

Constitutional Democracy and the Obligation to Include

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Written behind closed doors by less than five dozen white Christian men who lacked explicit authorization to do so, America's Constitution nonetheless begins, "We the People of the United States...do ordain and establish this Constitution." Akhil Amar has credibly defended this language by arguing that in its ratification, if not its writing, the creation of the Constitution was "the most democratic deed the world had ever seen" (Amar 2005, 5). He adds that while American women, non-whites, and non-propertied men largely did not participate in that ratification, American constitutionalism has since "widened its gate" to include "many of the groups initially excluded at the Founding" (18). Significant as the political dynamics through which those inclusions occurred are, they are not my subject here. Instead I wish to consider some parts of a large issue: whether constitutional democracies are morally obligated to become more inclusive over time, sometimes or always, and how far and to whom those obligations extend.

To avoid misunderstandings, let me first stress that here I do not reject but I do not rely on positions contending that some inclusions are required by universal moral obligations to all persons, such as "mutual aid," or by duties to redress and repair specific historical injustices done to certain groups. My argument is that, due to their foundational commitments, constitutional democracies are obligated to include as equal citizens all persons with legally recognized statuses and identities that have in significant measure been constituted by the democracies' coercively enforced policies, should those persons wish to be citizens. Since not all coercion is unjust, this formula includes

obligations to many to whom no reparations for injustices are owed; they may indeed have benefited from, for example, mandatory education. The formula does not, however, mandate obligations to all persons. Instead, the degree of this obligation is roughly proportional to the extent to which a constitutional democracy has constituted the status of the persons in question. Those who have had been born and raised with their forms of education, religion, sexuality, marriage, reproduction, art, morals, and politics, among other matters, regulated by a particular constitutional democracy have greater claims than their kinsmen residing in neighboring communities, even when those communities have been denied resources, economically exploited, and otherwise injured by the constitutional democracy over the years. But the latter have stronger claims than those whose lives have been relatively untouched by the constitutional democracy's actions.

Even for those with strong claims, this obligation to include is qualified by two limits that stem from what may be required to sustain constitutional democracies in particular circumstances. The first limit is that constitutional democracies need not incorporate new members when doing so would create divisions severe enough to destroy the regime. Still, policies that seek to build support for inclusion over time remain obligatory. The second limit arises when adding new members would expand the constitutional democracy so greatly as to render it impossible for the regime's institutions to provide any real semblance of democratic self-governance. It is then obligatory for leaders to seek to devise and support institutional arrangements that can provide defensibly democratic constitutional governance of, by, and for an enlarged populace over time. Since most actual constitutional democracies, including the United States, have long histories of coercively structuring the identities and statuses of populations

they have not accepted as equal citizens, these limits do not mean that obligations to include can be minimized. Instead, they set continuing tasks for democratic statesmanship in those regimes, tasks that are likely to endure for many generations.

I. Sources of Obligations to Include. The obligation to be inclusive in these ways is not self-evident. A quarter of a century ago, Michael Walzer argued that in order to sustain “*communities of character*,” members of democracies were entitled to determine for themselves who would be admitted to their ranks--so long as decisions were made by *all* members, including all long-time residents in the society, and so long as exclusionary decisions were consistent with the constraining moral principle of mutual aid (Walzer 1983, 62). Somewhat similarly, I have argued that because humanity has not yet devised ways that people can flourish without being organized into particular political communities, and we may not be able to do so, we must give moral weight to things that seem necessary for particular political communities to survive. I have also suggested that all long-enduring societies must be held together in part by “ethically constitutive stories” that define membership in a particular community as “somehow intrinsic to who its members really are, because of traits that are imbued with ethical significance” (Smith 2003, 64-65, 101-02). We must therefore give at least *some* moral weight to the desires of those in such communities to extend membership only to persons who share those characteristics, which may include linguistic, religious, cultural, and ethnic identities, as well as loyalty to certain political principles or ideologies, among other traits.

These “ethically constitutive stories” almost always contain mythical elements proclaiming the transcendental worth of the political identities they valorize. But their mythical qualities should not be taken to mean they are somehow unreal, unimportant, or

even wholly undesirable. Such stories are not only sources of common identity which help to sustain communities and institutions that contribute to the well-being of many people. They also provided senses of meaning and purpose for many who embrace them. When deployed to structure membership rules, socializing institutions, and a range of policies, they provide content that contributes to the substance, significance, and prestige of the legally, politically, and socially recognized identities and statuses people possess.

But crucially, they also play this role for many to whom a constitutional democracy may assign less than equal civic positions. To cite the most obvious examples for me and most readers: the American framers not only re-made themselves into citizens of a federal constitutional republic with much more centralized power than the league of states that the Articles of Confederation had created, thereby fostering deeper and richer senses of their American nationality. They also reconstituted the recognized political identities, allegiances, and obligations of their wives, sisters and daughters; their African-American slaves as well as resident free blacks; and persons belonging to or descended from the native tribes located on what the new American government regarded as U.S. soil. Over time, the U.S. also coercively transformed the identities and statuses of territorial inhabitants in the Northwest and Louisiana Purchase territories; (former) Mexicans in the southwest, in ways that greatly shaped the development of Mexico as well as the United States; the indigenous peoples of Hawaii and Alaska; and the residents of Puerto Rico, the Philippines, Guam, and other Spanish American war acquisitions, among others, in ways that many leaders justified via stories of America's religious and racial "manifest destiny" or "civilizing mission." In response to aggression against it, the United States also occupied and literally reconstituted the political communities of Japan

and Germany in the wake of World War II. In the modern era, with less blatant provocation, the U.S. has launched military interventions that have dramatically affected the statuses and identities of large numbers of Vietnamese, Cambodian, Laotian, and Iraqi citizens, and others. Many of those who more or less voluntarily assisted the United States then came to be labeled criminals, traitors, and enemies by the regimes the U.S. fought, in ways that profoundly altered their prospects.

The point about this history that I wish to stress is that coercive policies of the United States altered the educational, religious, cultural, moral, and political institutions and practices shaping these groups' identities, making the story of America, including its constitutional democratic principles, its policies allegedly implementing them, and its other ideologies and traditions, central if often profoundly troubling components in the formation of the identities and values of most of these groups' members. These policies helped constitute them as American women, as African-Americans, as Native Americans, as American territorial and colonial inhabitants, as members of regimes with American-imposed constitutions and other institutions, as American allies with few prospects for security outside of U.S. protection. For present purposes, I will not consider whether any or all of these policies and practices of exclusion, subordination, and military intervention and conquest were necessary for America's constitutional democracy to be created or to survive. It is probably true that the Constitution would not have been enacted if its provisions had banned slavery, enfranchised women, and provided the option of full U.S. citizenship to members of the native tribes and to free people of African descent. It is certainly true that the Japanese empire immediately threatened the survival of the United States in 1941; the Third Reich then did so as well; and perhaps vital American security

interests were at stake in others of the wars listed above. If so, I do not dispute that a constitutional democracy is entitled to take actions necessary to its creation, preservation and perfection as a constitutional democracy, even some actions that may render it less perfectly constitutional and less democratic for a time. Though failures to include as equal citizens those who have strong claims to that status do represent constitutional failures, they do not necessarily render the broader enterprise of constitutional democratic governance a failure—unless those shortcomings are never addressed.

Why must at least some of these exclusions be deemed failures of constitutional democracy that need to be addressed? My argument proceeds in three steps.

First, with Walter Murphy, I reserve the term “constitutional democracy” for political systems that not only provide the rule of law and some system of representation. Constitutional democracies are founded on beliefs in “equal human dignity, defined to include a wide degree of individual liberty,” so that constitutionalism demands adherence to “principles that center on respect for human dignity and the obligations that flow from those principles” (Murphy 2007, 7, 16). The accounts and specifications of equal human dignity and liberty that different members of a constitutional democracy endorse often vary, with some drawing on religious traditions, some on cultural, artistic, or philosophic ones; and the dominant accounts in different constitutional democracies vary as well. I have also argued that every long-enduring political society needs to add to these accounts more particular ones that valorize membership in that distinctive community. Nonetheless, every constitutional democracy rests on an overlapping set of views endorsing the worth of all human lives and the value of extensive liberty, views that

represent ethically constitutive stories providing moral legitimation for its principles (Smith 2003, 86-87, 91-92, 132-33).

Second, with Will Kymlicka, I agree that commitments to human dignity and a wide scope of individual liberty imply recognition of the importance of cultures and “cultural narratives” as preconditions for persons to be capable of “meaningful” choices, “intelligent judgments about how to lead” their lives in ways they experience as valuable (Kymlicka 1995, 82-83). The power to choose how to live is barren unless people have some notions of how they should live; and those are inevitably built upon, though they need not and should not be dictated by, the various cultural traditions that have helped to form (and re-form) their senses of their own identities, purposes, and worth. To be sure, some cultural traditions are hostile to commitments to equal individual dignity and liberty, and constitutional democracies should sometimes restrain discriminatory and repressive conduct that those traditions deem proper, even mandatory. But the flip side of that coin is that constitutional democracies should also respect and facilitate “cultural narratives” that support values of dignity and liberty and help people to decide how to express and pursue them in their personal and political lives.

The final step of my argument is to connect my own claim, that all political societies are bound together by overlapping ethically constitutive stories which they need to some degree to sustain if they are to endure, with the points just made, that constitutional democracies rest on stories of equal human dignity and liberty and that persons cannot really lead free lives if the cultures and cultural narratives that provide the resources for their senses of identity, meaning, and purpose are not sustained. I contend that those persons whose identities and values have been significantly constituted by the

coercive policies of a constitutional democracy cannot lead lives of dignity and freedom if they are denied the option of equal membership in that democracy's political culture, for they are being denied access to the political and cultural life that they may rightly see as providing their meaningful "context of choice." A constitutional democracy that professes to embody and express ethically constitutive stories valorizing its contributions to human dignity and liberty also cannot ignore its responsibilities when it has coercively shaped human identities and statuses in ways that lead people to share those values, even as it has denied them the opportunities to realize them. Constitutional democracies are instead obligated to provide those opportunities to all they have coercively shaped in these ways, insofar as they can.

This means not only that all who have grown up as members of the constitutional democracy must have citizenship revocable only through their own consent, as the Warren Court held (Afroyim v. Rusk, 387 U.S. 253 [1967]). It also means that those who cannot tell themselves their own stories about who they are, what they value, and why without drawing on the cultural narratives that the coercive policies of a constitutional democracy have made central to their lives—through conquest, enslavement, occupation, colonization, or even simply provision of residence without equal political status--must be offered the chance to have equal civic roles in determining how those narratives are continued. Many, particularly those in conquered lands, may well decide that they do not wish to accept such citizenship. They should then be offered a range of alternatives, from complete separation to some form of federated or associated status, structured to be consistent with the constitutional democratic principles. Otherwise, violations of the core commitments that the constitutional democracy has promised to respect and advance will

provide much of the meaning of those persons' individual stories and of that constitutional democracy's collective story. Neither persons nor political societies can regard a life of violated principles as a life expressive of human dignity or a life they would or should choose to live.¹

II. Limits on the Obligation to Include. Neither, however, is a constitutional democracy obligated to destroy itself as a constitutional democracy in order to save itself; so there are limits to these obligations to include. Let me note that the argument made so far defines an obligation to include that is already more limited than what Robert Goodin has rightly discerned as the leading answer to the problem of “constituting the demos” in much recent democratic theory: the principle of “all affected interests.” That principle holds that ideally, everyone should be enfranchised to help decide all issues that significantly affect their interests, which might well mean “giving virtually everyone everywhere a vote on virtually everything decided anywhere” (Goodin 2007, 40, 68). Though I am not seeking to refute that principle or the more realistic variations on it that Goodin discusses, the obligation to include and enfranchise that I am defending—call it “the principle of constituted identities”—is confined to those whose very identities have been substantially generated by a constitutional democracy, not to all whose interests are affected by its decisions. Though this obligation will often support the inclusion of many

¹ For a parallel argument built on the thought of Rousseau and W. E. B. Du Bois from which I have benefited, see Gordon 2006.

who are not currently recognized as citizens of a given constitutional democracy, it does not extend to “virtually everyone everywhere.”²

But a number of recent writers have stressed one such limit that the preceding analysis compels me to reject, or at least to treat as inapplicable to the persons claiming inclusion on the grounds just sketched. David Miller (1995, 73-80, 90-98), Matthew Gibney (2004, 69-76), and Stephen Macedo (2007, 76-81) all express concern that if constitutional democracies or republics add too many persons whom many citizens see as alien and unworthy, the result will be to undermine the senses of mutual trust and reciprocal concern that generate support for the provision of public assistance to the least advantaged members of that civic community. Many forms of distributive justice within a constitutional democracy thereby may be thwarted by excessive inclusiveness.

Though this is a legitimate concern, it is difficult to use it to justify exclusion of the persons I am discussing here: those with strong claims to membership based on the fact that the constitutional democracy has coercively provided much of the cultural “context of choice” generating the identities, values and purposes those persons feel they must realize if they are to lead meaningful, free lives of human dignity. My argument is that by doing so much to “make” these persons, constitutional democracies have *already*

² Nor does the obligation defended here extend as far as the one recently argued for by Arash Abizadeh, who contends that decisions about the legitimacy of the borders of a political community must be made by all who are subject to coercion by the democracy enforcing those borders (Abizadeh 2008, 45). Such coercion often falls short of significantly constituting persons’ identities and legal status in the manner on which my argument relies.

effectively made these persons their members, and they are obliged to recognize that reality and act accordingly. Thus these individuals have as much claim to be among the community's disadvantaged, deserving special consideration in policies of distributive justice, as those already recognized as citizens. Indeed, since they lack citizenship, they may be even more disadvantaged. But since these obligations exist in rough proportion to the degree to which a constitutional democracy's coercive policies have shaped those persons' identities and statuses, there may indeed be many with limited claims to membership who might legitimately be excluded if their presence would undermine support for just policies toward all existing members. Still, my view does not support the sharp boundaries drawn by these writers between the claims of those who are already legally recognized as citizens and many who are not.

My argument is also consistent with Michael Walzer's claim that political societies are entitled to limit inclusion considerably in order to main their distinctive "characters;" but that limit has less bite in my analysis than it seems to have in his, because I contend that the "characters," "cultural narratives," or "ethically constitutive stories" of constitutional democracies include commitments to human dignity and liberty that require them to embrace as members all those whom they have coercively shaped in ways that make the pursuit of these values in those societies central to their lives. And again, the justice or injustice of that coercive shaping is not crucial to this obligation: the fact of coercive shaping alone, on the part of a regime committed to the principles of constitutional democracy, is enough to generate a duty to recognize that the stories of those shaped cannot be legitimately kept apart from the community that did so much to make them who they are.

Still, limits remain, even for those with the strongest claims to full and equal citizenship, like the members of conquered tribes or nations, slaves, disfranchised women, and residents of annexed territories and colonies. If those seeking to create a constitutional democracy face the choice, as the framers of the U.S. Constitution arguably did, between either failing to create a highly imperfect approximation of a just system, or devising a constitutional democracy that does not include many whose identities and statuses it is profoundly shaping and will profoundly shape, it seems permissible to create the highly imperfect approximation. But it then becomes an enduring duty of the leaders and citizens of that regime to make it more perfect, if their stories of commitments to the principles of constitutional democracy are not to be revealed as hypocritical fables. So long as inclusions continue to threaten the very survival of the constitutional democracy, they can be delayed; but the longer the delay, the stronger the obligation citizens have to find sustainable ways to achieve more just boundaries of membership.

On this view, for example, Abraham Lincoln was probably right to favor a gradualist approach to ending slavery, though not to suggest only the prospect of colonization for emancipated slaves. But the legitimacy of gradualism did not mean that it was permissible to put the obligation to offer full membership to African Americans permanently on backburners of the nation's agenda, or to acquiesce to pressures to abandon that endeavor altogether. Thus Lincoln was also right to respond to southern secession by using coercive force to keep slaves within the Union, then to emancipate them, then to put them on the path to full citizenship, thereby sustaining the promise of inclusion to all whose identities, ideals, and aspirations had been profoundly constituted by the policies of America's putatively democratic regime (cf. Graber, 2006).

Similarly, America's constitutional democracy was *obligated* by its own ethically constitutive principles and its coercive policies eventually to enfranchise American women and to offer full and equal citizenship to members of the native tribes, to those residing on territories conquered in the Mexican American War, and to the inhabitants of Puerto Rico, Guam, and other Spanish American war acquisitions. Throughout the 20th century, many Filipinos have argued in American courts with much moral force, though with no legal success, that the occupation of their country by the United States in 1898 and its status as a U.S. territory until 1946, with a "special relationship" persisting thereafter, entitles them to U.S. citizenship. Their example highlights the second limit to the obligation to include. It would admittedly have been a challenge to create new democratic institutions incorporating all Filipinos who wished to be U.S. citizens into the civic body. Would the Philippines have simply become a non-contiguous state, as Hawaii and Alaska eventually did? Should it instead have sustained some sort of federated status, perhaps the "commonwealth" status Puerto Rico possesses? Would either of those statuses really have been consistent with democratic self-governance in the Philippines and in the United States as a whole, or it would they have amounted to new forms of colonial rule, as critics of Puerto Rico's status contend (including me)?

The answers are not obvious, and that reality flags the further difficulties that may justify limits on the immediate inclusion as full citizens of all persons with identities and values extensively constituted by a particular constitutional democracy. In many cases, incorporating particular excluded groups requires devising new institutional structures so that all involved can see their membership as genuinely democratic. And as inclusions grow, every large-scale constitutional democracy will increasingly face the challenge of a

“democratic deficit,” as it possesses populations so vast that meaningful roles in governance seem logistically impossible for all but a small percentage of the citizenry. Once again, a constitutional democracy is not obligated to adopt policies that would render it not a constitutional democracy. But once again, these difficulties cannot legitimately be treated as reasons to abandon altogether the project of finding appropriate forms of democratic civic inclusion for those who desire it and have legitimate claims to it. Instead, leaders and citizens must accept responsibility for working out defensibly democratic institutional arrangements, perhaps involving certain forms of decentralization, federation, or considerably autonomous regional or local statuses, which can make inclusions consistent with the principles of constitutional democracy possible. Democratic theorists like David Held (1995, 1998) have explored such arrangements extensively in recent years, many inspired by the as-yet highly imperfect example of the European Union. On the view of the obligations of constitutional democracies I advance here, members of most existing constitutional democracies need to do so as well, as part of efforts to consider how they can develop their systems into more perfect unions.

III. Some Implications. In that spirit, let me briefly consider what this obligation to include may imply for the United States in regard to some populations not currently treated as citizens, but who have nonetheless been extensively shaped by coercive American policies. I have already noted that post-W.W. II Japan and Germany operate under constitutions extensively written and imposed by their American conquerors, who also contributed to the restructuring of their educational, economic, and political systems in other important ways. Members of both countries have since modified their institutions and policies themselves, in ways not dictated by the United States, but it

cannot be denied that all who have grown up in those societies have had their identities, values, and cultures extensively shaped by American coercion. Does this history mean that on my view, modern Japanese and German citizens should also be able to claim U.S. citizenship if they wish to do so?

I do not reject this counter-intuitive possibility out of hand: if direct American domination of these nations had long continued, at some point their members would have been owed the option of full and equal inclusion. But it matters that the coercion exercised by the U.S. came in response to acts and declarations of war initiated by these opponents, so that responsibility for their subsequent coercive transformation rests in part with themselves; and it matters more that these communities were and are more likely to achieve constitutional, democratic ways of life if they remained distinct from the United States. Offers of full American citizenship to them would probably be spurned as absurd, indeed offensive, by most, but they might also create severe internal conflicts with any who urged that the offers be taken up. Most Japanese and German citizens have been and are far more likely to embrace constitutional democracy when its principles and institutions are seen as means for their own national self-governance, rather than as their absorption into the United States.

A far more difficult case is contemporary Mexico—for the Mexican-American War dramatically reconstituted both countries, resulting in the shift of California, Arizona, New Mexico, Nevada, parts of Colorado, and (less directly) Texas to the United States. The U.S. has since often intervened coercively in Mexico's political system and it has enforced policies that have greatly shaped the development of the Mexican economy. Has American coercion shaped most Mexicans' identities and statuses so extensively that

they can claim to be American citizens? Probably not; but I do think this long history of deeply constitutive coercions justifies given Mexicans special access to American citizenship, ahead of the residents of the many countries less affected by American policies, and in ways that should justify comparative leniency toward undocumented Mexican immigrants.

I also think the United States has special obligations to grant not just refugee status but citizenship to those Iraqis, Afghans, and others whose existence in their home countries has been disrupted, often made virtually impossible, by American military intervention and by their perceived roles as American allies. After much criticism for failing to grant even refugee status to displaced Iraqis, the U.S. announced in February, 2007 that it would facilitate their entry; but it is still aiming to admit only roughly 12,000 in the next year from a country in which an estimated 4 million people have been displaced since the U.S. invasion (Lewis 2007). Most of those 4 million, to be sure, would prefer to return to a peaceful and stable Iraq, and hopeful ones have begun to do so. But those who have acted as U.S. allies, who have good reason to believe that their lives in Iraq have been made untenable there by America's intervention, and who wish to become U.S. citizens, have a strong case for membership. The United States may not have played so central a role in constituting their identities for so long a time as in the other examples I have listed, but because its coercive policies have effectively deprived them of the political status and personal lives they would otherwise have had, it does have an obligation to aid them and, if they wish, include them as equal citizens.

These latter claims, and indeed much of the foregoing, are legitimately controversial, and further reflection might indicate that American obligations are

different, lesser or even greater than I have suggested here. At a minimum, I hope this discussion will convince readers that when we consider the topic of the failures of constitutional democracies, we must consider the issues of whether they have included as full and equal citizens all persons that their own principles obligate them to include, and whether or not they can responsibly deny membership to those who are who they are in large part because the coercive policies of a constitutional democracy has made them so.

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