Diversity and Uniformity in Conceptions of Canadian Citizenship

by

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Abstract

This thesis uses philosophical and conceptual analysis to examine communitarian critiques of homogenous liberal conceptions of citizenship and the contemporary recognition pressures in the Canadian polity. It attempts to make some observations on the degree of difference that the Canadian society could support without destroying the sentimental bond of citizenship that develops when citizens feel they belong to the same moral and political community. The assumption made in our introduction is that diversity or differentiation becomes too exaggerated when citizens no longer feel like they are similar and can reach agreement on common objectives. This thesis is consequentialist in nature. It seeks to respond to the question of whether or not the "federal spirit" that has preserved the Canadian state intact can help Canadians take the conceptual leap necessary to accept further differential citizenship for aboriginal and Québécois national minorities who seek expanded self-government and special provisions to preserve and promote their collectivities, and for non-territorial groups united by a shared life situation who seek group rights and representations.

In Part I of this thesis we examine theoretical considerations about diversity and uniformity in both liberal and communitarian conceptions of citizenship and review Kymlicka's attempt to reconcile cultural membership within liberal theory. We observe that liberals reject group rights and radical cultural pluralism out of concern that they may lead to a reduction of
individual autonomy and an erosion of cross-group dialogue. We demonstrate that although the liberal state is not completely neutral with regards to the promotion of a certain conception of the good life, it is more neutral than a communitarian state because it provides for individual autonomy and creates a structure for democratic dialogue. However, Kymlicka's work shows that within the global economy, cultural identity is an increasingly important qualitative element in an individual's life, providing her with an enhanced local social structure and with personal self-respect.

Although a reconciliation of liberal and communitarian conceptions of citizenship appear unlikely in pure theory, in the Canadian context, constitutional provisions have already acted to create elements of individual and collective rights. This reality implies that new theories have to be developed to explain the dynamic between individual and collective rights in particular political cultures. In Part II, we attempt to reconcile the fragmented concepts of citizenship which afflict the contemporary Canadian polity. This Thesis sets out that status quo federalism and homogenous liberal citizenship are threatening the stability of the Canadian polity. However, because of the interactive loyalties and differentiation inherent in the Canadian federal regime, federalism may provide the flexibility to accommodate the demands of Québécois, as well as aboriginal nationalists. Conversely, this thesis maintains that the arguments in favour of a politics of difference for oppressed social and cultural groups should be rejected, not on the grounds that these groups do not exist or that they do not speak in "different voices", but because it would undermine the democratic dialogue and test the fragile ties which bond citizens to one another. A further reason to reject a politics of difference or radical cultural pluralism
is that it would limit the autonomy of individual members of groups who want to be judged by their actions and words rather than their ethnicity, culture or gender. The liberal state can pursue policies to include non-territorial groups without granting group rights and representation.

For their part, Aboriginal communities and the province of Quebec should be recognized as distinct societies in Canada. The meaning of distinct society should be defined using section 1 of the Charter as a model. These distinct societies should be given minor group right provisions, in order to preserve and promote their collectivities which do not violate fundamental human rights. These minor provisions could be considered reasonable limitations in free and democratic aboriginal and Québécois distinct societies within Canada. Concomitantly, any new constitutional accommodation must also recognize that a precondition of federal citizenship is that all citizens whether members of self-governing aboriginal communities or citizens residing in the province of Quebec must accept decisions of the federal jurisdiction and be able to transcend their personal or national motivations and acknowledge their responsibility to others in the Canadian moral community if they hope to retain the benefits that our community provides all of its citizens.
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Dedication:

I would like to dedicate this thesis to the memory of my dear sister, Dr. Cynthia Joan Horner (April 19, 1964 - April 17, 1994)

Her love, friendship and academic and professional achievements always encouraged and will continue to nourish my academic pursuits.
Preface

"A community of citizens owes the character of its existence to what its constituent members have in common and this entails transcending the order of individual needs and wants to recognize that we are a moral body whose existence depends on the common ordering of individual needs and wants into a single vision of the future in which all can share."

Benjamin Barber, *Strong Democracy*

"The point of the cultural pluralist's arguments is that imposing a unitary conception of citizenship on historically excluded groups won't instill a sense of common identity or purpose either. If excluded groups do not see an affirmation of their identity in the institutions of the nation, they will continue to feel excluded and marginalized."

Will Kymlicka, "Recent Work in Citizenship Theory"

Citizenship is a multi-layered concept. In its ancient Greek sense it implied the act of belonging to a community and involved a reciprocal relationship of duties, obligations and rights. In contemporary liberal democracy, citizenship has become less duty oriented and increasingly focused on political and social rights to be expected from the community. In his essay, "Recent Work in Citizenship Theory", Kymlicka traces the different currents of political thought which shape conceptions of citizenship theory. His survey of this literature reveals that citizenship is a prominent issue across the spectrum of political thought. For example, twentieth century neo-conservative thinkers including Hayek, argue that "welfare citizenship" fails to adequately focus on the duties and responsibilities of citizens. They blame the passive nature of rights-based citizenship as a principal cause of apathy and loss of public spiritedness in the public arena and contend that citizens should be as economically self-sufficient as possible and voluntarily serve their community. Similar to this strand of conservative thought, civil society theorists argue that a healthy democracy requires a degree of civility and self-restraint by
These writers contend that the role of the state has expanded at the expense of civil society and argue that through offering blanket tax credits for voluntary organizations, citizenship could be reinvigorated.

The left, for its part, dismisses the duty-oriented discourse of elements of contemporary conservative thought and argues that participatory democracy and civic life should be reinvigorated by economic citizenship. Several leftist thinkers believe that voluntary citizenship concepts fail to acknowledge the fact that certain groups have unequal means to participate. For example, the feminist critique of contemporary liberal democratic citizenship argues that women cannot participate as full citizens because they lack resources due to lower wages and lack time since they are assigned child rearing roles in the family. Feminists therefore claim that society must re-engineer its patriarchal structure in order to achieve equal citizenship. Liberal virtue theorists, who also share a state-enforced view of citizenship, contend that interest group liberalism must be made more transparent to permit a public debate on policy issues.

The goal of this thesis is not to engage in an abstract examination of rights oriented or duty oriented conceptions of citizenship. Rather, our objective is to use philosophical and

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1 Kymlicka, Will, "Recent Work in Citizenship Theory" (Toronto: University of Toronto Press, 1992), 12.

2 Ibid.


3 Ibid., 15.
conceptual analysis to examine communitarian critiques of homogenous liberal conceptions of citizenship and the recognition pressures in the contemporary Canadian polity.

This essay will examine the communitarian critique that liberal citizenship focuses on legal rights and material benefits at the expense of identity and culture issues. Among the multiple strands of communitarian thought Taylor, in particular, emphasizes the importance of recognition to modern identity. He believes that ethnocultural identity, shared language and lifestyle identities are important aspects of individuals lives and may be deserving of affirmation in liberal democratic societies. However, some elements of communitarian thought such as, theocratic communitarians, reject the toleration of difference, while other communitarians believe that community is impossible unless the community is a face to face collectivity where all members know each other. We will specifically analyze one strand of communitarian thought and the particular sense of community it advocates by focusing on national minorities, ethnocultural groups and communities of shared life situations in contemporary liberal democracies.

In contemporary Canadian political thought, the belief in the liberal sentiment that differences between citizens can be transcended by our common citizenship is rejected by Taylor as a superficial portrayal of the "deep differences" in Canadian society. For Taylor, there are distinct sociological nations in Canada: the multiple aboriginal nations, the Québécois and English Canada or "the rest of Canada" (ROC). Since Confederation, Québécois and aboriginal nationalists have resisted assimilation into a purely Canadian citizenship. These "national
minorities" see themselves as self-determining nations with distinct cultures and shared histories that pre-date the Canadian state. Both groups received special status upon their entry into Confederation. Canada became a federal state largely in order to accommodate French-speaking Canadians living in Lower Canada. Conversely, in the British North America (BNA) Act of 1867, status Indians were given special constitutional status and were subsequently treated as "wards" of the Canadian state who had to be assimilated into the dominant culture. As Johnson sarcastically writes, "for the first nations over whom Canada asserts jurisdiction, the experience of Canadian citizenship has been somewhat less than ennobling." In fact, until 1960, if status Indians wanted to become full Canadian citizens, they were obligated, through the process of enfranchisement, to give up their Indian status. For the native peoples of Canada, Canadian citizenship was viewed as a tool of assimilation, and as a mechanism for the state to justify its prolonged assault on native culture. As a result, contemporary aboriginal nationalists reject the idea of Canadian citizenship and seek substantial autonomy in order to protect their distinct societies. Aboriginal groups including the Assembly of First Nations (AFN) argue that aboriginal culture is incommensurable with the procedural liberalism that imbues the Canadian political culture. They seek the establishment of aboriginal self-government, exempt from the Charter. For its part, the province of Quebec has been seeking recognition as a distinct society within Canada with special powers to preserve and promote the Québécois collectivity.

However, Quebec and aboriginal demands for recognition as distinct societies have been

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met with apprehension by the citizens and the political elites of English Canada. ROC is suspicious of collective rights and views these recognition pressures as a threat to the prevalent liberal conception of citizenship. This apprehension is embedded in a profound misperception between ROC and Quebec concerning the nature of Canadian federalism. Quebec views Canada as a pact of honour while ROC maintains that the equality of provinces is the preeminent principle of federalism.

There is also an increasing body of literature which argues that there are other differences between Canadians that are as deep as those among English Canadians, French Canadians and aboriginal peoples. For example, Young and Jackel argue for "differentiated citizenship" in the form of group rights and representation for both cultural and social groups which are oppressed by racist, sexist, homophobic, ageist and ablest behaviour. Moreover, in contemporary political thought, there is an expanding literature which argues that oppressed social and cultural groups cannot be represented by anyone outside of their group, and therefore merit group rights and institutionalized representation.

In order to take into full consideration the citizenship debate in Canada, this paper will focus on the demands of Status Indian and Quebecois nations within Canadian federalism and will also examine the demands of non-territorial communities. However, this thesis will not

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enter into an extensive justification of the right to self-determination, except to note that in contemporary Canadian politics, the Québécois and aboriginal collectivities are making claims for increased autonomy.

Our examination will attempt to discern the degree of differentiation that the Canadian liberal democracy can bear. The thesis is consequentialist in its orientation and seeks to respond to the question of whether or not the "federal spirit"\(^6\) which has preserved the Canadian state intact can help Canadians make the conceptual leap necessary to accept further differentiation citizenship for aboriginal and Quebecois Canadians. In this thesis, when we speak of "ROC", or "Quebec", we are referring to the elite representatives and institutions of English Canada and Quebec. When we discuss "status Indians" in Canada and aboriginal self-government we are referring to reserve-based status Indians as defined by the Indian Act and their representative body the AFN, unless otherwise stated. Although the word Indian is criticized as being a term imposed upon aboriginal nations, it is also used by different aboriginal groups in Canada to differentiate between reserve-based status Indians, Métis and Inuit Nations and will therefore be used for reasons of clarity. By limiting our discussion to status Indians, our discussion of aboriginals in Canada is therefore incomplete, because we do not examine the unique positions of Métis and Inuit peoples in Canada. However, this limitation is necessary for reasons of space and the need to simplify; and although our study of aboriginal is incomplete, we will focus on

\(^6\) Carl Friedrich described the federal spirit as follows: "the federal spirit involves a highly pragmatic kind of political conduct which avoids all insistence upon agreements of fundamentals and similar forms of doctrinal rigidity. Such behaviour proceeds in the spirit of competition and accommodation." In Trends in Federalsim in Theory and Practice (New York: Praeger, 1968), 39.
the largest and most significant category of aboriginal peoples in Canada.
Introduction

Liberal thought has traditionally assigned priority to individual rights over collective rights. The enlightenment values of individual rights, universal values and uniform national citizenship were originally criticized by thinkers of the French counter-revolution, by eighteenth and nineteenth century continental romantics and by Herder. In contemporary political thought, the Herderian criticism of enlightenment values has been seized by post-modern and cultural pluralist thinkers in order to criticize the liberal conception of justice as sameness. This contemporary criticism argues that liberal "equality of treatment" promotes assimilation, reflects a cultural bias and leads to unjust treatment of oppressed cultural or social groups. Historically, nineteenth century liberal thought assumed the desirability of the assimilation of cultural minority groups. This assimilationist ideal was embraced by thinkers such as Lord Durham, who recommended that the French speaking majority of Lower Canada be assimilated into the English majority. Durham contended that deep rooted cultural cleavages in a modern nation were incompatible with political and economic justice. The liberal conception of justice as equality of treatment also inspired the UN Declaration of Human Rights. In Canada, the liberal goal of equality and uniform citizenship was one of the Liberal government's principal reasons for the recommendation in the 1969 White Paper on Indian Policy to eliminate differential

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citizenship between status Indian and non-Indian Canadians. In the 1960's, many liberals were optimistic that modernization and liberal individual rights would eventually make ethnic attachment irrelevant.

However, since the 1960's, critiques of liberal democratic citizenship have developed to criticize the liberal conception of "justice as sameness". The communitarian critique opposes the liberal transformation of humans into "rights bearing individuals" and the social justice critique argues that the extension of equal citizenship rights has not led to social justice and equality. Both of these assaults on the traditional concept of liberal democratic citizenship maintain that identical treatment often produces inequality and that true equality can only be achieved through the accommodation of differences. Taylor's neo-communitarian critique, for example, argues that liberal citizenship neglects identity and cultural issues. This critique asserts that the liberal state, by favouring procedural liberalism over cultural membership promotes a certain conception of the good life and therefore contradicts liberal assertions that the liberal state be neutral concerning questions of the good life. Other commentators on uniform citizenship have attempted to demonstrate that cultural membership has a more significant status in liberal theory than is explicitly recognized. Among these critics of the absolutist individual rights paradigm, Kymlicka has attempted to defend and interpret minority rights as an integral element within


\[\text{See also Kymlicka, Will, Liberalism, Community and Culture (Oxford: Oxford University Press, 1989).}\]
the liberal tradition. Kymlicka argues that cultural membership determines an individual's range of options and conception of the good, and that cultural minorities may face disadvantages because of their cultural membership. Therefore, individuals deserve to have group rights to recognize and protect their identities.\footnote{Ibid., 189.}

Other critics of uniform citizenship have promoted a "politics of difference" for oppressed cultural and social groups. This current of critical thought contends that differences in culture, gender and social status are almost incommensurable, and that the only way to attempt to resolve these deep differences is to provide institutionalized means for the explicit recognition and representation of oppressed groups.\footnote{Young, "Polity and Group Difference: a Critique of the ideal of Universal Citizenship," 7.} Accordingly, national institutions in Canada are criticized for not adequately taking into account the particular cultural and social identities of citizens.

This phenomenon is not unique to Canada. In fact all contemporary liberal democracies have been assaulted by an awakening of group identity. These groups seek to enlist the power of the state to positively affirm the group and to support political mobilization.\footnote{Cairns, Alan, Williams, Cynthia, \textit{Constitutionalism, Citizenship and Society in Canada} Volume 33 (Toronto: University of Toronto Press, 1985), 8.} The spectacular growth in individual, group and national self-consciousness has been described as a byproduct

\begin{thebibliography}{12}
\bibitem{Cairns} Cairns, Alan, Williams, Cynthia, \textit{Constitutionalism, Citizenship and Society in Canada} Volume 33 (Toronto: University of Toronto Press, 1985), 8.
\end{thebibliography}
of democracy and capitalism in a context of relative affluence.\textsuperscript{13} The cultural factors which have contributed to this movement are the post-modern assault on established values and the lack of credibility of public institutions. The result of this value flux, according to Elshtain, is that private values and identities dominate the traditional role of the citizen.\textsuperscript{14}

The recognition pressures in Canada and other liberal democracies have profound implications for traditional democracy which is based on the concept that citizenship transcends particularity and difference. Is this traditional conception of democratic citizenship compatible with a multicultural and multi-racial society? Would differentiated citizenship in Canada dilute the bonds of common citizenship to the extent that people would no longer feel like they belong to a single community? To what extent may difference be expressed without destroying the common purpose of a liberal democratic society?

Canada is a multi-national country originally composed of native peoples, and resulting from the federation between English and French speaking residents of Upper and Lower Canada. Canada is also a poly-ethnic state because of the steady flow of immigrants.\textsuperscript{15} The Canadian state has already entrenched collective rights of minority language rights, multiculturalism, and catholic and protestant schools. These group rights are juxtaposed with

\textsuperscript{13} Ibid., 11.

\textsuperscript{14} Elshtain, Jean Bethke, Democracy on Trial (Concord: Anansi Press, 1993), 40.

the individual rights-oriented Charter of Rights and Freedoms. The nature of Canadian federalism also leads to a division of loyalties between regional and national identities. The effect of this division is that the question of priority of membership remains open. Canadians exhibit a plurality of identities and appear to lack a common purpose or unifying force at a crucial period of Canada's history. There are a number of factors in the contemporary political setting that will test Canadians commitment to tolerance. The majority of federal MP's from Quebec are from a party that seeks the secession of the province. The Parti Québécois (PQ), who also seeks the secession of Quebec seem poised to return to power. Furthermore, the Royal Commission on Aboriginal Peoples seems likely to recommend an extensive package of aboriginal rights which will give native peoples in Canada substantial autonomy and a substantially different relationship with the state than non-native Canadians. Given the contemporary political setting, the reconciliation of the legitimate demands of aboriginals and Quebec for recognition of their distinct societies within Canada will require Canadians to accept further differentiation for aboriginals and Quebec citizens. Our debate must attempt to discern the level of diversity between citizens where people begin to feel that they no longer belong to the same political and moral community. Although this level is not readily quantifiable, we can argue that citizenship becomes too differentiated when citizens or groups of citizens can no longer reach agreement on common objectives.

In an effort to determine the degree of difference that Canadian society can support, in Part I of this thesis we will examine theoretical considerations about diversity and uniformity in both liberal and communitarian conceptions of citizenship. In Chapter 1 we will review
liberal considerations about differential citizenship. In Chapter 2 we will examine the post-modern emphasis on cultural relativism and the challenges posed by the expression of group rights in a liberal democratic society. In Chapter 3 we will analyze Kymlicka's attempt to reconcile cultural membership with contemporary liberal thought. In Part II of this paper we will examine the fragmented conceptions of citizenship which afflict the Canadian polity. In Chapter 4 we will review the impact of federalism on conceptions of Canadian citizenship and the difficulty in reconciling the aspirations of the province of Quebec to preserve its language and culture with ROC's commitment to the equality of provinces and to the supremacy of individual rights. In Chapter 5 we will attempt to discern the challenge of aboriginal nationalism and will attempt to reconcile status Indian conceptions of citizenship with Canadian citizenship. Finally, in Chapter 6 we will critically examine the arguments employed to advocate a politics of difference for non-territorial groups in Canada.
PART I Theoretical considerations about diversity and uniformity in conceptions of citizenship in liberal democratic societies

According to Gutman, "the traditional liberal democratic conception of formal equal citizenship underestimates the need for people, as members of discrete ethnic, linguistic and other cultural groups, for recognition and preservation of their particular cultural identities."16 Gutman's observation is supported by a host of communitarian thinkers. This communitarian critique of undifferentiated citizenship has led some theorists to expand the concept of community to include social groups such as low income people, women, gays and lesbians, the handicapped and the aged. For example, Young argues that the state should create group rights and representation for social and cultural groups that are oppressed by racist, sexist, homophobic, ageist and ablest behaviour. Post-modern pluralism sets out the view of the state as the "conferrer of legitimacy and as the mediator of identities", whereas liberals view the state as providing the framework for liberty and democracy.17

An examination of the arguments put forward by communitarians and by the advocates of a politics of difference requires an initial review of the traditional liberal view of differential citizenship in Chapter 1. In Chapter 2 we will analyze the arguments put forward by cultural relativists, and in Chapter 3 we will examine Kymlicka's attempt to reconcile cultural membership with liberal theory.


17 Kernerman, Gerald, (Lecture: March 23, 1994)
Chapter 1: Liberal considerations about differential citizenship

The French revolution proclaimed the enlightenment values of formal equality. The 1789 Declaration of the Rights of Man and of the Citizen set out the equality of rights for all citizens and formal equality before the law. These values were in sharp contrast with the feudal view that an individual's original status was determined by religious or ethnic membership or status in a statified society. For Berlin, the French revolution, in its Jacobin form, was also an eruption of "positive freedom, of collective self-direction on the part of a large body of Frenchmen who felt liberated as a nation." In liberal democratic societies, the egalitarian ideal was refined with the growth of the welfare state and the emancipatory social movements of the twentieth century. Concomitantly, the expression of minority cultural membership became tolerated and protected in the private sphere. Our analysis of liberal considerations about differential citizenship will first examine the argument that group rights are likely to restrict individual rights. Second, we will expose the myth of a neutral liberal state in liberal thought and suggest that liberal democratic society is based on a consensual commitment to a set of norms and values which enforce a specific conception of the common good.

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A. Liberal orthodoxy and the politics of difference: a defense of formal equality

In nineteenth century liberal thought, Lord Durham and others rejected minority group rights. For Lord Durham, liberalism presupposed that particular traditions and particular loyalties had to be discarded if liberal beliefs were to be disseminated, and liberal values to prevail.\textsuperscript{21} According to Ajzenstat, Lord Durham's belief that assimilation of minority cultures was necessary was not predicated on a belief in the superiority of one culture over another. Instead, it was based on the notion that "unassimilated minorities would be unable to benefit from liberal rights and freedoms equally with members of the dominant culture."\textsuperscript{22} For Lord Durham and other liberals, the welfare of the individual mattered more than the cultural survival of a minority group.

Therefore, in traditional liberal thought, the formal equality ideal is based on the belief that freedom and equality are "incompatible with allocating rights differently on the basis of ethnic or racial membership, and that collective rights inevitably involve restricting individual rights."\textsuperscript{23} Liberals also argue that formal equality represents an unambiguous standard of equality which maximizes an individual's ability to develop without any constraints of group norms and expectations.\textsuperscript{24}

\textsuperscript{22} Ibid., 245.
\textsuperscript{23} Kymlicka, "Recent Work in Citizenship Theory," 33.
\textsuperscript{24} Young, \textit{Justice and the Politics of Difference}, 158.
Accordingly, traditional liberal thought views cultural membership as an individual choice whereby members of a cultural community are responsible for promoting their culture within the cultural marketplace. For example, Mill believed that as sentient moral beings, humans should not imitate their forbearers' norms and traditions, but profoundly reflect upon their meaning and accept or reject them. In On Liberty, Mill epitomizes the enlightenment ideal of rational human beings by stressing the individual's faculty to interpret traditions and customs in her own way. He concludes that,

"Although customs may be both good and suitable, to defer to customs does not educate or develop the individual in any of the qualities which are distinctive endowments of a human being. The human faculties of perception, judgement, mental act, and moral preference are exercised only in making a choice."\(^{25}\)

As Lustgarten evocatively writes, "Mill cherished individuality both intrinsically and instrumentally as a means of fostering moral and technological progress; and he despised actions based upon inherited custom."\(^ {26}\)

Although twentieth century liberal thought supports pluralism as a positive force in society and as a check on "state absolutism", it is wary of voluntary ethnocultural associations that seek partial or preferential treatment by the state. As Glazer explains, "the state sets before itself the model that group membership is purely private, a shifting matter of personal choice.

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According to Glazer, the liberal state should neither oppose the liberty of individuals to express their cultural attachments, nor should it nurture such expressions; it should respond with "benign neutrality". Since ethnicity is a private matter, liberals oppose the use of ethnic criteria in the distribution of rights and resources and oppose any special legislation or explicit government recognition of groups.

For example, Trudeau's defense of the 1969 White Paper on Indian Affairs, which would have removed any differential citizenship for status Indians, was based on these liberal assumptions. Trudeau viewed cultural preservation as the responsibility of the individual members of the cultural community. He believed that the state should not be enlisted to prolong the survival of separate identities and sub-cultures. Similar to Trudeau, Rockefeller argues that liberalism and liberal democracy inevitably conflicts with "any rigid idea of, or absolute right to cultural survival." 

B. The myth of the neutral state in liberal thought

For civil libertarians and some contemporary liberal theorists, in order to maximize individual autonomy, the state must demonstrate a substantial degree of neutrality. According

28 Ibid.
30 Rockefeller cited in Gutman, Multiculturalism and the Politics of Recognition, 91.
to Raz in his essay, "Neutral Political Concern", there are two factors underpinning state neutrality. First, the state must be neutral concerning each person's chances of implementing his ideal. Second, the state should be neutral concerning the likelihood that a person will adopt one conception of the good rather than another. Dworkin maintains that liberalism takes as its constitutive political morality that in order for a government to treat its citizens as free, or as individuals, or with equal dignity it must be neutral on the question of the good life. Dworkin describes the non-liberal or conservative conception of equality as the view that government cannot be neutral because "a government cannot treat citizens as equal human beings without a theory of what human beings ought to be." As Morton contends, "minority rights are aspects of pre-liberal society in which the health of the soul is a public concern and government activity promotes some choices about the good life." Communitarians and advocates of the politics of difference argue that the liberal state is by no means neutral. The following paragraphs first indicate that the liberal state creates a tolerant structure for dialogue, but also espouses a certain conception of the common good, and therefore cannot be wholly neutral. Second, we will demonstrate the biased nature of the liberal state by examining liberalism in Canada.

33 Ibid.
34 Morton cited in Kymlicka, Liberalism, Community and Culture, 191.
1. The liberal state as a tolerant structure for dialogue

According to Gellner, liberalism creates a structure which promotes dialogue based on liberal epistemological and sociological traditions. First, the liberal epistemological tradition works to create cumulative bodies of knowledge and shared definitions of phenomena. The liberal search for truth aims to eliminate all self-maintaining, circular belief systems and seeks to destroy all unsystematic or idiosyncratic explanations of reality. As Gellner states, "inconvertible currencies are not suitable for trade and ungeneralizable explanations are useless for a practical and cumulative body of knowledge." Second, the liberal sociological approach postulates that different cultures can communicate, and that all of them share the same world in which they compete. Gellner describes this intra-cultural communication in Oakeshottian terms, not as the uttering of truth but rather as a flow of sympathy. In other words, a civil dialogue can take place.

Both Gellner and Rockefeller agree that the liberal democratic state is not neutral with regard to the promotion of a certain conception of the good. Rockefeller believes that liberalism has its own value system, and echoes Dewey's assertion that "liberalism is the expression of a distinct moral faith and way of life." 

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36 Ibid.

37 Rockefeller cited in Gutman, Multiculturalism and the Politics of Recognition, 90.
It appears normal that the dominant cultural group will create a constitution and state which reflect its conception of the good. This is the norm in nation states in the world and would be considered normal in terms of Herderian notions of community. Obviously, constitutions and the laws of the state reflect the democratic preferences of the majority. Thus many liberals concede that procedural liberalism promotes a certain conception of the good life by creating a context of choice. However, they argue that the extension of minority or group rights could create a more restrictive context of choice.

2. Liberalism and the promotion of a certain conception of the good life in Canada

For example, the Canadian state demonstrates a substantial degree of neutrality but is not neutral on conceptions of the good life. As a liberal democratic society the contemporary Canadian state exhibits the liberal bias in favour of individual rights, and the liberal conception of the good life. In Canada, as in all democracies, there is a majority bias in public policy at the expense of minority social and cultural groups. Furthermore, the two founding nations in Canada, protestant English and catholic French have a privileged position in the Canadian constitution. Québécois and aboriginal nationalists as well as other social and cultural groups argue that the supremacy of individual rights embodied in the Charter represents a bias by the state against those "who value remaining true to the culture of their ancestors and those who might want to cut loose in the name of some individual goal of self-development." Turpel

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argues that "the Charter and conceptions of rights can be situated culturally, they are no means universal or progressive especially in so far as they affect aboriginal peoples." Turpel also believes that the preamble to the 1982 Constitution Act which states, "Canada is founded upon principles that recognize the supremacy of God and the rules of law", is also a portrayal of the liberal, WASP conception of the good. Gays and lesbians complain that through social and fiscal policy the Canadian state sets its preferences for certain forms of social activity. Ethnocultural groups complain that the Charter,

"perpetuates the established ethnic hierarchy by limiting protections for ethnic minorities to the area of individual rights, while clearly spelling out protections for the collective language, religious and educational rights of Canada's entrenched ethnic majority, the English protestant and the French Catholic charter groups."  

According to Kallen, the Charter fails to recognize and protect equally the collective rights of all Canadian ethnocultural collectivities. It is important to note that this is not a bias of liberalism but a deviation from it. The paradox within the Canadian polity, is that the Charter provides both liberal individual rights and collective rights of aboriginals according to section 25 and 35. The BNA Act for its part provides collective rights for English protestants and catholic French. The AFN contests the individual rights of the Charter while ethnocultural groups argue that liberalism in Canada is distorted to favour the two founding nations.


40 Ibid.

We will develop our analysis of the divergent conceptions of citizenship in Canada in Part II of our thesis. We will now examine the arguments employed by communitarians and cultural pluralists in favour of the recognition of collectivities by the endorsement of differential rights for minorities.
Chapter 2: Cultural relativism and group rights

The communitarian critique of liberal orthodoxy offered by Taylor sets out that the traditional liberal democratic position underestimates the need for people who are members of cultural groups for public recognition and positive affirmation of their cultural identities. Taylor in particular emphasizes the importance of language to communities. As we noted in our preface, not all communitarians are concerned with difference because the acceptance or affirmation of difference can work against the project of community as defined by some thinkers. The strand of communitarian thought that is relevant to our discussion of cultural group rights is best exemplified by the work of Taylor. Taylor's account of cultural membership is based on the premise that individuals capacity for choice can only be developed and employed in a conducive cultural context and that the measures needed to sustain this context are incompatible with liberal beliefs about individual rights and the neutrality of the state.42 In order to correct the bias inherent to a liberal state, Taylor and Young argue that national minorities, and historically oppressed social and cultural groups should be given group rights and or institutionalized position in the policy-making process. In addition, several cultural pluralist thinkers, including Lustgarten and Van Dyke, share the view that the expression of individual rights is inherently linked to the affirmation of various collective interests, which cannot survive un-protected in liberal democratic societies. The following paragraphs will first outline Berlin's conception of positive liberty. Although Berlin is critical of positive liberty, his

42 Taylor as presented in Kymlicka, Liberalism, Community and Culture, 2.
description of the concept helps explain the desire for recognition by minority cultural groups. Second we will analyze the emphasis placed by cultural pluralists on group rights as well as the problems posed by cultural relativism in a society where the development of plural rights may result in conflicting jurisdictions and a state of anarchy. Finally, we will review cultural relativism and the resulting stalemate for multicultural liberal democratic societies.

A. Positive liberty, recognition and modern identity

Berlin defines his conceptions of negative and positive liberty in his essay, "Two Concepts of Liberty". Negative liberty is described as "the area within which the subject - a person or group of persons - is or should be left to do or be what he is able to do or be without interference by other persons." In contrast, positive liberty is defined as, "what or who, is the source of control or interference that can determine someone to do or be, this rather than that." Positive liberty is at the heart of the awakening of modern group identity in liberal democracies that seeks group rights in order to positively affirm the group. For Berlin, positive liberty derives from the wish of self-mastery, the elimination of obstacles, be they irrational institutions or the opposing wills or behaviours of others. The notion of freedom in its positive sense is at the heart of the demands for recognition. Berlin argues that, "social, political, economic

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44 Ibid., 122.
45 Ibid., 146.
46 Ibid., 169.
groups represent collectivities of people with conscious needs and purposes... and seek recognition as, "...sources of human activity, as entities with wills of their own, not to be ruled, educated guided, with however light a hand." Although Berlin is opposed to positive liberty, he argues that the desire for status is also linked to solidarity, mutual understanding and association. He states that "to be governed, even mis-governed by members of my own group may be preferable than being influenced by a group which does not understand me". As we shall see in Part II of this thesis, Berlin's description of the yearning for positive liberty applies to our discussion of recognition pressures in Canada due to the profound misunderstandings between ROC and Quebec, ROC and aboriginals and Quebec and aboriginals.

B. **Group rights, cultural pluralism and the potential of anarchy**

Advocates of differential citizenship and some radical cultural pluralists argue that groups do not require sovereignty in order to achieve recognition. The state can recognize or positively affirm minority cultural groups by permitting differential moral spheres for different cultural groups. For example, Lustgarten asserts that "ethnic minorities should be permitted unrestricted freedom to follow their own customs and religious practices, be governed by their personal law, and receive education in their language and cultural tradition." Lustgarten attaches only two qualifications to this unrestricted freedom: first, a practice may be outlawed

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47 Ibid., 156.
48 Ibid., 157.
if it results in severe physical abuse, and second if its implementation appears to be wholly impracticable.

Van Dyke shares Lustgarten's belief that a sophisticated view of liberty requires the acceptance of cultural pluralism. He asserts that,

"It is clear that ethnic communities and peoples may have collective interests. I think it is clear that individuals have interests that can best be promoted and protected by granting a right to the community or to put it conversely, that some interests of individuals cannot be effectively served unless a right is conceded to the group to which the individual belongs."50

Lustgarten argues that the state is not neutral because the educational system and the laws of the land naturally reflect the bias of the dominant culture. Although Lustgarten asserts that his defense of cultural pluralism is not meant to enforce difference among people of different cultures, this is the natural consequence of his project. Therefore, the postmodernist emphasis on relativism and the equality of ideas comes into obvious conflict with the modern liberal democratic goal of forging a common ground for citizenship. Furthermore, the philosophical underpinnings of modernity, the enlightenment principles of civic duties and the balance of democracy and toleration are seen by post-modernists as a violation of their principles of relativistic equality.51

Cultural pluralists, however, fail to respond to the question, "what is the source of unity


in a society which recognizes differentiated citizenship?"52 If Lustgarten's radical definition of liberty were to be implemented, it would lead to a fragmented society, and dissolve peoples' sentiment that they belong to the same political and moral community. Even the left agrees that radical cultural pluralism would undermine civil society. Mouffe argues that, "an extreme form of pluralism, where all interests, opinions, and differences, are seen as legitimate could never provide the framework for a political regime."53

The plurality of norms and laws that would result in a radical culturally plural society would destroy any bonds of commonality. For example, according to Lustgarten, polygamy should be permitted for islamic minorities in Britain. This would result in the interaction of citizens in different, potentially conflicting legal spheres. In Lustgarten's society, would a moslem man in such a situation be allowed to have a non-moslem as one of his wives? What about gender equality? Therefore, it seems that the Herderian notion that humans should live in "natural cultural communities" would lead to anarchy in modern multicultural liberal democratic societies.

C. Cultural incommensurability and identity absolutism

The politics of difference debate is often phrased in terms of Herderian populism. Berlin describes Herder's populism as, "the belief not merely in the multiplicity, but in the

52 Kymlicka, "Recent Work in Citizenship Theory," 32.
incommensurability of the values of different cultures and societies''. Berlin argues that Herder's position was revolutionary because it rejected the supremacy of certain values over others.\(^{54}\) Herder considered each value as an incommensurable absolute, a premise which in fact denied the viability of culturally plural societies.

If we follow the logic of Herderian populism and cultural absolutism for which the flourishing of a certain way of life is a priority, we could argue that those who kept Canada closed to non-Europeans and non-Christian immigrants for so long acted ethically.\(^{55}\) Furthermore, in the Canadian context, one could argue that the state should actively promote full assimilation in order to protect the dominant culture and that Canadians of British heritage should have used their majority position to promote strict Anglo-conformity. In this repressive setting, multiculturalism would be unthinkable and as mentioned, immigration from non-caucasian countries would be prohibited. This ironic outgrowth of cultural incommensurability is understated by advocates of a politics of difference.

Radical cultural pluralism can clearly undermine the foundations of liberal democratic society. Although a Straussian thinker, Pangle has developed theoretical arguments which can be used to defend a liberal conception of the good life. Pangle does not believe in the incommensurability and cultural relativism theory, intrinsic in the arguments of the politics of


\(^{55}\) Howard, Rhoda, "Cultural Absolutism and the Nostalgia For Community," in *Human Rights Quarterly* (Vol.15, John Hopkins University Press), 325,
difference. He writes,

"what threatens us is not the excesses of passionate diversity but rather the deadening conformism to a bloodless and philistine relativism that saps the will and the capacity to define any principled basis for life."\(^{56}\)

Beyond the dangers of anarchy, Pangle perceives the emergence of a relativist dogmatism, described as "the post-modern prejudice". According to Pangle, Herder's and Lustgarten's thought is premised on,

"the easygoing belief that all ways of life and all points of view are equal; thence to the on that none is really worthy of, or in need of profound examination and passionate defense; and finally into the stridently moralistic belief that those who do insist on arguing for the superiority of their way of life or beliefs are elitist anti-democratic, and hence immoral."\(^{57}\)

Pangle's thought can be used to defend a liberal conception of the good life which sets out that the liberal state provides the environment for a real democratic dialogue. Democracy requires an open dialogue. A chief virtue of democratic societies is that they are generally tolerant of unpopular ideas, even those which undermine the democratic foundations themselves. We have reviewed the liberal assertion of citizenship as a defense of formal equality in order to protect individual rights. We have also examined the critique of liberal equality as being insensitive to cultural membership, and have established that the liberal state is not neutral. Since many citizens in Canada attach utmost importance to their group identity, we must strive for a compromise or reconciliation of cultural membership with the liberal tradition. Kymlicka has attempted to demonstrate that cultural membership has a more significant status in liberal


\(^{57}\) Ibid., 216.
thought than is explicitly recognized, and in the following Chapter we will examine his ambitious attempt to reconcile cultural membership with the liberal tradition.
Chapter 3: The attempt by Kymlicka to reconcile cultural membership with liberal theory

Our preceding discussion in Chapters 1 and 2 revealed that a reconciliation of group rights and cultural membership with liberal individual rights appears unlikely, even impossible on logical grounds. However, Kymlicka asserts that contemporary liberal theory can be reinterpreted to take into account communitarian elements in the formation of individual autonomy.58

The unwillingness to grant collective rights in contemporary liberal thought is based on their perceived threat to individual autonomy. Collective rights can threaten individual autonomy because members of minority groups may prefer to assimilate rather than be granted special status, in order to avoid any form of stigmatization or psychological re-segregation.59 In the following paragraphs, we will initially analyze Kymlicka's attempt to reconcile individual and group rights within the framework of contemporary liberal thought. We will then examine the weaknesses in Kymlicka's reinterpretation.

A. Kymlicka's interpretation of the contemporary liberal position on individual rights

Based on Kymlicka's interpretation, the following paragraphs outline the role of cultural

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58 Kymlicka, "Recent Work in Citizenship Theory," 33.

membership in underpinning individual rights and strengthening an individual's sense of self-respect.

1. The Rawlsian conception of formal equality

In contemporary liberal thought, the basis of liberal conceptions of formal equality is found in Rawls' Theory of Justice. According to Rawls' original position, behind the veil of ignorance, it would be rational for individuals to support a principle of formal equality before the laws of the state. Individuals are viewed by Rawls as "self originating sources of valid claims": every individual has equal moral worth and deserves equal treatment, and communities have no moral existence or claims of their own. Therefore, as long as individuals are treated equally, it is not necessary for communities to be treated equally.

In response, Kymlicka argues that it would also be rational for individuals in the original position to recognize that loss of culture would cause loss of self-identity, and would therefore be detrimental to personal agency. On the surface, Kymlicka's assertion seems congruous with the strand of communitarian thought associated with Taylor, and other communitarian thinkers. For example, in his essay, "The Procedural Republic and the Unencumbered Self", Sandel maintains that liberal concepts of justice misinterpret the relationship between the self and its

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61 Ibid.
social roles and relations. His communitarian critique of Rawlsian liberalism sets out that the liberal conception of justice depends on a concept of self that is unencumbered by social and cultural attachments, whose freedom is exercised by abstracting it from its social and cultural situation. For Sandel, individuals move in a history they neither summon nor command, which nonetheless carries consequences for their choices and conduct, and therefore that liberals exaggerate the capacity for, and the value of, individual choice.63 Other critics of Rawls argue that Rawls fails to base his theory on neutrality since the primary goods serve to advance many different individual plans, but they are less useful in implementing views that hold a good life to be achieved only in certain social structures.

Kymlicka, although ultimately critical of the communitarian discourse, argues that elements of the communitarian critique of liberalism can be reconciled within the liberal tradition. According to Kymlicka, in order to defend minority rights within liberalism, two factors must be demonstrated:

"Firstly, that cultural membership has a more important status in liberal thought than is explicitly recognized and secondly, that members of minority cultural communities may face particular kinds of disadvantages with respect to the good of cultural membership - disadvantages whose rectification requires and justifies the provision of minority rights"64

Second, Kymlicka attempts to demonstrate that traditional liberal thought significantly relies on cultural membership by considering social conditions as a determinant of what is

Kymlicka, Liberalism, Community and Culture, 1.

64 Kymlicka, "Liberalism, Individualism and Minority Rights," 188.
valuable in life. Kymlicka's qualitative arguments are entrenched in a renewed perspective of the Kantian ideal of respect for persons.

2. Cultural membership as a key element in the Kantian conception of respect

In *A Theory of Justice*, Rawls argues that the most important primary good is that of self-respect. Rawls' Kantian ideal of respect has two components: first, it includes a sense of one's value, one's conviction that one's conception of the good, or plan of life is worth carrying out; and second, it infers a confidence that so far as in one's powers one can fulfil one's goals. Rawls argues that without self-respect, "all desire and activity become empty and vain and we sink into apathy and cynicism, therefore the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect."  

Kymlicka attempts to draw upon Rawls's concept of self-respect as a means to integrate group rights into liberalism. He agrees with Rawls's assertions that there are certain goods, resulting from social cooperation such as income, and wealth, opportunities and powers. These liberties and rights are necessary for the pursuit of the good life. Rawls argues that in a just society, self-respect is achieved by our uniform citizenship and hence our recognition as equal

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65 Ibid., 189.
67 Ibid.
68 Ibid., 92-95.
citizens. Kymlicka, however, makes the provocative assertion that the community is not, as communitarians seem to think, a concept which is alien to Rawls' primary goods. Instead, he argues that cultural membership should be accorded the status of a primary good. According to Kymlicka, the sense that one's life plan is worth carrying out is determined by one's culture, and individuals may require a cultural structure to make sense of their lives. Kymlicka writes, "liberals should be concerned with the fate of cultural structures not because they have some moral status of their own but because it's only through having a rich and secure cultural structure that people can become aware of the options available to them."

In contrast to Schwartz, Kymlicka argues that special rights are justified for aboriginals in North America, because they have a legitimate claim to the protection of their cultural membership, whether or not the lives of non-aboriginals are thereby improved or enriched. He maintains that group rights can be equated with liberal acceptance of affirmative action programs. He argues that if liberals are concerned about whether inequality is the result of conscious choices or unchosen circumstances, then they should also be concerned with the unchosen culture of an individual. In sum, Kymlicka believes that a person's cultural heritage provides a foundation of emotional security, personal strength and self-respect, and is an

69 Ibid., 544-45.


72 Ibid., 190.

73 Ibid., 191.

74 Kymlicka, Liberalism, Community and Culture, 190.
unchosen circumstance that may affect our very sense of agency.\textsuperscript{75} Drawing upon sociological and anthropological research, he asserts that language is not just a neutral medium but is value laden and represents a marker of societal goals.\textsuperscript{76} In Kymlicka's opinion, although it may be possible for people to voluntarily give up their cultural identification, liberal society should not impose its conception of the good and should not expect individuals to relinquish their cultural associations. Kymlicka argues that the importance of cultural heritage to individual agency has not only been recognized by sociologists but also by racist and oppressive regimes around the world, who have tried to destroy and degrade the cultural heritage of the people they oppress in order to undermine their sense of personal efficacy.\textsuperscript{77}

Kymlicka argues that Rawls and Dworkin do not recognize culture as a primary good because they "work with a very simplified model of the nation state, where the political community is co-terminus with one and only one cultural community."\textsuperscript{78} Kymlicka argues that it is false to assume that the white settler colonies of Canada and the United States represent homogenous cultural communities. He argues that if we drop that assumption, then cultural membership, as a source of possible injustice and inequality should become a primary good.\textsuperscript{79}

\textsuperscript{75} Kymlicka, "Liberalism, Individualism, and Minority Rights," 193.

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid.

\textsuperscript{78} Kymlicka, Liberalism, Community and Culture, 178.

\textsuperscript{79} Ibid.
B. Weaknesses in Kymlicka's attempted reconciliation

However, in his attempt to reconcile the liberal conception of individual rights with enhanced cultural rights, Kymlicka fails to satisfy either communitarians or liberals. This failure which we will initially examine, is indicative of several weaknesses in Kymlicka's arguments. Secondly, we will examine how Kymlicka's interpretation of liberalism, appears to be highly selective and would be rejected by several classic liberal thinkers. Thirdly, we will set forth that by considering culture as a circumstance, Kymlicka suggests a situation where an individual has no choice to identify himself or not to his given cultural community. Finally, we will suggest that by arguing that culture is a circumstance, Kymlicka fails to differentiate between the claims of different cultural groups and neglects to consider involuntary membership in social groups.

1. The failure to satisfy both communitarian and liberal thinkers

In an effort to deflect the criticism that group rights provisions may lead to a denial of choice for individuals in the group, Kymlicka defends minority rights that "serve to protect the cultural community as a context of individual choice". He does not believe that cultural structures should deny choice; he criticizes, as a result, the Pueblo nation for restricting religious freedom. However, in attempting to salvage his argument, he contradicts his apparent goal as well as the goal of leaders of national minorities, such as North American aboriginals. MacDonald describes Kymlicka's attempted reconciliation as a "welfare liberal defense of

collective rights". The limits to Kymlicka's argument are that liberals will only extend collective rights for those cultures that support the formation of autonomous individuals. Native peoples whose personal identity is historically rooted in a collective-oriented non-individual rights framework would be ineligible for group rights according to Kymlicka's assumptions.

Taylor also criticises Kymlicka's attempted reconciliation and especially his comparison of group rights provisions with affirmative action programs. Taylor argues that in the politics of recognition debate, cultural groups are not seeking an equal playing field. He does not believe that the affirmative action analogy is effective for cultural groups, for the goal is "not to bring us to a difference-blind social space but, on the contrary to maintain and cherish distinctiveness not just now but forever." Taylor argues that although Kymlicka tries to argue in favour of a politics of difference within a theory of liberal neutrality, he fails to capture the actual demands made by cultural groups with respect to their goals of survival.

Kymlicka's attempted reconciliation therefore does not go far enough to satisfy communitarians. Conversely, Kymlicka's reconciliation cannot satisfy liberals. First, in the

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82 Ibid.

83 Taylor in Gutman, ed. Multiculturalism and the Politics of Recognition, 40.

84 Ibid.

85 Ibid., 40-41.
original position, a rational individual may want to have culture but may not want a plurality of cultures. Second, a rational individual, behind the veil of ignorance, would not choose group rights as a principle of justice because such an individual could envision membership in a collectivity which was too restrictive of individual freedom. Liberals also argue that group rights and representation will undermine Rawls' conception of personal autonomy and self-respect because individual members of a group may not want to be judged by their cultural identity, skin colour, speech or dress.

As Glazer argues, "if we begin to attach rights or members of parliament to ascriptive communities, this will hurt members of these communities who want to integrate or assimilate in the mainstream culture."86 Finally, liberals would also oppose Kymlicka's affirmative action analogy in support of minority rights for the opposite reason of the communitarians. Liberals are willing to accept temporary measures on the road to a difference blind society but will not accept permanent differential citizenship for different segments of the population.

2. Kymlicka's selective reference to liberal thinkers

A second weakness in Kymlicka's argument is his attempt to draw upon the writings of pre-World War Two liberals, Green, and Hobhouse. He argues that these thinkers recognized that, "human freedom was tied to the existence and consciousness of a common cultural

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86 Glazer, "Individual Rights Against Group Rights," 98.
membership.\textsuperscript{87} He writes that Hobhouse argued that "equality of franchise may have to be modified where cultural minorities exist."\textsuperscript{88} Kymlicka's reference to liberal thinkers appears to be highly selective since he ignores other significant liberal orthodox thinkers including Lord Durham, who would be opposed to Kymlicka's views regarding the treatment of minorities.

One could argue that in order for Kymlicka to make his point he only needs to demonstrate that in the history of liberalism there were liberals who recognized the importance of cultural membership. However, Kymlicka's substantial discussion of minority rights and the liberal tradition in \textit{Liberalism Community and Culture}, does not provide sufficient proof that any liberal would have risked individual liberty or autonomy for the sake of a cultural collectivity.

\textbf{3. Kymlicka's belief that culture is a circumstance rather than a choice}

Kymlicka's arguments are further weakened by the belief that one's culture is to be considered a circumstance, a premise which implies that it would be necessary to compensate for all cultural minorities.\textsuperscript{89} Many liberal thinkers argue that there is no need for the individual to accept or perpetuate a set of cultural values and traditions just because one's parents or

\begin{itemize}
  \item Ibid.
  \item and also Kymlicka, \textit{Liberalism, Community and Culture}, 210.
  \item Danley, "Liberalism, Aboriginal Rights and Cultural Minorities," 175.
\end{itemize}
community does so. Ultimately, culture should be considered as something that a person must take responsibility for, as opposed to a genetic handicap.

Tushnet argues that an individual can be a member of a group by history, opposition or choice. By opposition he refers to the fact that an individual may be a member of a group not by choice but because other people define him as such. He goes on to argue that because discrimination is inherently group-based, when the state prohibits discrimination, it acts to grant de facto group rights.

Tushnet's argument however, neglects the fact that in Canada, the Charter rights and state-sponsored campaigns to eliminate discrimination are meant to protect individual rights, not group rights per se. However, being a member of a group by opposition is a particularly difficult issue for liberal thought to reconcile, for although the belief that culture is not a circumstance but a choice has some cogency, the fact remains that an individual who chooses to give up his cultural association may still continue to suffer from negative perceptions of his or her community by the dominant society, especially if that individual is a member of a visible

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91 Danley, "Liberalism, Aboriginal Rights and Cultural Minorities," 175.


93 Ibid., 284.
minority. For example, many Métis people, prior to their constitutional recognition in 1982, attempted to assimilate into mainstream Canadian society but were the victims of systematic discrimination as "Indians".

Drawing upon the work of Shklar, Jackson argues that liberals would want to prevent situations in which an individual felt obliged to pass for something other than what he or she really was in order to avoid social ridicule and contempt.\textsuperscript{94} In Canada, although section 15 of the Charter prevents discrimination on the basis of association some argue that negative liberty is insufficient for the goals of providing social dignity. According to Jackson,

"(section 15) can ensure that one's freedom to associate will not be obstructed by any other agent but it cannot ensure that individual's who choose to associate in ethnic or other particular ways will be accorded dignity by the public at large. Negative liberty, other things being equal is more likely to produce assimilation, for the only way that individuals can acquire dignity in such a climate is to conform to the dominant choice."\textsuperscript{95}

Jackson concludes that if the liberal state is dedicated to personal autonomy of individuals belonging to ethnocultural groups, it must do more than tolerate social diversity: it must take positive measures to support it.\textsuperscript{96} In the Canadian context, the state provides positive affirmation of the plurality of immigrant cultural groups in Canada through the policies of multiculturalism but has been unwilling to grant substantial group rights or distinct society provisions for either aboriginals or the Québécois. Kymlicka argues that,


\textsuperscript{95} Ibid., 6.

\textsuperscript{96} Ibid., 18.
"a government that gives special rights to members of a distinct cultural community may still be treating them as individuals; the provision of such rights just reflects a different view about how to treat them as individuals and as equals."^97

This assertion, however, neglects the particular situation of an individual in Quebec who cannot chose to study in the language of her choice, or the potential for human rights abuses on self-governing aboriginal communities.

4. Kymlicka's failure to differentiate between the claims of different groups

A final weakness with Kymlicka's arguments is that he fails to differentiate between the claims of different cultural groups and ignores involuntary membership in social groups. In his article "Liberalism, Aboriginal Rights and Cultural Minorities", Danley criticizes Kymlicka's arguments for failing to differentiate between the important moral differences existing among national minorities and other immigrant minorities. Danley points out that national minorities including the Québécois or the aboriginal nations have characteristics which set them apart from immigrant minority groups in Canada.

Danley argues that immigrants arriving in Canada did not sign treaties as a member of a sovereign collectivity. Instead, they entered into a contract with the Canadian government as

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Therefore, public subsidization of cultural activities in Canada should be a matter of policy, not right. On the other hand, national minorities, such as the Québécois or aboriginals in Canada have legitimate claims to the rights of self-determining peoples.

Kymlicka also ignores the question of whether or not social groups should receive group rights. Susan Okin would criticize Kymlicka for failing to mention gender as an additional group whose members are placed at a disadvantage by no choice of their own. In the context of feminist theory, Okin argues that gender, even more than culture, is a category that the individual has no choice over. She writes, "like the hierarchy of caste, that of gender ascribes roles, responsibilities and rights and other social goods." Therefore, a liberal society must find a way to break down the economic structures and customs that perpetuate the patriarchal ideology. Gay and lesbian groups are also citing an increasing body of scientific literature which asserts that their sexual preference is not a matter of choice but of genetic predisposition. We will return to the issues of feminist and homosexual group rights in Chapter 6 when we discuss non-territorial groups.

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99 Ibid., 185.

100 Kymlicka, "Liberalism and the Politicization of Ethnicity," 250.

101 Okin, Susan "Justice and Gender" in Philosophy and Public Affairs (Vol. 17, #5, 1987), 56.

102 Ibid.
PART II  Reconciling Conceptions of Citizenship in Canada

Although Kymlicka fails to reconcile cultural membership within liberal theory, his work underlines the importance of cultural membership for individuals. Kymlicka's attempted reconciliation underscores the need for a debate attuned to the practical implications of the demands for recognition made by communities in Canada. The majority of ROC believes that liberal democratic society can provide an environment conducive to the maintenance of the group identities without conferring permanent group rights. However, because of the recognition pressures threatening to divide the country we must examine whether or not Canada should grant further differential citizenship for groups in Canadian society in order to avoid the separation of Quebec, violent or civil disobedience in aboriginal communities or a decline in the credibility of public institutions. We will now shift our focus from theoretical considerations to the practical reality of the centrifugal forces in Canadian society. In Chapter 4 we will review the impact of federalism on conceptions of Canadian citizenship and the difficulty in reconciling the aspirations of the province of Quebec to preserve its language and culture with ROC's commitment to the equality of provinces and to the supremacy of individual rights. In Chapter 5 we will examine the challenge of aboriginal self-government to conceptions of Canadian citizenship, and will attempt to reconcile Indian citizenship with Canadian citizenship. Finally in Chapter 6 we will critically examine the arguments employed to advocate differential citizenship for non-territorial groups in Canadian society.
Federalism is central in our discussion of diversity and uniformity in conceptions of Canadian citizenship because it is the dominant strain of Canadian political culture. It acts to divide citizens' loyalties between Canadian and provincial identities and has provided the constitutional basis to bolster the French Canadian majority in Quebec. The profound effect of federalism has moved beyond the fostering of dual provincial/federal identities towards an increasingly complex debate centred on the establishment of non-territorial group rights. Advocates of differential citizenship for oppressed social and cultural groups argue that federalism, which provides group representation based on territory, should also grant group rights and representation to non-territorial cultural or social groups. Advocates of aboriginal self-government believe that self-governing aboriginal communities should be given an institutional position within the federal structure. The aim of this chapter is not to examine the primary questions related to federalism, such as whether or not it promotes a greater amount of freedom than unitary states and whether or not it embodies a set of values or goals. The aim of this chapter is to discuss the impact of federalism on conceptions of Canadian citizenship.


citizenship, and the degree of differentiation that the Canadian liberal democratic society can bear. We will question whether or not the federal spirit that has preserved the Canadian federal state intact can provide the flexibility to further accept and affirm the deep sociological differences in Canadian society which are currently being exacerbated by aboriginal and Québécois political elites.

In this chapter we will initially review the nature of Canadian federalism and the impact of federalism on the Canadian identity: we will examine the impact of competitive loyalties to liberal democratic societies and review how Canadians citizens have accommodated themselves to this reality. We will then analyze the roots of discontentment in Canadian federalism by retracing the creation and evolution of the federal state in Canada from a Québécois perspective. Finally, we will examine the fundamental disputes in conceptions of Canada between ROC and Quebec: we will demonstrate that the crisis of Canadian federalism originates in the cleavage between procedural liberalism in ROC and the concern for community in Quebec.

A. The nature of Canadian federalism

This section will first outline the relationship between the existence of separate orders of government and multiple identities. Second, we will describe how the elements which have ensured the resiliency of Canadian federalism have also fostered cleavages which impede the development of a common conception of Canadian citizenship.
1. Canadian federalism and the development of competing loyalties.

Federalism can be defined as a constitutional division of powers between central and regional authorities which neither side can modify unilaterally. Smiley offers a more concise definition, describing federalism as "territorial pluralism."106 Livingston stated that at its origin, "federalism is a function not of constitutions but of societies."107 However, Cairns and Smiley have demonstrated that the long-term resiliency of federalism is also a result of the apparatus and relative autonomy of governments.108 It is also clear that the federal government structure has acted to establish societal organizations along federal lines. In Smiley's words, "both Canadian government and Canadian society are federalized in the sense that conflicts and identities are demarcated by national and provincial boundaries."109

The effect of federalism on citizenship is seen in the creation of two distinct loyalties for citizens to maintain due to the existence of two separate orders of government. The coexistence of distinct loyalties in a federal state was valued by thinkers such as Lord Acton and Proudhon. They believed that competing loyalties within the framework of federalism act


to increase the freedom of choice of the individual and prevent the development of tyranny. According to Vernon's analysis, Proudhon favoured a polity in which the question of priority of membership would remain permanently open. Proudhon advocated a set of systematically competitive loyalties, of which neither province nor state would enjoy monopoly. Vernon argues that Proudhon's belief in "agnosticism towards the community" as a means to enhance self-determination, was an original contribution to political thought.

Vernon's analysis applies to our discussion on Canadian citizenship because the question of priority of membership remains open in Canada. Although federalism may divide loyalties at the abstract level, at the practical level, membership remains open. According to Elkins' and Simeon's research, "(Canadian) citizens generally see no need to choose sides to renounce either their federal or their provincial loyalties or identities." The fact that a person is born in a particular province and receives a marriage licence and unemployment insurance from different levels of government holds little saliency for the majority of Canadians outside of Quebec. All citizens have multiple identities and in the hierarchy of identities, one's religion, language, gender or ethnocultural association may be far more important than an individual's association

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to province or even country. As LaSelva argues, Canadian federalism is a device that attempts to accommodate ethnic and other particularities within the framework of a morally open society.\textsuperscript{114}

\textbf{2. Federalism and the exacerbation of regional cleavages}

However, it has also been observed that all political systems have a specific bias in favour of the exploitation of some kinds of conflict and the suppression of others.\textsuperscript{115} As a result of their organizational structure, federalist systems favour inter-governmental conflicts and centre-periphery conflicts over class conflict. Canadian federalism has acted to reinforce regionalism and has encouraged a politics in which provincial particularisms are accorded special prominence.\textsuperscript{116} Federalism has led to the separation of provincial and federal party systems and to different voting patterns in federal and provincial elections. In addition, in democratic elections at both the provincial and federal level, governments attempt to deflect the blame for unpopular policies to the other level of government. Therefore, regional differences affect attitudes towards Canada. The bias towards regionalism inherent in federalism has important implications for our discussion of citizenship. The nature of provincial jurisdictions


\textsuperscript{116} Cairns, "The Governments and Societies of Canadian Federalism," 718.
and the determination of Quebec to follow a strict multi-national federal model have thwarted the creation of a strong pan-Canadian identity which some argue is central for the creation of a bond of loyalty to the political community.

In Quebec, the francophone majority has always viewed federalism as a means to provide the province with enough power to ensure the survival of its language and culture. Despite the fact that polling indicates that Quebec citizens are profoundly attached to both Quebec and Canada, their aspirations to preserve their language and culture represent the most salient cleavage in Canadian federalism.117 This cleavage is the result of divergent conceptions of federalism in ROC and Quebec. Many Canadians think that federalism provides a more nuanced representation of their interests and more opportunity to participate in the democratic process but express frustration with the ability of the provinces, especially Quebec, to prevent the articulation of a national will. The lack of common identity inherent to a federal polity has led some Canadians to support greater centralization and others to support expanded decentralization. The differences that undermine the relationship between ROC and Quebec are the divergent perceptions of federalism whereby Quebec defends dualism and ROC promotes the recognition of provincial equality as the preeminent principle of federal justice.118 The majority of English Canadians see federalism as a mere administrative division which provides regional autonomy and responsive government. They are not willing to come to terms with the

117 Maclean's/Decima Poll (July 1994)

118 Russell, Peter, "Can Canadians be a Sovereign People?", Canadian Journal of Political Science (Vol. 24, 1991), 708
Québécois nationalist sentiment that Canada is a multi-national federation more akin to Switzerland than Australia.

In order to understand the origin of these diverging conceptions of federalism, it is necessary to examine the creation and evolution of federalism in Canada from a Québécois perspective.

**B. The evolution of the Canadian federal state from Quebec's perspective**

The decision to create a federal dominion in Canada had its genesis in the sociological reality of entrenched regional elites who aspired to retain a degree of autonomy. Almost a century later, the Tremblay Commissioners interpreted the BNA Act as giving Quebec authority over all matters related to its culture. The well-articulated view of federalism according to Quebec, expressed by the Tremblay Report severely contrasted with the Massey Commission's goal of forging a strong pan-Canadian cultural identity. The divergent conceptions of Canadian citizenship underpinning these cleavages have recently appeared in the failure of the Meech Lake and Charlottetown accords. This section will review these four historical landmarks, the BNA Act, the Tremblay Commission, the Massey Commission and the Meech Lake and Charlottetown Accords to outline the evolution of Canadian federalism and divergent conceptions of Canadian citizenship in ROC and Quebec.
1. The BNA Act as a "pact of honour" between French and English speaking Canadians

In 1867 it was agreed that the new Canadian dominion would be a federal state because the predominantly French-speaking and Catholic residents of Lower Canada and the Maritime provinces would have vehemently opposed any unitary regime type. According to Smiley and Careless, the BNA Act was a significant innovation with regards to the relationship between cultural nationhood and political organization. In Smiley's opinion, "the fathers of confederation explicitly put aside both the assimilationist premises of the Act of Union and the consociational devices which had developed as a response to English-French duality." Smiley argues that the BNA Act created a series of provisions in the domain of language, religion and culture, including sections 92, 93 and 133, that represented the basis of a contract or in the words of Henri Bourassa "a pact of honour" between French and English speaking Canadians. This notion of dualism became deeply ingrained in the mythology of Quebec history and has always been used by Quebec nationalists to argue that Quebec has been betrayed by English Canada.

In practice, the two-nation view of confederation was never fully achieved: after 1867,

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121 Ibid.
Canadians who were not of Anglo-Saxon heritage were not given an equal role in Canadian affairs, and the federal government did not safeguard cultural, linguistic and religious duality against English speaking and protestant provincial majorities. In contrast, in the post-confederation period, the English-speaking minority in Quebec had sufficient economic power to protect its duality within the province of Quebec. Consequently, the BNA Act's failure to initiate an acceptable pact for both French and English speaking Canadians has entrenched divergent perceptions of federalism in ROC and Quebec.

Since 1867, successive governments in Quebec have always defended a strict dualistic federal structure in Canada in the face of centralizing and homogenizing tendencies in Canada. According to Ryder, in the case of jurisdictional disputes Quebec has always used a classical paradigm or a "watertight compartments" interpretation of Section 91 and 92 of the BNA Act in order to restrict federal intrusion. Ever since Lord Durham's Report, which set out that, "French speaking people would abandon their vain endeavour to preserve a French Canadian nation once they were under the vigorous rule of an English majority," the French have feared that English Canada would use the federal government as an instrument of assimilation. The Tremblay Commission or the Quebec Royal Commission of Inquiry on Constitutional Problems

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provides an insight into Quebec's anxiety within federalism and describes Quebec's vision of itself as the guarantor of French civilization.\textsuperscript{124}

2. The Tremblay Report, as a framework for Québec's view of cultural preservation and Canadian federalism

The section of the Tremblay Commission that is of most interest to our inquiry is part one on French Canadian culture. The philosophy expressed by the Report, described by Brady as "catholic pluralism", insists that cultural groups should be given the necessary freedom to survive, and that individuals should be given the freedom to develop their personalities in a group.\textsuperscript{125}

The report employs Herderian imagery in its description of French-Canadian culture. It argues that the French-Canadian culture is innate in the spirit rather than a conscious choice. Culture is linked with ethnic homogeneity and embodies not only religion and language, but also national genius.\textsuperscript{126} According to the Report, cultural preservation constitutes the common good of any nation, because to live in an environment commensurate with one's cultural heritage is the prerequisite for the success of every person.\textsuperscript{127} The Report expresses the view that the BNA Act gave the provinces jurisdiction over everything "that touched the human side most


\textsuperscript{125} Brady, "Quebec and Canadian Confederation," 267.


\textsuperscript{127} Ibid., 210.
nearly and which most influenced the Canadian citizens' manner of living."\textsuperscript{128} Accordingly, the commissioners viewed the BNA act as granting Quebec authority over all matters arising from its historical, cultural and religious character, and jurisdiction over civil rights and aspects of language. The Commissioners therefore concluded that Quebec was the, "accredited guardian of French-Canadian civilization."\textsuperscript{129} In essence, the Tremblay Report articulated a vision of Quebec's place in Canadian federalism that would enable it to perpetuate the French Canadian culture.

As a result, the Tremblay Commission Report argues that the federal government could not try to create a pan-Canadian community of citizens because it would go against the spirit of federalism and dualism and represent a threat to Quebec culture. The Tremblay Commission was critical of the recommendations of the Massey Commission on National Development in the Arts, Letters and Sciences. These recommendations, which promoted the creation of national cultural institutions, including, the CBC the NFB and the Canada Council, were attacked by Duplessis and the Commission as, "unwarranted intrusions into areas of provincial jurisdiction."\textsuperscript{130} In Coleman's words, "the (Massey Commission) report raised the prospect of the imposition of cultural institutions and practices from above by a government taking its inspiration from a community whose values differed from those of French-Canadians."\textsuperscript{131} This

\textsuperscript{128} Thid., 45.
\textsuperscript{129} Ibid.
\textsuperscript{131} Ibid.
view that the federal government was the agent of ROC is central in the writings of Groulx and the Action Nationale. This opinion also reflects the Parti Québécois's core arguments for the separation of Quebec and the contemporary Quebec Liberal party's justification of expanded powers for Quebec.

3. The Massey Commission and the outline of a Canadian citizenship based on a national commitment to liberal values

In contrast, the Report of the Massey Commission characterized the optimism following the Second World War that a Canadian identity could be formed. The Anglo-Canadian centralist/nationalist theses put forward by Creighton and others assumed that the task of central government was to create a Canadian people, influenced the policy recommendations of the Massey Report.132 Trudeau also viewed the creation of a pan-Canadian identity as a development congruent with the spirit of federalism. Trudeau's Liberal governments' attempted to respond to the nascent nationalist movement in Quebec by forging a common Canadian identity. The foundations of this identity were the equality of individuals and provinces and the policy instruments employed to achieve these goals were: bilingualism, multiculturalism and the Charter. The Liberal strategy had mixed results. Although ROC generally accepts multiculturalism and accepts the Charter and the equality of provinces, significant elements of

132 Cairns, Alan, (Correspondence: May 30, 1994)
See also Cairns, Alan, "The Judicial Committee and It's Critics," Canadian Journal of Political Science (Vol. 4, 1971)
ROC reject bilingualism. Conversely, Quebec rejects multiculturalism, and the strict equality of provinces, and Quebec nationalists reject the Canadian Charter as well as bilingualism for Quebec. The majority of Quebec francophones have remained firmly committed to the primacy of Quebec as their political community and have resisted federal attempts at forging a pan-Canadian national identity.

The fundamental disagreement concerning dualism and/or provincial equality is central in the misunderstanding between ROC and Quebec. French Canadians residing in Quebec view Canada as a compact between two nations. On the other hand, English Canada, especially western Canada has never felt dualism to be a day to day reality. With the increasingly diverse demographic make-up of ROC and the concomitant demise of anglo-conformity, one can no longer describe English Canada as a nation as we can Quebec. As a result, ROC views the Charter and the procedural liberalism that it embodies as a common reference point in an increasingly heterogenous society. Conversely, nationalist elements in Quebec believe that the preservation of the French speaking Québécois collectivity in North America is of paramount importance.

According to their vision of Canada as a pact between two nations, Quebec elites want to renegotiate the agreement in order to provide the province with the means of preserving and

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133 Maclean's/Decima Poll

promoting its distinct society. The acceptance of Quebec's demands could entail either equal
decentralization, separation or some form of asymmetrical federalism. By rejecting the Meech
Lake and Charlottetown Accords, ROC affirmed it's principled belief that Quebec is a province
like any other and that any collective ambition of Quebec must be subordinated to the
Charter.¹³⁵ For example, though polling data reveals that although 35% of English Canadians
agree that "Canada is a pact between two founding groups, English and French rather than a
country of ten provinces," only 17% of English Canadians are willing to give Quebec special
status as a condition of keeping it within Canada.¹³⁶

4. The failure of the Meech Lake and Charlottetown Accords

The failed attempts of constitutional reconciliation of the Meech Lake and Charlottetown
Accords highlighted these profound differences of opinion. The political debate over the Meech
Lake Accord revealed the willingness of provincial elites to play partisan politics with national
unity and the Canadian publics unwillingness to accept any longer closed door executive
federalism. The fall out of the failed Meech Lake Accord is that a future reconciliation is
hampered by the fact that the closed door "executive federalism", where elite accommodation
and compromise was possible no longer appears acceptable to the Canadian people. However,
although one could argue that this type of elite accommodation took place in Canada from

¹³⁵ Mackay, Wayne, "Linguistic Duality and the Distinct Society In Quebec: Description of
Sociological fact or Legal Limits on Constitutional Interpretation," in K. Swinton, C.J. Rogers,

¹³⁶ Maclean's/Decima Poll
confederation until the Meech Lake Accord, popular opinion has more than once unravelled closed door agreements, even before the demise of the Meech Lake Accord. The multi-lateral negotiations, popular referendum and subsequent failure of the Charlottetown Accord make it likely that future constitutional amendments will involve an ever widening group of non-governmental actors and will again have to pass the scrutiny of the electorate. The referendum process is a desirable development but it holds the danger that provincial elites will play party politics with proposed amendments. The fact that Quebec is a distinct society with its own language, traditions and shared history, is a sociological reality but it is politically unpopular with ROC and therefore provincial elites use populist rhetoric to condemn Quebec's demands for special status. ROC's view is that Quebec is a province like any other and that all Canadians should have the same rights. According to polling date there is a fusion of internal and external preferences on behalf of a majority of English Canadians regarding what Canadian citizenship should entail.  

C. Liberalism in ROC and the concern for community in Quebec: a reconciliation in conceptions of Canadian citizenship

The differences that undermine the relationship between ROC and Quebec go beyond divergent perceptions of federalism where Quebec defends dualism and ROC promotes the recognition of provincial equality as the preeminent principle of federal justice. There is a more profound and intrinsic philosophical division between ROC and Quebec. As we shall first

137 Ibid.

138 Russell, "Can Canadians be a Sovereign People?, " 708.
examine this debate is centred on the degree of flexibility that ROC and Quebec will accept in their interpretation of individual rights, and of the "good life". Finally, we will show that this debate stresses the need to differentiate nationality from citizenship in the Canadian polity.

1. The relationship between individual and collective rights in Canada and Quebec

Quebec accepts the Charter but also seeks distinct society status and accepts minor infringements on individual rights in order to preserve and promote the Québécois collectivity. On the other hand, ROC sets forth the preeminence of individual rights as the guarantor of human dignity, and as a common reference point for all Canadians. In the debate about the content of the Meech Lake Accord, English Canada expressed concern with the impact of linguistic duality and distinct society provisions on the interpretation of the Charter. The conflict between the individual rights of the Charter and Quebec's desire to be recognized as a distinct society is a fundamental stumbling block in constitutional reconciliation. The Charter implies individual rights and national standards, and distinct society involves collective rights to a particular kind of culture and a recognition of regional differences. Taylor reflects upon Quebec's and ROC's diverging priorities in his essay, "Shared and Divergent Values". He points out the irony that Canadian federalism is in crisis at a time when individual citizens' values towards equality, non-discrimination, rule of law, and social provision have never been more similar. In English Canada, the Charter acts as a centralizing and unifying instrument because

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139 Taylor, "Shared and Divergent Values," 156.
it has established a set of national standards for the protection of civil liberties.\textsuperscript{140} Taylor describes the difference of opinion as follows: "the new patriotism of the Charter has given an impetus to a philosophy of rights and of non-discrimination that is highly suspicious of collective goals."\textsuperscript{141} For example, when the Quebec Liberal government invoked the notwithstanding clause after Bill 101 was judged unconstitutional by the Supreme Court, ROC became increasingly critical of an undefined distinct society clause in the Meech Lake Accord. Even though the Quebec Liberal government did not renew the notwithstanding clause and now permits English signage, education in the language of one's choice remains restricted and ROC is wary of what measures a Quebec government could take to preserve and promote the Québécois collectivity.

From a liberal perspective, the problem is that policies which aim to preserve and promote culture actively seek to increase the community's membership by coercive policies. In Quebec, Bills 22, 101 and 178 limited the rights of individuals in Quebec to attend the schools and hang signs in the language of their choice. The concerns about these bills are in part a response to the ominous language used by the government in the debate leading up to their adoption. For example, the government document introducing the Charter of the French Language stated that, "when the national language and culture are not threatened, the existence of vigorous and active cultural minorities can only be a source of enrichment, provided the

\textsuperscript{140} Hogg, Peter, "Federalism Fights the Charter," in David Shugarman, Reg Whitaker, eds., \textit{Federalism and Political Community} (Toronto: Broadsview Press, 1989), 249.

\textsuperscript{141} Taylor, "Shared and Divergent Values," 165.
individuals concerned have sufficient knowledge of the national language to enable them to integrate into the society.\textsuperscript{142} René Levesque claimed that "every more or less clear headed and open-eyed person surely knows that the nation is almost as vital to his balance and growth as the family. De-nationalized, he becomes disoriented, incomplete, a member of an impoverished nation; a fearful nation, uncertain of everything including itself; he is thus degraded. Within a dynamic nation on the contrary, he feels magnified, prouder and stronger."\textsuperscript{143} This communitarian discourse has led to the underlying criticism that Quebec nationalism is potentially harmful for minority groups in Quebec. The critical question will always remain as to how far the province of Quebec would go in order to preserve and promote a distinct Québécois collectivity? Quebec nationalism has raised fears among citizens living in Quebec who are not ethnically "pur laine" Québécois and who do not speak French as their mother tongue. The historical result of these concerns has been a steady exodus of anglophones and allophones from Quebec to other parts of Canada.

The challenge of Québécois nationalism and the question of individual and collective rights leads us to a larger philosophical debate over the nature of community and the good life. As we discussed in our theoretical section, this debate represents a central dispute in contemporary political thought between liberal and communitarian thought.

\textsuperscript{142} Quebec's Policy on the French Language (Government of Quebec: March 1977), 41.

\textsuperscript{143} Rene Levesque cited in Smiley, "Reflections on Cultural Nationhood and Political Community in Canada".
2. Conceptions of "the good life" in Canada and Quebec

In her examination of the political thought of Lord Durham, Ajzenstat sets out that the "mainstream liberal analysis tells us that justice is threatened when a particular way of life is privileged." Taylor, as a communitarian, disagrees with her assessment, and would argue that the state, "is not neutral between those who value remaining true to the culture of their ancestors and those who might want to cut loose in the name of some independent goal of self-development." As we discussed in our theoretical section, liberal states are far from neutral. The Canadian state, by espousing liberal values obviously adopts an individualistic conception of the good life. In practice, whether a state promotes individual rights or collectivist rights, it naturally creates substantive moral commitments with regards to a particular conception of the good life. In Quebec, the flourishing of the French culture and language is viewed by many Québécois as a good in itself. In Cameron's words, "membership in a collectivity is for many a condition of the good life: a conception of well-being which was exhausted by the idea of material security and possession would miss much of what is most important in the life of man, and within Canada to neglect the importance of either an individuals' personal autonomy or his reliance on cultural association for the good life would be to misconstrue the animating spirit of a great many Canadians." For both Taylor and Cameron, cultural association is viewed as

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145 Taylor, "Shared and Divergent Values," 175-76.

146 Cameron cited in Ajzenstat, The Political Thought of Lord Durham, 15.
a human good comparable to national security and the acquisition of possessions.\textsuperscript{147}

The importance of cultural association to individuals in Canada also raises the issue of minority cultural groups in Quebec. In the course of this thesis we have highlighted the important differences in the claims of national minorities and immigrant minorities. Following our logic, the Québécois, as a national minority and a founding people have the right to demand that immigrants living in Quebec learn the language of the majority. However, because there were English Canadians living in Quebec prior to Confederation, the same logic cannot apply to the anglophone minority residing in Quebec.

Taylor argues that in a multi-national federation, one must yield to different conceptions of the good life and allow communities to take active measures to protect their culture. Taylor distinguishes between, "fundamental liberties and privileges and immunities which are important but can be revoked or restricted for reason of public policy."\textsuperscript{148} Taylor point out that there is a difference between basic human rights and the right to hang signs in the language of one's choice. Although liberals are wary of permitting exceptions with regards to the freedom of the individual, the distinct Anglophone community in Quebec must realize that a community can reject the ascription of language rights exclusively to individuals without embracing racism or exhibiting intolerance and violating the dignity of the individual.\textsuperscript{149}

\textsuperscript{147} Ibid., 93.

\textsuperscript{148} Taylor, "Shared and Divergent Values," 176.

\textsuperscript{149} Ibid.
3. The need to distinguish nationality from citizenship

The Charter patriotism expressed in ROC reflects an acceptance of individual rights based liberalism. We have already pointed out the irony that the Québécois also share liberal values and take for granted the procedural and substantive rights guarantees of the Charter. However, as we stated in Part I in our theoretical examination of positive liberty, recognition and the myth of the neutral state, the forces behind Quebec nationalism may require significant reform of the Canadian polity in order to be reconciled. However, ROC's unwillingness to recognize Quebec's specificity increases the possibility of separation-by-default.

Nevertheless, if the Québécois vote to separate from Canada, an independent Quebec would have the same "recognition pressures", that currently exist in Canada. If Quebec separates there would still be demands for self-government by aboriginals in Quebec, as well as demands of other societal and cultural groups who may not share the same conception of the good life as Quebec elites. Breton argues that because the province of Quebec is viewed as the guarantor of the Québécois identity, there will be increased pressure to define the membership, not in terms of ethnicity but in terms of language and citizenship. Furthermore, according to Breton, "the political values and norms that prevail in Canada and Quebec will exert pressure towards the full inclusion of minorities in public institutions."

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150 Breton, Raymond, "From Ethnic to Civic Nationalism in English Canada and Quebec," *Ethnic and Racial Studies* (Vol. 11, #1, 1988), 98.

151 Ibid., 99.
demographic projections will drastically alter Quebec nationalism. Demographers estimate that if the present birth rate in Quebec remains at the same level, by 2080 only 12% -15% of Québécois will be able to trace their ancestry to today's population. The demographic projections for Quebec indicate that because of the a shrinking population of "pur laine" Québécois who are most inclined to be nationalists, the window of opportunity for a majority vote in favour of separation is narrowing and may be impossible in the long term.

However, in the short- to medium-term, Canadian federalism will continue to be strained by the Québécois nationalist movement. The misperception of Quebec in English Canada and the fact that the federal government must be generous with Quebec interests for fear of raising nationalist criticisms have severely tested the workability of Canadian federalism. The fact that Western Canada voted for the Reform party in the 1993 federal election demonstrates that ROC will no longer accept favouritism towards Quebec or nationalist blackmail. There is a fundamental dispute between the view of ROC that the Charter and the liberalism that it embodies symbolizes a common reference point in its increasingly heterogenous territory on the one hand, against the desire of Quebec to preserve and promote the distinct society of the Québécois collectivity on the other.

Quebec should be recognized as a distinct society. Federalism was originally instituted in Canada largely to accommodate the French speaking majority in Lower Canada. It is a fact that Canadian confederation was a compact between French and English speaking Canadians.

152 Ibid.
However, contemporary Canada no longer fits this dualistic mould. Multiculturalism and Charter patriotism have replaced Anglo-conformity as the defining feature of ROC. Quebec’s claims for special consideration are joined by the claims of aboriginals and other oppressed social and cultural groups. The Canadian state’s ability to accept and affirm further differential citizenship for aboriginal and Québécois Canadians will in turn depend on the willingness of the aboriginal, and Québécois nationalists who seek differentiation and the provincial political elites who oppose differentiation, to moderate their demands. Federalism already provides for a significant degree of differential citizenship. Different policies adopted by provincial governments for example in the areas of union organization, welfare entitlements and age of majority act to differentiate the law regime of Quebec from that of ROC. Federalism is also flexible enough to create an institutionalized position for self-governing aboriginal communities. A problem remains in discerning the threshold where differentiation is excessive and so dissolve the bonds of common citizenship and common political community.

Resnick argues in his book *Thinking English Canada*, that in order for ROC to understand that we live in a multi-national federation it needs to develop a sense of English Canadian nationality. Political elites and public opinion makers in English Canada should act more responsibly and pro-actively to avoid separation-by-default. Although the imagined community of Quebec is more contentious than separatists are willing to admit, English Canada should not underestimate the importance of the French language to the Québécois. It appears

LaSelva, "Re-imagining Confederation: Moving Beyond the Trudeau-Levesque Debate," 707.
that Quebecers view separation as a last resort only to be embraced if ROC remains indifferent to their demands for recognition. In order to avoid separation by default a new agreement needs to be reached between Quebec and ROC that recognizes Quebec as a distinct society. This agreement would have to affirm language as a fundamental human right but not necessarily the various manifestations of language, for example the right to hang a sign in the language of one's choice. A defined distinct society clause would permit Bill 101 as a reasonable limitation in a free and democratic distinct society.

In order to continue our examination of the practical recognition pressures in the Canadian polity, our next chapter will focus on status Indian nations in Canada who, are historically involuntary citizens of the Canadian state. The following chapter will examine aboriginal rights, individual rights and the reconciliation of self-governing status Indian communities with conceptions of Canadian citizenship.
Chapter 5: Aboriginal Rights, Individual Rights and Canadian Citizenship

The aboriginal rights debate in Canada is a moral and political challenge. The historic oppression and continuing inequity between native peoples and the majority of Canadians makes the resolution of the debate a moral imperative. The desire of aboriginal peoples to have an entrenched right to self-government also represents a political challenge for Canada in so far as it is opposed to traditional concepts of Canadian federalism and citizenship. Moreover, the debate over aboriginal rights and self-government is inherently controversial because its outcome may "dissolve the moral and political ties between aboriginals and other citizens."

The aboriginal rights and self-government debate is penetrated by a sense of guilt, taboos and demands for inter-generational justice. The inhibiting legacy of the historical assault on native culture clouds the discussion about the functioning of future self-governing aboriginal communities. For example, Cairns believes that many anthropologists and political scientists understate incidents of abuse of power in native communities in order not to jeopardize the movement for self-government. This behaviour is paternalistic because it assumes that natives cannot participate in such discussions as equals. Cairns believes that if non-natives opt out of

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155 Ibid.

156 Cairns, Alan, Lecture: "Aboriginal Citizenship" (Vancouver, March 24, 1994)
See also Cairns, Alan, "Ritual, Taboo and Bias in Constitutional Controversies in Canada," Timlin Lecture: University of Saskatchewan (November 13, 1989)
the debate, democratic discussion is impossible.157

Another issue underpinning the aboriginal question is the heterogenous nature of aboriginal communities. As Cairns writes,

"aboriginal nationality is a label for an indeterminate number of nations divided by tribe, treaty status, location, presence or absence of a land base and by a history of separate administration for status Indians that Inuit and Métis lacked."158

The representative organizations of aboriginals are prone to factional tendencies. Indian peoples do not consider themselves one nation; some bands are wealthier and larger than others and therefore seek greater political and administrative autonomy.159 However, in their demands for significant autonomy, status Indians clearly exhibit first loyalties to their respective groups, which they consider as nations.160

Our attempt to describe aboriginal conceptions of citizenship is further hampered by the "absence of rich intellectual capital" to describe how self-governing aboriginal communities are to relate to the rest of Canada.161 This lack of literature is not only a result of the small cadre

157 Ibid.


159 Bear, Boldt, Menno, Long, Anthony, Pathways to Self-Determination (Toronto: University of Toronto Press, 1984), 178.


161 Cairns, "Aboriginal Citizenship"
of aboriginal writers, but is also due to the fact that natives are reluctant to embrace the "white man's" concept of citizenship.¹⁶²

Despite these limits, the likelihood of expanded differential citizenship for aboriginal and non-aboriginal Canadians underscores the merit of an examination of how self-governing aboriginal communities will interact with Canada. We will not enter into the debate about the source of an "inherent" government authority of First Nations. Instead we will examine the reconciliation of self-governing aboriginal communities with Canada, working under the assumption shared by many legal scholars that an aboriginal right to self-government has been entrenched in section 35 of the Charter, and that the powers of aboriginal government are limited in scope and can only be exercised within the context of the Canadian federation.¹⁶³

It is important to note that substantial differential citizenship already exists between status Indians and non-native Canadians because according to the Indian Act and section 25 of the Charter and Section 35 of the 1982 Constitution Act, aboriginals retain special group based status and rights.¹⁶⁴ For example, section 25 of the Charter protects any rights or freedoms held by aboriginal peoples from treaties, the Royal Proclamation of 1763 or that will be gained in land claim settlements from being abrogated or derogated by the Charter.

¹⁶² Interviews: Native Long House - UBC


Our discussion of aboriginals in Canada will be limited to reserve-based status Indians as defined by the Indian Act. Within the framework of the historic and contemporary aboriginal debate, this Chapter will first review considerations about aboriginal group rights and citizenship in Canada. Second, we will examine the debate concerning aboriginal rights and the applicability of the Charter to self-governing aboriginal communities. Third, we will challenge the arguments put forward by some aboriginal scholars who view aboriginal and non-aboriginal cultures as incommensurable. Finally, we will attempt to reconcile Indian conceptions of citizenship with Canadian citizenship. This reconciliation is not only essential for the preservation of moral ties between natives and non-natives, but also for the possibility of a political and economic dialogue.

A. Historical and contemporary political considerations about aboriginal group rights and citizenship in Canada

The historic relationship between status Indians and non-Indian Canadians has been characterized by oppression, cultural imperialism and paternalism. In the BNA act of 1867, status Indians were given special constitutional status and were subsequently treated as "wards" of the Canadian state who had to be assimilated into the dominant culture. In fact, until 1960, if status Indians wanted to become full Canadian citizens, they were obligated, through the process of enfranchisement, to give up their Indian status. As a result, Canadian citizenship was viewed by them as a tool of assimilation, and as a mechanism for the state to justify its prolonged assault on native culture. Ever since status Indian's rejected the 1969 White paper, a vocal native critique of the liberal rights paradigm has developed. As we noted in our
theoretical observations, this communitarian perspective, premised on the belief that identical
treatment and citizenship is a form of cultural imperialism, criticizes the liberal conception of
"justice as sameness", and seeks the entrenchment of group rights in the constitution. Despite
the weaknesses in Kymlicka's attempt to reconcile cultural membership with mainstream
liberalism, aboriginal rights do not necessarily clash with liberalism itself. As Danley argues,
aboriginals could be granted special rights within the liberal tradition, based on liberal theories
of property and liberal doctrinal nationalism whereby nations should be self-determining.165

The theoretical debate about individual versus group rights within Canadian liberalism
is also influenced by practical political considerations. First, there is substantial pressure from
the international community that Canada be generous and compassionate with the aboriginal
peoples because of the historic discrimination and cultural imperialism levelled against them and
also because of the contemporary social problems in aboriginal communities. Second, the
contemporary Canadian political elites are more sensitive to native culture and recognize that
native communities represent distinct societies. In the Charlottetown round of constitutional
negotiations, in contrast with the province of Quebec, native groups were successful in
extracting group rights concessions, in principle, from Canadian political elites. Despite the
failure of the Charlottetown Accord, the eventual acceptance of aboriginal group right
provisions, and guaranteed aboriginal representation in national institutions seems inevitable.
The Charlottetown Accord would have guaranteed aboriginal representation in the House of
Commons and the Senate; and the Royal Commission on Aboriginal Peoples is expected to

recommend an expanded package of group right provisions for self-governing native communities. Furthermore according to Boldt and Long, if Canada denies the claims of aboriginals for meaningful aboriginal self-government through political or legal stratagems, it will inhibit the economic, social and political development of aboriginal communities and could lead to violent extra-legal action on the part of frustrated native groups.\footnote{166} The violent conflict at Oka serves as a warning to Canadian elites on the dangers of not proceeding with aboriginal self-government within Canadian federalism.

However, despite these international pressures, moral suasion and increased cultural understanding, and potential for extra-legal action, political elites in Canada are reluctant to expand aboriginal rights and self-government because of their concern for the territorial integrity of Canada, the ownership of resources and the potential for individual rights abuses in self-governing aboriginal communities. There is also a fear that expanded differentiation between status Indians and non-aboriginal Canadians would undermine the moral and economic ties between natives and non-natives. These concerns are reflected in the debate about the applicability of the Charter of Rights and Freedoms, which is outlined in the following section.

B. Group versus individual rights and the applicability of the Charter of Rights and Freedoms to self-governing aboriginal communities

As we discovered in our theoretical section, collective rights for native peoples are problematic because of their perceived threat to individual rights. A dialogue between Indians and non-Indians must therefore address the potential for human rights abuses by self-governing Indian communities.

In the political discussion of aboriginal self-government in Canada, the issue of collective versus individual rights remains unresolved and was one of the reasons for the failure of the constitution conferences following the 1982 Constitution Act. Although the central stumbling blocks were the issues of a delegated or inherent right to self-government and funding arrangements, another significant issue of contention was whether or not the Charter would apply to self-governing Indian communities. In particular, AFN leaders argued that self-governing aboriginal communities should be able to restrict mobility, property and voting rights to non-aboriginals in spite of the Charter, whereas some provincial premiers were adamant that aboriginal self-government be subordinated to the Charter.

It is important to remember that many of the aboriginal provisions in the Charlottetown Accord were only political accords to be negotiated at a later date. In other words, the same

167 Kymlicka, "Liberalism, Individualism, and Minority Rights," 188.

obstacles which existed in the post-1982 constitutional setting persist today, and the issue of whether or not the Charter would apply to self-governing Indian communities is still pending. Our theoretical examination revealed that liberals are concerned that group rights could permit collectivities to enforce oppressive social orders where individual deviancy would be punished.\textsuperscript{169} In her article, "Cultural Absolutism and the Nostalgia for the Community", Howard provides a powerful justification for liberal human rights.\textsuperscript{170} Her article is relevant to the current critique of the liberal individual rights paradigm from the perspective of aboriginal group rights. Howard argues that communitarians who dwell on romantic notions of peaceful historical communities forget the oppressive features of rigid social orders based on custom. In the contemporary Canadian aboriginal context, there is concern among Indians and non-Indians that aboriginal rights could be used to discriminate against individuals.\textsuperscript{171}

While the liberal position on the applicability of the Charter is firmly anchored in the belief that in so far as aboriginals are Canadians they should abide by the Charter, the Indian position remains divided. The following paragraphs will first present the mainstream and minority aboriginal positions concerning the applicability of the Charter. Finally, we will explore the alternative solutions which have attempted to overcome the lack of consensus among Indians.

\textsuperscript{169} Howard, "Cultural Absolutism and the Nostalgia for Community," 317.
\textsuperscript{170} Ibid.
\textsuperscript{171} Green, Joyce, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government," in Constitutional Forum (1992), 110.
1. The mainstream Indian position concerning the applicability of the Charter

The majority of Indian leaders prefer the internal codes, tribunals and commissions to the external protection provided by the Charter.\(^{172}\) In general, the individual approach of the Charter is seen by many Indians as serving the original intention of the 1969 White Paper, that is imposing individual rights on aboriginals in order to promote cultural assimilation.\(^{173}\) The AFN views the Charter as an infringement on its sovereignty and mistrusts the Canadian judicial system's sensitivity towards collective Indian rights.\(^{174}\) Kymlicka argues that Indian leaders have sought exemption from the Charter, not in order to "restrict dissent" in their communities but rather to protect their intergroup rights from charges of being discriminatory, according to section 15, and in order to prevent individual and collective rights from being judged in a biased fashion by non-aboriginal judges.\(^{175}\)

Several aboriginal scholars argue that cultural or group rights are necessary to protect aboriginal communities from internal Charter challenges. In particular, Mary Turpel, in her


\(^{173}\) Ibid., 84.


\(^{175}\) Kymlicka, "Recent work in Citizenship Theory," 49.
article "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", contends that the existing liberal individual rights paradigm in Canada is incommensurable with aboriginal conceptions of community based citizenship. She believes that the existing legal culture cannot account for the lived experience of aboriginals in Canada.  

She states,

"any case which presents a Canadian court with the opportunity to expand a rights analysis will be an opportunity to undermine the recognition of the aboriginal peoples as fundamentally different cultures."

Turpel argues that Canadians must seek to move from the continued oppression of the status quo to the "tolerance of differences and the recognition of incommensurable communities."

Scott supports aspects of Turpel's analysis. He promotes the entrenchment of the inherent right to self-government in order to minimize or eliminate intervention by external legislative or judicial authorities. Scott believes that the entrenchment of self-government is necessary for the survival and revival of indigenous institutions. He argues, "appeals to external authorities are clearly inappropriate... they lack the cultural knowledge of local authorities to decide matters

177 Ibid., 44.
178 Ibid., 45.
of custom and community precedent.180

Slattery believes that section 27 of the Charter, which provides, "this Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", acts to force the judiciary to interpret aboriginal cases in a manner consistent with the culture and traditions of aboriginal peoples181

For its part, the AFN rejects the application of the Charter because it is "white" and argues that its imposition would be a "continuation of imperialism with one set of values imposed upon another."182 The Grand Chief of the AFN, Ovide Mercredi argues that the Charter would undermine traditional forms of Indian government and dispute resolution.183 He cites the case of hereditary systems of government as an example of a native tradition that could be challenged by the one-person one-vote premise of the Charter. He argues that the hereditary system with direct consultation and involvement with the people is also democratic. According to Boldt, Indian leaders also fear that Charter equality provisions could undermine band council jurisdiction over membership criteria184, in other words, that a "series of Charter-based judicial decisions in favour of individual interests over community interests could lead to a snow-balling

180 Ibid., 327.
183 Mercredi, Ovide, Turpel, Mary, In the Rapids (Toronto: Penguin, 1993), 98.
184 Boldt, Menno, Surviving as Indians (Toronto: University of Toronto Press, 1993), 148.
destruction of their communal society.\textsuperscript{185}

2. The minority Indian position concerning the applicability of the Charter

AFN objections to Charter individualism fail however, to address the legitimate concerns of Indians who want to retain Charter protection both within self-governing Indian communities and in Canadian society when they seek employment, accommodation and services.\textsuperscript{186} Indian objections to the Charter fail to recognize that although the international community expects Canada to grant autonomy to aboriginal communities it also expects the Canadian government to make sure that there are no human rights abuses in self-governing Indian communities.

In defense of the community-oriented nature of aboriginal communities at the expense of the Charter, the AFN seems to ignore the penetrated realities of Indian communities. Traditional conceptions of aboriginal self-governance and decision-making were developed at a time when Indian communities were generally homogenous. However, in the contemporary setting, Indian communities are heterogenous in philosophy and values. As a result of this heterogeneity, Boldt argues that Indian communities are conducive environments for individual rights violations.\textsuperscript{187}

\textsuperscript{185} Ibid., 148-49.
\textsuperscript{186} Ibid., 151.
\textsuperscript{187} Ibid.
Furthermore, additional fears of human rights abuses on self-governing Indian communities surfaced in the preliminary report of the Royal Commission on Aboriginal Peoples. According to the Report,

"Many women, urban residents, and community members, while supportive of self-government, are worried that its implementation might perpetuate existing inequities, such as a lack of community control and accountability, abuses of power, elitism, and infringements of individual rights."\(^{188}\)

The Royal Commission also reported that concerns about band council and AFN accountability and performance were voiced by aboriginals in every region of Canada. For example, in her submission to the Commission, Grace Meconse argued that,

"with reference to the political process, the Indian leadership is a one party system. If we are going to have democracy, the Indian leadership (must) understand the political and democratic process."\(^{189}\)

The fears of nepotism, corruption and human rights abuses are based on contemporary controversies on Indian reserves. For example, many Indian women reinstated after the C-31 amendments to the Indian Act have been denied the right to return to reserves. Some band councils have argued that the collective interests of the band have priority over the individual rights of the women concerned.\(^{190}\) The Native Women's Association of Canada (NWAC) has documented the patriarchy, violence and intimidation that are a fact of life on Indian reserves. In addition, the Canadian Panel on Violence Against Women has shown that Indian women are

\(^{188}\) *Framing the Issues* (Royal Commission on Aboriginal Peoples: Ottawa, 1992), 24.

\(^{189}\) Ibid., 25.

\(^{190}\) Boldt, *Surviving as Indians*, 152.
two times as likely as non-native women to suffer from physical, sexual, psychological or ritual abuse. NWAC is concerned that unless the Charter applies to self-governing Indian communities, aboriginal governments could invoke inherency or tradition to support measures that discriminate against women. Joyce Green describes the case of the Rosseau River Reserve in Manitoba where the band council asked the RCMP and the tribal police to leave the reserve in order to replace them with local "warriors". Women fearing for their safety had to request that Grand Chief Ovide Mercredi intervene. Doris Young of the Indian Women's Collective argues that the Charter must continue to apply to self-governing Indian communities because,

"although we believe that we have an inherent right to self-government we also recognize that since European contact, our leaders have mainly been men, men who are by-products of colonialization, we believe that traditional values with respect to aboriginal women are not practised in a total sense by our leaders." Doris Young of the Indian Women's Collective argues that the Charter must continue to apply to self-governing Indian communities because,

Many native women favour the use of the Charter because of its positive impact on the reinstatement of Indian women who had lost their status. The Charter has also helped Indian women highlight the sexual inequality in aboriginal communities.

191 Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government," 111.
192 Ibid., 116.
193 Ibid., 118.
194 Framing the Issues, 24.
3. The lack of consensus about the applicability of the Charter

The question of whether or not the Charter of Rights and Freedoms should apply to self-governing Indian communities has caused considerable division within Indian communities. In the process of aboriginal debates, rights are dismissed as being incompatible with aboriginal approaches to land, family, social life, personality and spirituality. However, they are also enlisted to support aboriginal struggles against oppression. According to Burrows, the Charter contains many values that are currently accepted and were traditionally endorsed by a considerable number of Indian peoples.

A real democratic dialogue has not yet taken place among the disparate Indian communities. The lack of internal dialogue regarding the legitimate concerns of Indians undermines the credibility of democratic self-governing Indian communities. NWAC and aboriginal feminists have been derided as "puppets of white Toronto feminists" and are criticized for "undermining the greater goal of aboriginal liberation." Indian leaders argue that male and female Indians must present a unified front against a society which oppresses them equally. In the Charlottetown negotiations, NWAC was marginalized by the other native groups

196 Ibid., 2.


199 Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government," 118.
and did not receive funding from the federal government. However, the debate over the right balance of collective and individual rights has also affected NWAC. Two leaders of NWAC, Sharon MacIver and Teresa Nahane as well as the legal counsel Mary Eberts, were recently voted out of their positions because of the perception that they were "too liberal rights oriented."  

Gibbins and Ponting argue that to place self-governing Indian communities outside of the Charter is to severely weaken the citizenship of Indian Canadians. They predict that as bands experiment with self-government, there will be failures and injustices committed. For Gibbins, the potential for violations of individual rights and freedoms in self-governing Indian communities is enormous because of the small size, homogeneity, and extensive kinship and family ties. The extensive kinship ties could lead to nepotism and corruption. Other factors that contribute to the risks of self-government are the economic problems, the remoteness and the lack of trained personnel.

In an effort to protect Indians from the risks associated with self-government, NWAC has proposed the creation of one or several aboriginal charters of rights and freedoms. They do

\[\text{200 Interview John Burrows - Director of the First Nation Law Program (UBC Faculty of Law) April 12, 1994} \]

\[\text{201 Gibbins, Ponting, "An Assessment of the probable Impact of Aboriginal Self-Government in Canada," 218.} \]

\[\text{202 Ibid, 235.} \]

\[\text{203 Gibbins, "Citizenship, Political and Intergovernmental Problems with Indian Self-Government," 375.} \]
not want to modify the Canadian Charter but prefer to emulate the UN Charter. Obviously a native charter would be more salient for native dignity and nationalism than would be a modification of the existing Canadian Charter. Other commentators have recommended that bands be given a notwithstanding clause which would require a three-quarter majority to be implemented.  

However, if Indian charters do not reflect substantial consensus of Indians, the Canadian government should extend the protection of the Charter to self-governing Indian communities. The argument that natives who are unhappy with potential infringements on individual rights can always leave the community and join mainstream Canadian society is not an acceptable argument, for it does not address the reality that in the international community, Canada would be criticized for any human rights abuses in self-governing aboriginal communities. Furthermore, the weakest members of the community would typically experience the most severe exploitation and would be least able to leave the community and prosper in the surrounding English or French society.

C. The degree of commensurability between Indian and non-Indians in Canada

Our examination of the group versus individual rights debate revealed that a central issue in the establishment of Indian self-government was the degree of commensurability between contemporary Indians and non-Indians. The failure to find a common ground destroys the purposes of defining a conception of citizenship acceptable for all members.

204 Boldt, *Surviving as Indians*, 148.
In contemporary political thought, there is an expanding literature that argues that certain cultures are incommensurable with other cultures or with the dominant culture. As a result of this incommensurability, minority cultural groups may face systemic discrimination and should therefore be represented only by members of their group.\footnote{Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," 7.} For example, Ovide Mercredi argues that, "we can speak for ourselves and no one else has the political or spiritual authority to speak for us because Canadians are different."\footnote{Mercredi, Turpel, \textit{In the Rapids}, 36.} However, Mercredi also indicates that,

"(aboriginals) have to appeal to what we hold in common with non-native society... we have a rich heritage of nation to nation, treaty to treaty, government to government relations. By reclaiming our past we will not destroy Canadian society, we will improve it."\footnote{Ibid., 45.}

In the following paragraphs we will first outline the contours of a potential Indian citizenship within the Canadian state, before examining the extent to which Indian and non-Indian societies in Canada are penetrated. Finally we will attempt to reconcile Indian and Canadian conceptions of citizenship.

1. Indian Citizenship

The implementation of Indian citizenship is contentious primarily because it is based on \textit{jus sanguis} rather than \textit{jus solis}. Full aboriginal citizenship in self-governing aboriginal communities is generally based on Indian blood as defined by the Indian Act. Since the C-31 amendments to the Indian Act, aboriginal band councils have adopted membership codes based
on one or two parent rules or blood quantum rules. These membership codes pose serious problems for the future of Indian communities and for the equality of aboriginal citizens.

In their study, "Population Implications of the 1985 Amendments to the Indian Act", Clatworthy and Smith demonstrate how the C-31 amendments and the subsequent heterogeneity of membership codes adopted by band councils, will lead to a declining register Indian population in roughly fifty years and create differential status and aboriginal citizenship.208

Bill C-31 was created in order to meet Charter equality provisions by eliminating inequality between male and female aboriginal persons by reinstating status Indian women and their children who married non-Indians and lost their status prior to 1985. C-31 creates differential status, full Indians registered under 6(1) and half indians registered under 6(2). They have unequal rights because they differ in their capacity to pass Indian status to their children. These descent rules are an unsatisfactory means to define citizenship in self-governing Indian nations.209

In the words of Clatworthy and Smith,

"C-31 legislates inequality and violates first nations traditions which employ equal participation, the enjoyment of resources collectively, and decision making by consensus; it is

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209 Ibid.
also in contradiction to the democratic principles underlying the Canadian political system."

C-31 also creates a third class of people in first nation communities. Non-Indian spouses and children of 6(2) parents have the right to live on a reserve provided, that their spouse or parent is a band council member, but enjoy no rights within them unless the band council votes to make them members. C-31 revoked the right of non-Indian spouses to have legal status and has the potential to create tension within first nation communities by creating within them fundamental differences in opportunities and rights. This tension could become entrenched in the social and political life of first nation communities and could result in internal Charter challenges to band council membership codes and the lack of political rights of spouses and non-Indian children who grow up on reserves. A further issue of dispute will be the transfer of certificates of possession on reserves.

The membership rules represent a serious threat to Indian democracy and are incompatible with the premises on which any form of Canadian citizenship should be based. It is conceivable, however, that band councils be elected by a minority of residents in a reserve which has a two parent membership code.

The differential status of Indians within self-governing Indian communities will create significant human rights controversies within Indian communities. It is important to note that

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210 Ibid., 55.
211 Ibid.
although Slattery has attempted to argue that aboriginal nations are "constitutional entities" rather than ethnic or racial groups, because of the definition of a status Indian in the Indian Act and the membership codes adopted in aboriginal communities, access to membership and hence to self-government, is also based on blood. An example of the types of controversies to be expected was the recent events on the Kahnawake reserve in Quebec. On March 16, 1994, the chiefs of the Kahnawake reserve in Quebec asked 143 people to leave in order "to protect the genetic quality of the community". The Globe and Mail reported that the chiefs asked people to leave because of a shortage of land and the need to protect the genetic quality of the reserve. Band Councils defend the right to define what membership is by arguing that all nations define their membership. However, this example is not fully representative of the relationship between Indian and non-Indians in Canada. Contrary to this movement, the following paragraphs describe the interlocking realities of Indian and non-Indian Canadians.

2. The existence of a moral community between aboriginals and other Canadians

There are mixed messages coming from Indian elites with regards to how much natives and non-natives have in common. In order to gauge the commensurability of Indian and non-Indian culture in Canada, it is revealing to examine the existing similarities and shared realities. For example, 34% of Indians marry non-Indians, a figure which is projected to rise. Indian

212 Globe and Mail (Toronto: March 17 1994)

communities below the 60 parallel have substantial contact with non-aboriginals. According to Mercredi, approximately 60% of status Indians live in urban areas, off their reserves; in fact, according to his book, almost 10% of all Indians live in metro Toronto. Other similarities relate to modernization, employment, mobility and the requirement of gender equality. Cairns describes Indian societies as penetrated societies, "their members live in many worlds at once and relate to more than one community".

LaSelva argues that despite the legacy of oppression, a moral community exists between Indians and other Canadians. As evidence of this community, he asserts that the central political strategy of natives is the "politics of embarrassment" which is predicated on a set of moral claims that are intended to appeal to non-natives. He also points out that all propositions for self-government assume some form of continued fiscal support which again implies a series of moral claims. However, the evidence put forward by LaSelva does not suggest a pro-active moral community; rather, it describes a community based on the awareness of the other party's weaknesses.

Building upon his analysis of the moral interdependence of aboriginal and non-aboriginal Canadians, LaSelva disputes the incommensurability of cultures thesis, the rejection of

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214 Mercredi, Turpel, *In the Rapids*, 43.
liberalism and the stereotypes of de-colonization put forward by some advocates of aboriginal cultural rights. He contends that the aboriginal strategy aims at creating a mythical era of peaceful native culture prior to European contact and compares the rejection by many native scholars of the individual rights of the Charter with the third world de-colonization movement. Both Cairns and LaSelva believe that the widespread use by Indian leaders of the discourse of colonialism in describing their aspirations for self-government is problematic. For these authors, it implies that in order to be liberated, Indians must secede. However, only the Mohawk and some Albertan nations speak of real sovereignty. Therefore, this de-colonization discourse is not only an inaccurate representation of Indian goals but it is also potentially irresponsible as it rejects the obvious similarities between aboriginals and non-aboriginal Canadians. Furthermore as Flanagan has demonstrated, "sovereignty" is not well suited either to the political traditions or aspirations of status Indians in Canada.218 For the current generation of Indian leaders, the sovereignty discourse is a means to an end rather than an end in itself.219

Although the de-colonization discourse is a powerful rhetorical device of Indian leaders, it contradicts the penetrated reality of aboriginal communities in Canada. Even if a substantial devolution of power accompanied aboriginal self-government, Indians will continue to interact with, marry and work with non-aboriginal Canadians. Strong homogenizing tendencies have emerged, including the commitment to gender equality, and the widespread desire to reap the


benefits of modern technology. The reality is that the liberal value of gender equality is as salient for aboriginal women as non-aboriginal women and that modern technology has drastically altered the traditional native way of life. In Boldt's words,

"After more than a century of exposure to Euro-Canadian hierarchical, political and economic and social institutions, norms and values, tribal customs and traditions have become inoperative and no longer guarantee the human dignity of individual members within their communities."220

It is clear that Indian communities will have to cooperate with those that exploited them.221 The incommensurability thesis of Turpel does not recognize the inter-connected reality of aboriginals. Native leaders cannot return to the past traditions as natives are in various stages of acculturation and share many of the values of Canadian liberalism. The various degrees of acculturation present in Indian communities could either act as a natural safeguard for individual rights or could push bands to attempt to reduce acculturation through promoting the survival of the collective culture at the expense of the individual.

3. A reconciliation of aboriginal and Canadian citizenship

The penetrated reality of natives in Canada, their weak economic resources and their physical dispersion makes native separation all but impossible for the vast majority of aboriginal communities. Furthermore, the Canadian government will not accept full independence or

220 Boldt, Surviving as Indians, 151.

221 Cairns, Lecture: "Aboriginal Citizenship".
absolute sovereignty for Canada's Indians. A continuing relation with Canada is therefore inevitable and our discussion of the existence of a moral community between Indians and ROC suggests that we can work together.

Indian self-government implies that Indian peoples will be citizens in three communities, their native community, their province and also the pan-Canadian community. The central question that native self-government confronts us with is to what extent are native people citizens of Canada and to what extent are they citizens of first nation governments and how can these different conceptions of citizenship be reconciled?

Kymlicka argues that self-governing native communities will naturally lead to distinct and separate citizenship identity for each group but that it is possible for people to have two overlapping communities.

According to Gibbins and Ponting,

"no matter what is the status of aboriginal self-governing communities, the residents of such communities will continue to have an interest and a stake in the affairs of the federal government. Aboriginals will want the right to participate in national debates as Indians and as

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223 Cairns, Lecture: "Aboriginal Citizenship".
225 Kymlicka, "Recent Work in Citizenship Theory," 36.
Canadian citizens and would not want their opportunity limited by their Indian status."\(^{226}\)

Gibbins, in his contribution to *Arduous Journey* argues that in order for Indians to retain Canadian citizenship, three basic conditions should be met. First, Indians should retain the franchise and Charter protection. Second, Indians should start to pay taxes. Third, there should be a redistribution within and among self-governing Indian communities.\(^{227}\) The status Indian position on taxation is clear; it insists on a complete exemption, arguing that taxes have already been paid in perpetuity by the loss of aboriginal lands. Gibbins and Ponting argue that the aboriginal free-rider status could undermine political support for continued fiscal transfers.\(^{228}\) They also argue that because the Canadian government will continue to provide financial assistance to self-governing communities, it gives the federal government the right to impose conditions on self-government, such as Charter protection.\(^{229}\)

In response to native demands for self-government, Cairns hopes that "a basis for sympathy, empathy and sharing can survive the reinforcement of difference."\(^{230}\) Cairns believes that some form of special positive status is desirable and inevitable but outlines the potential dangers for aboriginal communities of over-sufficient and under-sufficient differentiation. Cairns


\(^{229}\) Ibid., 233.

believes that a resolution, should "stress connections to the Canadian community and the values of a common citizenship as well as giving sufficient support to natives to protect their culture". The incommensurable thesis put forward by Turpel is not a invitation for a real dialogue between aboriginals and non-aboriginals. Turpel's arguments can be viewed as an exaggeration of difference in an effort to realize her political goal for aboriginals - the inherent right to self-government. Fortunately, other aboriginal writers such as Burrows are attempting to create a conversation between liberal rights and aboriginal traditions. Natives and non-natives share a moral community and as LaSelva stresses, "Canadian federalism is flexible enough to promote aboriginal emancipation while recognizing the social and moral constraints on differentiation." 

There is a growing consensus among both English and French Canadian elites that aboriginal peoples represent self-determining nations which are deserving of increased powers of self-government. It is possible that this consensus could be reconciled within the liberal tradition not because cultural membership is necessary for political autonomy, but by appealing to liberal notions of doctrinal nationalism, international law regarding self-determining peoples and liberal theories of property. For example legal scholars such as Macklem argue that Anglo-Canadian conceptions of property, contract, sovereignty and constitutional right can be reconceptualized "to permit the construction of legal spaces in which First Nation self-

231 Ibid., 27.

government can take root and flourish."233 Aboriginal communities in Canada are geographically dispersed, heterogenous in language, culture, values, economic resources and the majority are penetrated by liberal values and require continued fiscal transfers from the federal government. In light of these realities, it is necessary for aboriginal and non-aboriginals to work together.

This chapter focused primarily on status Indians and its goal was to raise legitimate questions about the contemporary debate over Indian citizenship and self-government. The human tragedy of Indian reserves requires that Canadians accommodate Indian demands for substantial autonomy. However, before substantial autonomy can be granted, an honest democratic dialogue must take place within Indian communities about issues of accountability, aboriginal feminism and the problems of different classes of aboriginal citizens created by membership codes. A second dialogue must take place between aboriginal and Canadian leaders about how we are going to work together in the future and how aboriginal communities are going to guarantee individual rights protections. The end result of these dialogues could be a modification of Canadian federalism to accept a third order of aboriginal government, an aboriginal justice system for criminals who are not a threat to others and provisions to preserve and promote aboriginal language and culture. These dialogues, however, must reflect the interconnected reality of Indian and non-Indian Canadians and provide concrete provisions for the protection of fundamental human rights in self-governing Indian Communities.

In Chapters 4 and 5 we examined the recognition pressures of the Québécois and aboriginal national minorities in the Canadian polity. In Canada, however there exists an increasing body of literature which argues that there are other differences between Canadians that are as deep as between English Canadians, French Canadians and aboriginal peoples. This literature refers to non-territorial groups of interest that share a particular life situation. In our final Chapter we will critically examine the arguments employed to advocate differential citizenship for non-territorial groups in Canadian society.
Chapter 6: Non-territorial groups and the politics of difference in Canada

As we noted in our theoretical considerations, recognition is an important part of modern identity and is increasingly considered as an integral part of citizenship. For Taylor, identity is what defines us as human agents; it is who we are and recognition implies acceptance of ourselves by others.234 Although Taylor is primarily concerned with national minorities, he is aware that the discourse of recognition could unleash an avalanche of demands by social and cultural groups. However, in the Canadian context there is a significant difference between the demands for recognition as distinct societies from the Indian and Québécois political elites, who seek governing powers within deep diversity communities and the claims of non-territorial groups who seek to be recognized and represented as a category of citizens with a particular life situation.235 The latter movement has been developed by critical race and feminist scholars who argue for differential citizenship in the form of group rights and representation for both cultural and social groups which are oppressed by racist, sexist, homophobic, ageist and ablest behaviour.

Ironically, and contrary to the Québécois and aboriginal national minorities, until the 1960's, many of the groups which are now calling for group rights sought to assimilate into a uniform citizenship.236 The movement for differentiated citizenship seems to have originated


235 Ibid., 191.

236 Young, Justice and the Politics of Difference, 161.
from the frustration of social and cultural groups who fought to be included in the "we" community of undifferentiated citizenship, only to realize that they could not achieve real social equality and respect, despite the apparent removal of discriminatory measures.

In the Canadian context, an example of these non-territorial group pressures are the demands of scholars including Jackel and the claims of women's groups such as the National Action Committee on the Status of Women that the Canadian House of Commons and Senate should become "houses of equality" and act as a forum where the different voices of oppressed groups could be heard through a system of guaranteed representation. In Canada, citizens exhibit a plurality of identities. Traditions, and traditional views towards sexual conformity, gender roles and sexual lifestyles have been eroded by the pressures of group consciousness.

Our theoretical discussion in Part I demonstrated that liberalism is not opposed to the erosion of traditions. Liberals such as Mill valued the diversity and uniqueness of individuals, groups and civilization and detested narrowness, uniformity, the crippling effect of persecution, the crushing of individuals by the weight of authority, custom or public opinion. However, Mill and contemporary liberals oppose the discourse of the advocates of the politics of difference who argue for the institutionalization of "specific traditions, practices, languages, and

238 Cairns, Williams, Constitutionalism, Citizenship and Society in Canada, 12.
239 Berlin, Four Essays on Liberty, 176.
other culturally specific forms of social existence". \(^{240}\) Our theoretical observations revealed that liberals oppose group rights, and radical cultural pluralism that threaten individual autonomy, but also to the democratic dialogue. We will now examine the discourse of the advocates of a politics of difference and then analyze the theoretical and practical weaknesses linked to their arguments.

A. **The rationale for differentiated citizenship**

In her article, "Polity and Group Difference", Young argues that no general perspective exists which all persons can adopt or from which all experiences and perspectives can be understood and taken into account. \(^{241}\) According to Young, the only way to express all group experiences and social perspectives is to have special group rights and representation. \(^{242}\) Young argues for "differentiated citizenship" in the form of group rights and representation for social groups that are oppressed by racist, sexist, homophobic, ageist and ablest behaviour. Her analysis draws upon the traditional arguments in favour of affirmative action programs. She states that the equal treatment of social groups with unequal power resources is insufficient and therefore tends to sustain the existing imbalance of justice. Young contends that although the liberal ideals of equal citizenship may be blind to race, gender and other group differences,

\(^{240}\) Young, *Justice and the Politics of Difference*, 161.


\(^{242}\) Ibid.
society is not. The logic of conferring special privileges to needy groups is based on the conception that,

"Privilege allows dominant groups to assert their experience of and perspectives on social vents as impartial and objective. In a similar fashion, their privilege allows some groups to project their group-based capacities, values and cognitive and behavioral styles as the norm to which all persons should be expected to conform." 243

In the contemporary political setting, Young describes three public policy areas of special interest for the implementation of her arguments: first, affirmative action, second, comparable worth, and third, bilingual and bicultural education and service. According to Young, in seeking social justice within these policy areas,

"The goal is not to give special compensation to the deviant until they achieve normality but rather to de-normalize the way institutions formulate their rules by revealing the plural circumstances and needs that exist or ought to exist within them." 244

Many oppressed social and cultural groups insist that society affirm their difference and provide various kinds of institutional support and recognition for their difference. For example, public funding for group-based organizations, language rights, guaranteed representation in political bodies, and legal exemptions for cultural practices are advocated. These demands must be debated in contemporary liberal societies. It is important to note that the Canadian Ethnocultural Council has declared that it will not seek group rights protections for "hyphenated Canadians. However, Canadian ethnic groups are seeking government services and education in languages other than English or French.

243 Ibid., 10.

244 Ibid., 13.
Young believes that liberal pluralism can work if disadvantaged groups are given an institutionalized position in the policy process. She argues that,

"people necessarily and properly consider public issues in terms influenced by their situated experience and perception of social relations. Different social groups have different needs, cultures, histories, experiences and perceptions of social relations which influence their interpretation of meaning and consequences of policy proposals and influence the form of their political reasoning."245

Young has faith in the liberal political process to catalyze a real public dialogue once oppressed views are given an institutionalized position. She argues that liberal democratic societies should remove the pretext of impartiality and describes her politics as a politics of inclusion. Young's thought echoes that of Lustgarten in the sense that they both believe that if groups are recognized it will strengthen the commitment of individuals within groups to society-at-large.

Kymlicka agrees with the inclusionary ideals of Young's vision of citizenship. He argues,

"that if the aim of citizenship is full membership and participation, then people can be denied effective citizenship if they feel culturally excluded, if they are unable to identify with societies institutions and customs."246

245 Ibid., 5.

246 Kymlicka, "Recent Work in Citizenship Theory," 23.
B. A critique of the politics of difference

Ironically, the inclusionist objective of advocates of differentiated citizenship may result in re-segregation within liberal democratic society. In the paragraphs that follow we will analyze the reasons underpinning the negative outcome. First, the politics of difference could lead to group rights provisions, where individuals are defined by ascriptive categories. Second, group representation could cause an erosion of cross-group empathy. Third, group rights could prove counterproductive to the goal of including oppressed groups by creating a societal backlash of increased racism and resentment. A further result of differentiated citizenship could be a decline in the democratic principles of public reasonableness.

1 Which groups deserve differentiated citizenship?

An initial impediment to the implementation of differentiated citizenship is the difficult task of determining which oppressed social and cultural groups should receive group rights. Young admits that most people in modern society have multiple, cross-cut group identities and differences. In fact, one category, that of the aged, is eventually shared by all citizens. Therefore, how can we determine who should receive special group representation?

Kymlicka criticizes Young's categories, arguing that they would include approximately 80% of the Canadian population: "in short everyone but relatively well-off, relatively young
able bodied heterosexual white males. Kymlicka also argues that group representation could lead to an endless proliferation of sub-groups clamouring for further sub-division of group representation and bitter disputes about who should receive it.

2 The dangers of stigmatization

As we discussed earlier in the critical review of Kymlicka's attempted reconciliation, group representation can stigmatize individuals and reduce individual autonomy because it acts to psychologically segregate people as defined members of ascriptive groups. In "Democracy and the Politics of Difference", Elshtain provides a defense of the traditional liberal citizenship. She describes the cultural pluralist discourse as promoting the politics of re-segregation and wants to return to the traditional democratic ideal where differences are expressed in the private sphere and are not endorsed by the state.

The stigmatization that would result from group representation may also undermine its goal of giving disadvantaged groups a meaningful voice in the public policy process. Kymlicka questions the desirability of group representation when he states that it could become an excuse for white men not to understand or represent the needs of others. In support, he cites research

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247 Kymlicka, "Group Representation in Canadian Politics," 76.
248 Kymlicka, "Recent Work in Citizenship Theory," 5.
249 Elshtain, Democracy on Trial, 81.
250 Kymlicka, "Group Representation in Canadian Politics," 68.
that contends that the guaranteed representation of the Maori people in New-Zealand has been
taken by the non-Maori as an excuse to absolve them of any representative function in Maori
affairs. Therefore, Kymlicka acknowledges the potentially negative consequences of a politics
of difference. For example, he writes, "if affirming difference is required to integrate
marginalized groups into the common culture, there may cease to be a common culture."251
Furthermore, he argues that to renounce the possibility of cross-group representation is to
renounce the possibility of a society in which citizens are, "committed to addressing each others
needs and sharing each others fate."252

Kymlicka believes that if group representation for oppressed social and cultural groups
was to be enacted, it should be viewed as the temporary measure of a society on the road to
equality. He contends that if there were no "sunset clauses" placed on group representation, they
could act to permanently segregate society. In fact, groups might actively pursue a politics of
difference and deny that a more egalitarian society had been achieved in order to retain their
special privileges.253 Furthermore, if the state extends official constitutional recognition or
benefits of public policy based on groups it could, "induce individuals to redefine themselves
to enhance their capacity to receive state support."254

252 Ibid.
253 Kymlicka, Liberalism, Community and Culture, 171.
254 Cairns, Williams, Constitutionalism, Citizenship and Society in Canada, 14.
3. The erosion of democratic dialogue

The most dangerous side effect of the arguments employed by advocates of a politics of difference is that it is premised on the assumption that we cannot have empathy with other citizens from different social and cultural groups.

Elshtain responds to the advocates of a politics of difference and group rights in her work Democracy on Trial. Elshtain argues that if no amount of thought or sympathy, no matter how careful or honest, can transcend the barriers of experience, then we must renounce the possibility of cross-group representation and hence the possibility of democratic dialogue. For Elshtain, the politics of difference leads to identity absolutism, where people are judged by what they are rather than what they say.255 Elshtain's concept of identity absolutism relates to Cairns's description of the "insider/outsider" phenomenon in discussions on aboriginal, feminist, and gay and lesbian affairs in Canada, whereby only a member of the group can describe internal group debates.256 Identity absolutism, or incommensurability destroy public reason, political judgement, and compromise.257 If we literally cannot understand each other then the human dialogue essential for democratic communication is impossible.258

255Elshtain, Democracy on Trial, 40.
256 Cairns, "Ritual, Taboo and Bias in Constitutional Controversies in Canada," 17.
257 Elshtain, Democracy on Trial, 58.
258 Ibid., 75.
In his essay, "Recent Work in Citizenship Theory", Kymlicka classifies Elshtain's arguments as belonging to "liberal virtue theory". Liberal virtue theory maintains that the ultimate political virtue of citizenship is the willingness to engage in public discourse.\(^{259}\)

"Public discourse is not just the willingness to participate in politics, or to make one's views known, rather it includes the willingness to listen seriously to a range of views which, given the diversity of liberal societies, will include ideas the listener is bound to find strange and even obnoxious. The virtue of political discourse also includes the willingness to set forth one's own views intelligibly and candidly as the basis for a politics of persuasion rather than coercion."\(^{260}\)

The concept of "public discourse" applies to the politics of difference debate because a real dialogue should take place in the public sphere where participants use reason, not coercion or manipulation. Liberal citizens should learn to justify their political demands with public reasons that other citizens of different faith and opinion can understand and accept as consistent with their status as free and equal citizens.\(^{261}\) It is not acceptable to permit groups to say, "I am different, you cannot understand me and I demand the following" without a real debate. A real public discourse requires that inhibitions and political correctness recede into the background to enable an honest dialogue.

\(^{259}\) Kymlicka, "Recent Work in Citizenship Theory," 18.

\(^{260}\) Ibid.

\(^{261}\) Ibid., 18.
4. The agenda of the politics of difference

A further limit to the arguments supporting differential citizenship is that they may conceal an agenda that goes beyond their apparent goal of civic inclusion. In fact, advocates of differential citizenship may want to move beyond equality of opportunity, to compete in the economic and cultural marketplace, to equality of result. For example, Jackson, who argues that the negative liberty in section 15 of the Charter is not enough to ensure that individuals who choose to associate in a given group will be accorded dignity by the community at large does not seem to realize that the liberal state cannot legislate dignity.

In seeking the equality of result between individuals and groups, supporters of the politics of difference favour an interventionist state. For example, the politics of difference movement seeks to expand the economic citizenship of individuals, although these ambitions are not prominent in its discourse. Young mentions the marxist interpretation of societal structure at the beginning of her article, "Polity and Group Difference", but declines to enter into the debate. A marxist interpretation would assert that, "economic life is not sufficiently under the control of citizens to affect the unequal status and treatment of groups." 262

Mouffe, however, is more honest in her desire to expand economic citizenship as a way to democratize capital accumulation. In fact, the politics of difference appear to be deeply rooted in critical race and marxist theory. Advocates of differentiated citizenship argue that the

liberal belief in formal equality and public discourse is a rhetorical tool to retain privilege and dominance. An underlying problem with the agenda of advocates of a politics of difference is that their criticisms of liberal democratic citizenship relate to larger issues such as the structure of the capitalist economy and the dynamics of majority preferences in democratic regimes.

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263 Kernerman, Lecture.
Conclusion

Part I of our thesis analyzed the theoretical aspects of individual versus group rights and liberal and communitarian conceptions of citizenship. In Chapter 1 we reviewed the classical liberal conception of citizenship as the promotion of equality and undifferentiated rights as a guarantor or individual welfare. Our examination revealed that liberals reject group rights and radical cultural pluralism out of concern that it could lead to a reduction of individual autonomy and an erosion of cross-group dialogue. In Chapter 2 we examined the communitarian critique of liberal conceptions of citizenship. We analyzed the cultural pluralism of Lustgarten and Van Dyke and reviewed the concepts of positive liberty and recognition as the driving forces behind group rights pressures in liberal democracies. Our observations demonstrated that although the liberal state is not completely neutral with regards to the promotion of a certain conception of the good life, it is more neutral than a communitarian state because it fosters individual autonomy and a structure for democratic dialogue. In Chapter 3 we critically reviewed the attempt by Kymlicka to reconcile cultural membership within the liberal tradition. Although Kymlicka fails to reconcile cultural membership with liberal theory, his work underlines the benefits of cultural membership for individuals. Kymlicka's work suggests that within the global economy, cultural identity is an increasingly important qualitative element in an individual's life, providing him with an enhanced local social structure and with personal self-respect. Our analysis of Kymlicka's attempted reconciliation also revealed that liberal thought is wary of inequalities that could result from group membership by opposition, whereby an individual may be designated as a member of a group in spite of his individual choice. In response to this
situation, liberals support multiculturalism and affirmative action programs to promote groups that face discrimination. However, liberals stop short of accepting group rights or representation.

Although a reconciliation of liberal and communitarian conceptions of citizenship appears unlikely at the theoretical level, in the Canadian context, constitutional provisions have already acted to create elements of individual and collective rights. Our study revealed that there already exists differential citizenship for Quebec and status Indians according to the provisions in the BNA Act and the Charter. As shown in Part II, the contemporary Canadian polity is confronted by differential citizenship paradigms and recognition pressures, which will dominate its future evolution. In Chapter 4 we reviewed the nature of Canadian federalism and examined the fundamental disputes between ROC and Quebec. These disputes originate in misperceptions concerning the nature of federalism and the conflict between Quebec's aspirations to preserve its language and culture and ROC's commitment to the equality of provinces and to the supremacy of individual rights. However, because of the interactive loyalties and differentiations inherent to the Canadian federal regime, federalism may provide the flexibility to accommodate the demands of Québécois, as well as aboriginal nationalists. In Chapter 5 we examined the complex moral, political and economic debate involved in reconciling aboriginal demands for self-government and differential citizenship. We discovered that the cultures of aboriginal and non-aboriginal Canadians are not incommensurable and that the interconnected reality of aboriginal and other non-aboriginal Canadians will inevitably define and restrict the scope of aboriginal self-government and citizenship. Finally in Chapter 6, we analyzed the arguments employed by advocates of group rights for oppressed social and cultural non-territorial groups.
We concluded that the stated goal of their advocates, which is to include excluded groups, could in fact act to re-segregate groups and jeopardize cross-group dialogue.

This thesis was not empirical in nature, but used philosophical and conceptual analysis and logical argument to analyze the degree of difference that Canadian society could support without destroying the sentimental bond of citizenship that develops when citizens feel they belong to the same moral and political community. The assumption made in our introduction was that diversity or differentiation becomes too exaggerated when citizens no longer feel like they are similar and can reach agreement on common objectives. The central and recurrent stumbling block in our search of Canada's minimal common denominator was the contentious supremacy of individual rights over group or collective rights, reflected in the debate concerning the applicability of the Charter. What emerges from our discussion is the conceptual appeal of the Charter as a common Canadian focal point, based on the idea that building a society in which differences of ethnicity, sex, religion, and culture are no longer relevant to people's rights remains a noble project. The Charter can be a common denominator because while it recognizes difference, it also provides a significant degree of commonality between Canadians. However, although the Charter can provide Canadians with a shared object, our discussion also set forth the vital role of communitarian identity for the welfare of many Canadians.

Our examination of communitarian critiques of homogenous liberal conceptions of citizenship and the recognition pressures in Canada have revealed the underlying confusion and the complex web of interests and ideological conflicts underpinning the Canadian polity.
Although we have focused on the dangers of differential citizenship and have assumed that too much difference leads to the lack of common objectives, ironically the real threats to the stability of the Canadian polity appear to be status quo federalism and homogenous liberal citizenship. It is also ironic that Canada is on the verge of fragmentation despite the fact that its citizens have never been more similar in terms of their personal values. The growth in individual, group and national self-consciousness has been described as a result of the post-modern assault on established values, and the lack of credibility of public institutions in the context of a relatively affluent democracy. In Canada, the spectacular growth in group consciousness has also been a result of historic inequities between groups, the power of ideas and the indescribable yearning for positive liberty and recognition.

Any progress in the current stalemate lies in the capacity to overcome the post-modern belief that groups are incommensurable. Our theoretical and practical discussions have shown that the incommensurability thesis undermines the necessary dialogue between minority and dominant groups in society. If we cannot understand each other, why have guaranteed representation? Humans are not incommensurable. We share many basic traits in common. Human beings at all times become aware of needing such things as food, shelter, security, language, sexual satisfaction, and human companionship. We are joined by the knowledge of our mortality, our existential loneliness and our need to love and be loved. Post-modern thought undermines democratic society by weakening the appeal of liberal democratic principles and inferring that different social and cultural groups are incommensurable. Liberal democracy depends upon an appeal to reason which infuses the rule of law. Liberal citizens must therefore
try to engage in an intra-cultural human dialogue.

Therefore, the minimum requirement for all groups in society appears to be a form of integration only so much as to conform to public reasonableness in order to promote a democratic dialogue. Liberal citizens are free to pursue the public policies of their choice but should not seek institutional representation on the grounds that other citizens cannot understand them.

Classical conceptions of liberal democratic citizenship may seem artificial or insufficient since citizens do have deep divisions along cultural, ethnic, class and gender lines. Indeed, the root cause of the politics of difference movement is the fiction of a neutral liberal individual. However, the arguments put forward by liberal virtue theorists concerning the need for a public discourse are compelling and would stimulate a constructive environment for real cross-group dialogue and empathy. Unfortunately, liberal virtue theory is often seen by supporters of differentiated citizenship as a mask for the dominant class. It is understandable that liberal virtue theory may seem like hollow rhetoric to historically oppressed groups, for oppressed groups can argue that discussion has not improved their position. However, a central problem with the politics of difference discourse is that many of the underlying criticisms of liberal citizenship relate to larger issues, including the structure of the capitalist economy and the dynamics of majority preferences in democratic regimes. Moreover, if no amount of empathy can make up for lack of experience between separate groups, the goals of fraternity, cross-group dialogue and the search for the public good are jeopardized. It therefore appears that the arguments in favour
of a politics of difference for oppressed social and cultural groups should be rejected, not on the grounds that these groups do not exist or that they do not speak in "different voices" but because it would undermine the democratic dialogue and test the fragile ties which bond citizens to one another. A further reason to reject a politics of difference or radical cultural pluralism is that it would limit the autonomy of individual members of groups who want to be judged by their actions and words rather than their ethnicity, culture or gender.

It is clear that liberal states are not neutral and liberal democratic societies express the preferences of the majority. Yet these majority preferences may be tempered with important safeguards for individuals, including their freedom to practice the religion, and to associate with the group of their choice. Liberal states have employed a number of public policies to reduce racism, sexism and prejudice and promote groups that face discrimination. Until racism is eliminated, some groups will seek group based-rights. Liberal states can pursue policies that act to include non-territorial groups without granting group rights and representation. For example, affirmative action programs, literacy programs and sensitivity training for public servants. Furthermore, non-territorial groups who are oppressed can achieve substantive equality without promoting the incommensurability of groups and identity absolutism. Public policy and political parties are responsive to interest group pressure and groups that are not "national minorities" must work through the common democratic process available to all citizens. Non-territorial groups can substantially correct liberal state's bias by continuing to challenge majority assumptions.
This is not to say that a homogenous conception of citizenship would be acceptable in Canada as it is in France or the United States. The most visible source of Canada's troubled conception of citizenship, in which also lies a host of original solutions for the future, is federalism. Federalism was originally instituted in Canada largely to accommodate the French speaking majority in Lower Canada and was a compact between French and English speaking Canadians. However, Canada no longer fits this dualistic mould. Multiculturalism and Charter patriotism have replaced Anglo-conformity as the defining feature of ROC while the legitimate claims of status Indians and the Québécois for special consideration are viewed with apprehension by English Canada because of ROC's commitment to the supremacy of individual rights and the equality of provinces. The response to the question we posed at the beginning of this thesis; whether or not the Canadian federal spirit that historically promoted compromise and accommodation can further accept and affirm the deep sociological differences in Canadian society, will depend on whether or not the status Indian and the Québécois on the one hand and provincial political elites, wary of differential citizenship, on the other, can moderate their positions.

For aboriginal communities in Canada, separation is not an option. However, there is a growing consensus among both English and French Canadian elites that aboriginal peoples are deserving of increased powers of self-government. This consensus can be reconciled within the liberal tradition, not because cultural membership is necessary for political autonomy, but because of liberal notions of doctrinal nationalism, international law regarding self-determining peoples and liberal theories of property. Aboriginal communities in Canada are geographically
dispersed, heterogenous in language, culture, values, economic resources and the majority are penetrated by liberal values and require continued fiscal transfers from the federal government. In light of these realities, it is necessary for Indians and non-aboriginals to work together.

A constitutional amendment to entrench an aboriginal order of government as foreseen by the Charlottetown Accord could act as an efficient means to grant aboriginals substantial autonomy and resolve disputes between self-governing aboriginal communities and Canadian governments. However, fundamental human rights protections in the Charter should apply to self-governing aboriginal communities until one or several native charters that adequately protects native human rights are adopted.

On the other hand, if ROC will not accept some form of recognition of Quebec as a distinct society within Canada, the alternatives for Quebecers are clear: they can either seek additional powers within Canadian federalism or vote to secede. Our discussion concerning the desire of Quebec to preserve and promote its distinct society in Chapter 4 revealed that there is a difference between the violation of fundamental human rights and the inability to hang signs in the language of one's choice. If ROC refuses an undefined distinct society clause, the solution may be to promote a defined distinct society clause which clearly sets out which minor individual rights, such as signage, will be subordinated to the goal of preserving the French speaking Québécois collectivity. Language is a fundamental human right but its various manifestations may not be. Similar provisions can be made for self-governing aboriginal communities using section 1 of the Charter as a guide, these distinct societies should be given
minor group right provisions that do not violate fundamental human rights in order to preserve and promote their distinct societies. These minor provisions could be considered reasonable limitations in free and democratic aboriginal and Québécois distinct societies within Canada.

Canadian federalism already accepts that different citizens will have different ways of relating to Canada. Furthermore, by affirming the multicultural heritage of Canada, Canada has also already accepted a first level of diversity. In Taylor's opinion, what we need is the acceptance of "second level deep diversity"; whereby, some citizens will view their citizenship in Canada through their constituent nation be that Mic Mac or Québécois. In Taylor's words, "the world needs other models to be legitimized in order to allow for more humane and less constraining modes of political cohabitation." As Kymlicka writes, "in other parts of the world individuals are incorporated into the state not universally - where each individual stands in the same direct relationship to the state but consociationally - where individuals relate to the state through membership in a cultural community. Under the consociational model the nature of rights vary with membership in a cultural community." However, the consociational model would not be acceptable to ROC because it implies extensive group rights. Although Resnick shares many of Taylor's assumptions, he provides a vision that is more compatible with sentiment in ROC. He argues that, "we need to distinguish nationality from citizenship, and our identity as English speaking Canadians from our membership in a larger political framework.

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265 Kymlicka, Liberalism, Community and Culture, 137.
that includes Québécois and Aboriginal peoples." Canadian federalism can accommodate the recognitions pressures of aboriginal and Québécois national minorities. However for federalism to work in Canada, federal authorities must have the ability to make binding decisions for the public good, whether that means pursuing an aboriginal criminal residing in a self-governing aboriginal community or denying a hydro-electric project in the province of Quebec because of its environmental side effects. Aboriginal communities and the province of Quebec should be recognized as distinct societies in Canada. However, any new constitutional accommodation must also recognize that a precondition of federal citizenship is that all citizens whether members of self-governing aboriginal communities or citizens residing in the province of Quebec must accept decisions of the federal jurisdiction and be able to transcend their personal or national motivations and acknowledge their responsibility to others in the Canadian moral community if they hope to retain the benefits that our community provides all of its citizens.

266 Resnick, Phil, Thinking English Canada (Toronto: Stoddart, 1994), xi.
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