond Civil Rights: Considering 'Third-Generation' Human Rights Law in the United States," *University of Miami Inter-American Law Review*, Vol. 28, No. 2 (Winter 1996/1997), pp. 389 and 395-398, <http://repository.law.miami.edu/cgi/viewcontent.cgi?article=1341&context=umialr> (accessed September 22, 2017).
 77. Universal Declaration of Human Rights, Article 2. See also Article 7.
 78. *Ibid.*
 79. For the pertinent U.N. Human Rights Council resolutions, see United Nations, Office of the High Commissioner for Human Rights, "United Nations Resolutions—Sexual Orientation and Gender Identity," <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx> (accessed September 21, 2017). See also the recently adopted Canadian measure to this effect, "An Act to Amend the Canadian Human Rights Act and the Criminal Code," Bill C-16, Parliament of Canada, 42nd Parliament, 1st Session, Royal Assent June 19, 2017, <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-16/third-reading> (accessed September 21, 2017). Numerous local human rights ordinances in the U.S. include sexual orientation and gender identity as protected classifications; see, for example, New York City's Human Rights Law, <http://www1.nyc.gov/site/cchr/law/the-law.page> (accessed September 21, 2017). A proposal introduced in the U.S. Congress in 2015, the Equality Act, would add sexual orientation and gender identity to federal civil rights laws as categories of proscribed discrimination. See Ryan T. Anderson, "Sexual Orientation and Identity (SOGI) Laws Threaten Freedom," Heritage Foundation *Backgrounders* No. 3082, November 30, 2015, http://www.heritage.org/civil-society/report/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom#_ftnref4.
 80. It could also mean that we have discovered a form of unequal treatment of which we were previously unaware, but such cases seem both less common and less significant for the development of human rights doctrine than cases in which previously approved inequalities came to be regarded as unjust.
 81. A practice of sex discrimination that seems clearly arbitrary and unjust in the case of voting rights may appear less so in cases concerning the right of eligibility for certain professions. The exclusion of women from military combat service, for instance, is at least arguably based on differentials in physical competencies and the increasingly prevalent labeling of such exclusion as arbitrary discrimination at least arguably signifies a lowering or narrowing of the requirements pertinent to those requirements as manifested especially in sex-differentiated training regimens.
 82. U.N. News Centre, "Ban Welcomes U.S. Supreme Court Ruling Guaranteeing Right to Same-Sex Marriage," June 26, 2015, <http://www.un.org/apps/news/story.asp?NewsID=51267#.WVKJulWcGM-> (accessed September 21, 2017).
 83. Human Rights Campaign, "Sexual Orientation and Gender Identity Definitions," <http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (accessed September 21, 2017).
 84. For further discussion of these implications, see "From Natural Rights to Human Rights: Critical Reflections," *infra*.
 85. The Equal Protection Clause reads: "No state shall...deny to any person within its jurisdiction the equal protection of the laws." On its relation to the natural rights idea, see especially the speech by Representative John A. Bingham, principal architect of the amendment, February 28, 1866: "Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every State of the Union, in accordance with the written words of your Constitution, may, by the national law, be secured in the equal protection of his personal rights. Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter...by what tyrannical hand his liberty may have been cloven down...shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations." *Congressional Globe*, U.S. House of Representatives, 39th Congress, 1st Session, p. 1094, <https://memory.loc.gov/ammem/amlaw/lwclink.html#anchor39> (accessed November 7, 2017).
 86. Universal Declaration of Human Rights, Article 7. This language is repeated in subsequent U.N. instruments, including (with some modifications) Article 7 of the U.N. Declaration on the Elimination of All Forms of Racial Discrimination and Article 26 of the International Covenant on Civil and Political Rights. See United Nations, General Assembly Resolution A/RES/18/1904, "United Nations Declaration on the Elimination of All Forms of Racial Discrimination," November 20, 1963, <http://www.un-documents.net/a18r1904.htm> (accessed September 22, 2017); and United Nations, Office of the High Commissioner for Human Rights, "International Covenant on Civil and Political Rights," adopted December 16, 1966, entered into force March 23, 1976, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed September 22, 2017).
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87. A brief clarification is in order concerning the use of the terms “arbitrary” and “unjust” as adjectives describing discrimination. Several points are relevant. First, as indicated in the preceding paragraph, the term “arbitrary” as pertaining to acts of discrimination means unreasonable or lacking rational basis. Arbitrary discrimination thus involves the differential assignment of rights or obligations by reference to qualities irrelevant to the possession of rights or the performance of duties, or unrelated to considerations of the public good. Second, not all discrimination is arbitrary. Some forms of discrimination—for example, age classifications in cases where maturity or life experience is pertinent to the assignment of right, privileges, or duties—are reasonable and thus permissible under the equal protection principle. Third, not all arbitrary discrimination is unjust where injustice denotes a violation of rights or a transgression of the limits of legitimate authority. As explained below, when governments discriminate arbitrarily, as a general rule, they act unjustly, but acts of private-party discrimination are frequently arbitrary without being unjust, at least on the first-wave understanding of rights.
88. See especially Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Cambridge, MA: Harvard University Press, 1995). See also West, *The Political Theory of the American Founding*, pp. 28–30.
89. William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J. B. Lippincott Company, 1893), Vol. 4, Chapter 13, pp. 167–168: “Inns in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very sufficient cause; for thus to frustrate the end of their institution is held to be disorderly behavior.” See also *Ibid.*, Vol. 3, Chapter 9, p. 166. On public accommodations in U.S. and common law, see Alfred Avin, “What Is a Place of ‘Public’ Accommodation?” *Marquette Law Review*, Vol. 52, No. 1 (Summer 1968), pp. 1–74, <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=2418&context=mulr> (accessed September 22, 2017).
90. The Black Codes, as they have come to be known, were a series of discriminatory regulations enacted to by ex-rebel states in the near aftermath of the Civil War, designed as measures of social and economic control over the newly freed people. For a general history, see Theodore Brantner Wilson, *The Black Codes of the South* (Tuscaloosa: University of Alabama Press, 1965). In defense of 19th-century civil rights legislation to protect against anti-black discrimination, see especially Justice John Marshall Harlan’s dissenting opinion in *The Civil Rights Cases*, 109 U.S. 3, 37–62 (1883), <https://supreme.justia.com/cases/federal/us/109/3/case.html> (accessed September 22, 2017). Also applicable to the case of relations between the freed people and the former master class in the decades following emancipation in the U.S. is Locke’s argument that “a man can no more justly make use of another’s necessity, to force him to become his vassal, by withholding that relief, God requires him to afford to the wants of his brother, than he that has more strength can seize upon a weaker...and with a dagger at his throat offer him death or slavery.” See Locke, “First Treatise of Government,” Chapter IV, § 42, in *Two Treatises of Government*, p. 170.
91. For a brief summation of this argument, see Richard Epstein, “Freedom of Association and Antidiscrimination Law,” *Liberty Fund Library of Law and Liberty*, January 2, 2016, <http://www.libertylawsite.org/liberty-forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/> (accessed September 22, 2017). On the Founders and monopoly, see West, *The Political Theory of the American Founding*, pp. 334–353.
92. Avin, “What Is a Place of ‘Public Accommodation?’” pp. 3–6.
93. For the full text of the Civil Rights Act of 1964, see U.S. National Archives and Records Administration, “100 Milestone Documents: Transcript of Civil Rights Act (1964),” <https://www.ourdocuments.gov/doc.php?flash=true&doc=97&page=transcript> (accessed September 22, 2017).
94. United Nations General Assembly, “United Nations Declaration on the Elimination of All Forms of Racial Discrimination,” Article 2, November 20, 1963, <http://www.un-documents.net/a18r1904.htm> (accessed November 8, 2017).
95. For a summary of U.N. antidiscrimination positions, see United Nations, Office of the High Commissioner for Human Rights, “A Special Focus on Discrimination,” <http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination.aspx> (accessed September 22, 2017).
96. General Assembly, “Declaration on the Elimination of All Forms of Racial Discrimination,” Article 2, Section 3.
97. *Ibid.*, Article 4.
98. Martin Luther King Jr., *Why We Can’t Wait* (New York: New American Library, 1963), pp. 135–136.
99. The difficulty appears upon consideration of the alternative. To suggest that full enjoyment of rights could be achieved by anything less than proportional equality in outcomes would be to suggest that only *some*, not all, group disparities in outcomes are the results of unjust discrimination. The implication would be that the remaining disparities result either from simple bad fortune, which would itself provide cause for remedial efforts, or from moral or cultural factors specific to the victimized groups themselves—an implication that, though surely containing in most cases a portion of truth, would just as surely elicit indignant charges of victim-blaming and thus could not be reasonably ascribed to a document fashioned to reflect a consensus among U.N. member states.
100. Article 5 likewise commits states to terminate “without delay” not only all policies that segregate by race, but also “all forms of racial discrimination and separation resulting” from such policies.
101. “Disparate-impact” analysis denotes the idea that a presumption of unjust discrimination is warranted in cases in which the operation of a given law or policy, even if facially neutral and even where there is no evidence of underlying discriminatory intention, produces differential group outcomes. By the disparate-impact standard, for instance, an employment test or a university admissions aptitude test in which groups aggregated by racial identity achieved different average scores would be judged presumptively discriminatory. For the U.S. Supreme Court’s early endorsement of the concept, see *Griggs v. Duke Power*, 401 U.S. 424 (1971).
102. The implication of this argument is not that group disparities are irremediable and permanent, but only that their elimination requires attention to cultural reform, likely involving some effort in cultural assimilation in addition to antidiscrimination measures as commonly conceived. On the importance of culture as an explanatory factor in socioeconomic disparities, see especially the work of sociologist Orlando

Patterson, most recently *The Cultural Matrix: Understanding Black Youth* (Cambridge, MA: Harvard University Press, 2015), especially pp. 1-135, and that of Thomas Sowell. On the discounting of culture and the perpetuating of group rights, see Thomas Sowell, *Civil Rights: Rhetoric or Reality?* (New York: William Morrow and Company, 1984), pp. 13-60, 73-90, and 127-140, and Thomas Sowell, *Race and Culture: A World View* (New York: Basic Books, 1994).

103. United Nations, "International Convention on the Elimination of All Forms of Racial Discrimination," Article 2, Section 1(e), adopted December 21, 1965, entry into force January 4, 1969, <http://www.hrcr.org/docs/CERD/cerd3.html> (accessed November 8, 2017).
104. Frederick Douglass, "The Blessings of Liberty and Education," September 3, 1894, in John W. Blasingame and John R. McKivigan, eds., *The Frederick Douglass Papers, Series One: Speeches, Debates and Interviews*, Vol. 5: 1881-95 (New Haven, CT: Yale University Press, 1992), p. 625.
105. Universal Declaration of Human Rights, Article 27.
106. United Nations Human Rights, Office of the High Commissioner, "International Covenant on Civil and Political Rights," adopted December 16, 1966, entered into force March 23, 1976, Article 27, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed November 8, 2017).
107. United Nations, "Universal Declaration on Cultural Diversity," <http://www.un-documents.net/udcd.htm> (accessed September 22, 2017).
108. Ibid.
109. Charles Taylor, "The Politics of Recognition," in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994), pp. 25 and 32 [emphasis in original].
110. Ibid., pp. 25-26.
111. Ibid., p. 26.
112. Universal Declaration of Human Rights, Article 5.
113. Ibid., Article 4.
114. News release, "Target Hate Speech and Hate Crimes, Zeid Urges States," United Nations, Office of the High Commissioner for Human Rights, March 21, 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21407&LangID=E> (accessed September 22, 2017).
115. In the European Court of Human Rights' "Factsheet on Hate Speech," for instance, appears the following language, quoted from European Court rulings: "[I]t may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance," or still more generally, "any remark directed against the Convention's underlying values would be removed from [legal] protection." See European Court of Human Rights, "Factsheet—Hate Speech," March 2017, pp. 1-2, http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf (accessed November 7, 2017). See also Paul Coleman, *Censored: How European "Hate Speech" Laws Are Threatening Freedom of Speech* (Wein, Austria: Kairos Publications, 2016).
116. See Foundation for Individual Rights in Education (FIRE), "Spotlight on Speech Codes 2017," https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2016/12/12115009/SCR_2017_Full-Cover_Revised.pdf (accessed November 7, 2017). The issue has lately attracted the interest of popular media. See, e.g., Nina Burleigh, "The Battle Against 'Hate Speech' on College Campuses Gives Rise to a Generation That Hates Speech," *Newsweek*, May 26, 2016, <http://www.newsweek.com/2016/06/03/college-campus-free-speech-thought-police-463536.html> (accessed November 7, 2017), and Elliot C. McLaughlin, "War on Campus: The Escalating Battle Over College Free Speech," May 1, 2017, <http://www.cnn.com/2017/04/20/us/campus-free-speech-trnd/index.html> (accessed November 7, 2017).
117. On the Murray case, see (among numerous reports), "Protesters Disrupt Speech by 'Bell Curve' Author at Vermont College," *The New York Times*, March 3, 2017, https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html?_r=1 (accessed September 22, 2017). On the MacDonald Case, see Howard Blume, "Protesters Disrupt Talk by Pro-Police Author, Sparking Free-Speech Debate at Claremont McKenna College," *Los Angeles Times*, April 9, 2017, <http://www.latimes.com/local/lanow/la-me-ln-macdonald-claremont-speech-disrupted-20170408-story.html> (accessed September 22, 2017).
118. Universal Declaration on Cultural Diversity, Article 5.
119. UNESCO, "Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005," Preamble, adopted October 20, 2015, entered into force March 18, 2007, http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html#ENTRY (accessed November 8, 2017).
120. See Leah Jessen, "Oregon Bakers Pay \$135K Fine After Refusing to Bake Cake for Lesbian Wedding," *The Daily Signal*, December 30, 2013, <http://dailysignal.com/2015/12/30/oregon-bakers-pay-135k-fine-after-refusing-to-bake-cake-for-lesbian-wedding> (accessed November 7, 2017). The Kleins' case, rather than being an isolated instance, exemplifies a spreading problem. See also the cases of Richland, Washington, florist Baronelle Stutzman, recounted in Associated Press, "Washington Supreme Court Rules Against Florist in Same-Sex Wedding Case," *CBS News*, February 16, 2017, <http://www.cbsnews.com/news/washington-supreme-court-florist-same-sex-wedding-case/> (accessed September 22, 2017); and former Atlanta, Georgia, fire chief Kelvin Cochran, recounted in David French, "How the Atlanta Fire Chief's Christian Views Cost Him His Job," *National Review*, February 25, 2016, <http://www.nationalreview.com/article/431859/kelvin-cochrans-christian-views-cost-atlanta-fire-chief-his-job> (accessed September 22, 2017).
121. Donnelly, *Universal Human Rights in Theory and Practice*, p. 27.
122. Ibid., pp. 30 and 35-36, and Jeremy Waldron, "The Role of Rights in Practical Reasoning: 'Rights' Versus 'Needs,'" *The Journal of Ethics*, Vol. 4, Nos. 1 and 2 (January-March 2000), pp. 127-128.

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123. Universal Declaration of Human Rights, Article 22.
124. Waldron, "The Role of Rights in Practical Reasoning," p. 129.
125. Jacques Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951), pp. 76-77.
126. Universal Declaration of Human Rights, Article 1.
127. Michael P. Zuckert, "Human Dignity and the Basis of Justice: Freedom, Rights, and the Self," *The Hedgehog Review*, Vol. 9, No. 3 (Fall 2007), pp. 42-43.
128. Universal Declaration of Human Rights, Article 24.
129. Thomas Pangle and Clifford Orwin, "The Philosophical Foundations of Human Rights," in Marc Plattner, ed., *Human Rights in Our Time: Essays in Memory of Victor Baras* (Boulder and London: Westview Press, 1984), p. 15. See also Zuckert, "Human Dignity and the Basis of Justice," pp. 41-42, and Maurice Cranston, *What Are Human Rights?* (New York: Basic Books, 1964).
130. Ryan T. Anderson and Melody Wood, "Gender Identity Policies in Schools: What Congress, the Courts, and the Trump Administration Should Do," Heritage Foundation *Backgrounder* No. 3201, March 2017, <http://www.heritage.org/education/report/gender-identity-policies-schools-what-congress-the-courts-and-the-trump>. Note especially pp. 22-23.
131. Alexis de Tocqueville, *Democracy in America*, ed. Harvey C. Mansfield (Chicago: University of Chicago Press, 2000), p. 663.
132. The model of third-wave degradation, of course, is the Yale student videographed protesting against an administrator who ventured to question the hypersensitivity of a campus directive concerning Halloween costumes. See Liam Stack, "Yale's Halloween Advice Stokes a Racially Charged Debate," *The New York Times*, November 8, 2015, https://www.nytimes.com/2015/11/09/nyregion/yale-culturally-insensitive-halloween-costumes-free-speech.html?_r=0 (accessed September 22, 2017).
133. Waldron, "The Role of Rights in Practical Reasoning," pp. 123 and 131. See also Ignatieff, *The Rights Revolution*, p. 23: "Agency is the key idea in rights."
134. Madison, *Federalist* No. 51, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 269.
135. Roosevelt, "Campaign Address on Progressive Government."
136. U.S. Federal Reserve System, "Purpose: Overview of the Federal Reserve System," p. 1, https://www.federalreserve.gov/aboutthefed/files/pf_1.pdf (accessed September 22, 2017).
137. See U.S. Equal Employment Opportunity Commission, "All Statutes (Charges Filed with EEOC) FY 1997-FY 2016," <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (accessed September 21, 2017).
138. James Madison, *Federalist* No. 48, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 256.
139. Roosevelt, "Campaign Address on Progressive Government."
140. Madison, *Federalist* No. 10, in Hamilton, Madison, and Jay, *The Federalist Papers*, p. 45.
141. James Madison, "Speech in Congress on Religious Exemptions from Military Duty," December 22, 1790, in *Madison: Writings, 1772-1836*, p. 479.
142. Elliot Abrams, "Reflections on the UDHR," *First Things*, April 1998, <https://www.firstthings.com/article/1998/04/002-reflections-on-the-udhr> (accessed September 21, 2017).
143. Maritain, *Man and the State*, pp. 76-77.



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