RETHINKING THE PLACE OF GROUP RIGHTS IN LIBERAL THEORY: ABORIGINAL CULTURAL RIGHTS AND THE CANADIAN CONSTITUTION

by

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ABSTRACT

During the period of the 1992 constitutional negotiations and the national referendum debate, in response in part to initiatives to recognize Aboriginal rights, including rights relating to culture, a number of prominent Canadian liberals argued that liberalism requires a denial of the fundamental nature of group claims, opposition to the inclusion of any group rights concepts in the Constitution or, at a minimum, insistence upon the primacy of individual rights and the subordination of group claims in the event of conflict. In this paper, I argue that this interpretation does not have the authority asserted on its behalf as a representation of liberalism and liberal values, and that liberal theory (at least as articulated by John Rawls) not only can but must recognize certain categories of group rights, including rights related to culture.

I argue that Rawls's political conception of the person as a free and equal moral being constitutes the fundamental standard by which arguments for and against extension of his constructivist procedure within the boundaries of a modern constitutional liberal democracy must be measured. I argue that cultures are of intrinsic derivative, as well as instrumental, value to their members and, as such, are critical to their capacity for, and exercise of, their two moral powers, and their ability to have and pursue a determinate conception of the good. I contend that Rawls's constructivist procedure, when applied to the basic structure of an open, culturally heterogeneous modern constitutional democracy, must recognize that 'equal liberty to participate in, produce and enjoy one's own culture' is justified as a basic liberty.

I also examine Rawls's approach to the specification and adjustment of the basic liberties and its implications for the recognition and interpretation of group rights and for the treatment of rights and freedoms in conflict. In particular, I argue that this aspect of Rawls's constructivist analysis places a positive obligation upon governments to entrench the rights and freedoms necessary to effect the basic liberties in a constitution, and to develop legislation and policies concerning the protection and provision of the goods necessary to give effect to those rights and freedoms. It also provides substantive criteria for the recognition and implementation of rights and freedoms, the assessment of rights-claims, and the resolution of conflicts of rights and freedoms that should alleviate many of the concerns surrounding the recognition of group rights.

Finally, I consider two issues that are raised uniquely by group rights-claims and are common to all such claims - the questions of the recognition of communal goods as legitimate objects of rights-claims, and of groups as rights-claimants. I propose a methodology for the treatment of group rights-claims to communal goods which, by displacing the inquiry from one that concentrates primarily on the nature of groups capable of being rights-claimants to one that addresses the nature of the claim, differs in its focus from that advocated by many proponents of group rights.

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TABLE OF CONTENTS

INTRODUCTION

Group Rights and Canadian Constitutional Initiatives

The 1992 constitutional negotiations, the Charlottetown Accord, and the national referendum which followed spurred a public debate in Canada about the recognition of group rights[1] and their relationship to individual rights already entrenched in the Constitution.

Much of the debate during this period reflected what Avigail Eisenberg has described as the "dominant" perspective: it proceeded from the assumption that individual and group rights represent divergent traditions and protect incommensurable values, that conflict between them is inevitable, and that their relationship is one of an elemental struggle for primacy[2]. Although the Charlottetown Accord itself reflected an emerging national recognition of the fundamental nature of group interests and an attempt to balance individual and group rights, it did so by means of an intricate series of trumps which reproduced this assumption of incommensurability and deep conflict[3].

And this made some liberals very nervous.

For example, in a speech given in October 1992 at the 11th Cité libre dinner, Pierre Elliott Trudeau set out his objection to recognition of group rights in the Charlottetown Accord:

> You speak of collective rights ... as if they were of no importance. Collective rights *are* important: what we need is to determine whether they will take precedence over individual rights, that's all. So people have said, 'it's not as upsetting as all that, the judges aren't stupid, they will know what to do with collective rights! Mr. Bourassa has said, word for

word, 'I am the only premier who has dared trample individual rights in the name of collective rights'. I don't have to draw you a picture: it was Bill 178. He took rights away from people who had been told by the courts they had the right to put up signs in small letters in English. Mr. Bourassa passed a law saying 'Inside but not outside'. That's what collective rights are about. And it's the unhappy result of collective rights running into each other. You are quite right that Canada is a collectivity. It's a nation, the Canadian nation, Quebec is a collectivity, it's the Quebec collectivity. And if collective rights must predominate, then certainly the greater will predominate over the smaller.

Does that mean that in Canada, and it was true during a good part of our history, that English Canada could largely ignore the rights of francophones. And if the collective rights of Quebec predominate, then that means [Quebec] can pretty much ignore the Aboriginal peoples, who say that if Quebec separated, they would not necessarily join Quebec. Which Quebec does not appreciate. And that is why the theory of collective rights is a dangerous one. Larger and smaller collectivities confront each other in the heart of one and the same country, and that can lead eventually to civil wars. That's what collective rights are all about. And that's why the French Revolution established liberty as a fundamental right. No-one is subject in his fundamental rights to the state: that is *liberalism* - which says the individual in the exercise of his fundamental rights precedes the state, and all individuals are equal - that's the American Constitution, that's the Universal Declaration of Human Rights. So I'm not against collective rights. My family is a collectivity, we at *Cité libre* are a collectivity with majorities and minorities. It's plain for all to see. But the question is not whether collectivities are legitimate: they exist, I am not denying that. I am asking whether it is better for collective rights of the majority to be able to abolish the collective rights of a minority. If the answer is yes, the minority will say 'But we too form a collectivity, so we will separate from the majority and make our own state'. That's what is happening in Bosnia. Everyone will have their own little state, and minorities will be badly treated, so the minorities will say they are leaving. It's the whole problem of Canada, and the problem I wanted to put an end to in adopting the Charter of Rights and Freedoms, in saying listen, citizens, you are all first of all *equal among yourselves*, and that your rights take priority over those of the state. That doesn't mean that the state is not a collectivity or doesn't have rights: of *course* it has rights, it has the right, according to our Constitution, to make laws. The citizen pays his taxes, and obeys the law. So the collectivity has rights. It's just that according to my philosophy, according to liberal philosophy and the philosophy of the Enlightenment, the collectivity

always has rights delegated to it by the individual. The collectivity is not the *bearer* of rights: it *receives* the rights it exercises from the citizens.[4]

When collective rights take precedence over individual freedoms - as we see in countries where ideology shapes the collectivity, where race, ethnic origin, language and religion shape the collectivity - we see what can happen to the people who claim to live freely in such societies. When each citizen is not equal to all other citizens in the state, we are faced with a dictatorship, which arranges citizens in a hierarchy according to their beliefs.[5]

... [I]t is the *greater* evil to trap yourself irremediably in a Constitution which will destroy the Canada we know, a Canada of equality for all without distinction. Here [in the Accord], they are weakening the Charter of Rights.[6]

And I understand even less, why people like you, who want peace and quiet for yourselves and your descendants, why you are ready to live in a society where collective rights take precedence over individual rights, in a society where citizens are arranged in a hierarchy and where the Charter of Rights does not make everybody equal.[7]

Deborah Coyne and Robert Howse took a similar position[8]:

Collective rights are a euphemism for the right of one group over other groups or individuals. Historically, they have been an ideological weapon of the extreme left and the extreme right - aimed at seizing the moral high ground of rights talk and neutralizing the liberal concern with the dignity and worth of the individual. In our view, it is the individual that comes first. After all we have seen in this century, right up to Sarajevo, Osijek and Vukovar, is it not reasonable to insist that any durable model for ethnic accommodation and justice must rest on an unshakeable, *prior* affirmation of the dignity and freedom of the individual?[9]

The [Canada] clause is a genuine and disturbing reflection of the 'new tribalism' - ethnicity counts for more than other aspects of human identity, such as gender, that may create at least as much vulnerability and be justly deserving of at least as much government attention.[10]

Although the legal opinion released to the press by Lorraine Eisenstat Weinrib and others during the constitutional referendum period took a less hysterical approach to the

interaction of the individual and group rights provisions in the Charlottetown Accord, in my view, its analysis and conclusions were ultimately driven by the "dominant" perspective described by Eisenberg[11].

These excerpts also indicate that the assumption that the fundamental values and principles which underlie group rights are incommensurable with those that ground individual rights was transformed into a perception and a representation that group rights are innately 'illiberal', and therefore that any conflict between group and individual rights that is resolved in favour of, or accommodates, group rights represents an incursion upon the integrity of liberal values and of liberalism itself. The response was to assert that liberalism itself requires a denial of the fundamental nature of group claims altogether[12], opposition to the inclusion of any group rights concepts in the Constitution[13] or, at a minimum, insistence upon the primacy of individual rights and the subordination of group claims in the event of conflict.

The problem is that this particular representation of liberalism, with its refusal to recognize the fundamental nature of group claims and its insistence upon the uniform application of individual rights across cultural boundaries, fails to respect the different needs, values, and traditions of particular communities and their members and is ultimately assimilative, serving majoritarian interests. On this point, in the context of ethnic groups, Vernon Van Dyke has observed that

> [t]o stress individualism in a democracy and to ignore or neglect the claims of groups is to fight the battle of any ethnic community that happens to be in a majority. Those in a majority community can insist on individualism and the nondiscriminatory treatment of individuals, and can decry any differentiation based on race, language or religion, knowing that this formula assures their dominance.[14]

My purposes in this paper are to show that this interpretation does not have the authority asserted on its behalf as a representation of liberalism and liberal values, and that liberal theory (at least in its Rawlsian incarnation) not only can but must recognize certain categories of group rights. I also intend to challenge the conceptualization of group and individual rights as representing incommensurable and conflicting values. I do not deny that conflict exists among rights and freedoms (although I do argue that conflict is not raised uniquely by group rights). However, I will argue that the same fundamental values and principles (or "deep assumptions" in Jeremy Waldron's terms[15]) may be seen to underlie both group rights and individual rights, and that conflict is resolvable by reference to those values and principles. In this context, I have relied upon, and work from, John Rawls's interpretation of liberal theory in (and since) *A Theory of Justice*[16], and have attempted to build upon Will Kymlicka's application of Rawls's analysis to questions of cultural integrity and membership in *Liberalism, Community and Culture*[17].

The paper addresses rights relating to culture, as a particular expression of group rights. Although much of the discussion is relevant to cultures in modern democratic societies in general, I should emphasize that the focus and boundaries of the argument in the paper have been defined by the debate surrounding Aboriginal cultural rights. In addition, where appropriate, I pursue implications of the discussion for Aboriginal cultures in a Canadian context in particular.[18]

For the most part, I have limited the scope of the paper to issues raised, or alleged to be raised, only by group rights. In other words, I do not address issues and concerns in rights analysis that are raised by individual rights (and which may be

similarly raised by group rights). My assumption is that if rights of a collective nature do not raise a unique problem or concern, then their exclusion from recognition cannot be justified on that basis.

Finally, I do not attempt to respond to criticisms of Rawls's theory, but only to explore the implications of his methodology for the recognition of group rights and the treatment of rights and freedoms in conflict. In other words, for the purposes of this paper, I am content to take Rawls's argument as a given and to explore its boundaries.

In chapter 1, I will argue that Rawls's political conception of the person as a free and equal moral being constitutes the fundamental standard by which arguments for and against extension of his constructivist procedure within the boundaries of a modern constitutional liberal democracy must be measured. I will argue that cultures are of intrinsic derivative, as well as instrumental, value to their members and, as such, are critical to their capacity for, and exercise of, their two moral powers, and their ability to have and pursue a determinate conception of the good. I will contend that Rawls's constructivist procedure, when applied to the basic structure of an open, culturally heterogeneous modern constitutional democracy, must recognize that 'equal liberty to participate in, produce and enjoy one's own culture' is justified as a basic liberty. Finally, I will argue that refusal to recognize 'equal liberty to participate in, produce and enjoy one's own culture' as a basic liberty privileges the members of majority cultures arbitrarily from a moral perspective, and denies to persons who are members of minority cultures recognition of their status as free and equal moral beings.

In chapter 2, I will examine Rawls's approach to the specification and adjustment of the basic liberties in the four-stage process. In particular, I will describe how Rawls's constructivist procedure also requires that the basic liberties be specified (and adjusted, if necessary) in accordance with the concept of significance in the following sequence: At the constitutional stage, delegates to the constitutional convention must specify the basic liberties in the constitution in the form of rights or freedoms, or a combination of rights and freedoms. At the legislative stage, legislators then must develop legislation and policies concerning the protection and provision of the goods necessary to give effect to the rights and freedoms which specify the basic liberties. The judicial stage involves the assessment and enforcement of claims that protection or provision of a particular good in a particular form is necessary to give effect to a right or freedom which specifies a basic liberty.

In chapter 2, I also consider general methodological questions relating to the justification of rights-claims and the resolution of conflicts among rights and freedoms. Let me clarify: the justification of a rights-claim involves the process of assessing a claim that a particular good should be the object of a right or freedom, or in other words, that protection or provision of a particular good is necessary to give effect to a right or freedom. Conflicts most commonly arise when various goods claimed to be necessary to give effect to a single right or freedom conflict or their interaction diminishes the effectiveness of that right or freedom, or when the goods necessary to give effect to different rights and freedoms conflict.

Unfortunately, efforts to assess the justification of rights-claims and to resolve conflicts of rights and freedoms have been plagued by a lack of substantive criteria that would enable the development of a coherent scheme of rights and freedoms. This has resulted in the prominence of the "argument from anarchy"[19] which has tended to exclude from protection all but the most traditionally recognized rights and freedoms. This problem is compounded in the case of group rights by the perception, described above, that the fundamental values and principles which underlie group and individual rights are incommensurable and that group rights are illiberal. It is in the context of these concerns that I will examine Rawls's approach to the specification and adjustment of the basic liberties and its implications for the recognition and interpretation of group rights and for the treatment of rights and freedoms in conflict.

In chapter 3, I will consider two issues that are raised uniquely by group rights-claims and are common to all such claims - the questions of the recognition of communal goods as legitimate objects of rights-claims, and of groups as rights-claimants.

I assume in the paper that the constitutional rights and freedoms which implement Rawls's basic liberties must purport to secure goods whose moral desirability can be expressed in terms which refer to benefits to, for, or from the point of view of individuals. However, it does not follow that these goods must be capable of enjoyment or enforcement by separate individuals, but rather only that their moral desirability can be expressed in terms which ultimately refer to benefits to, for or from the point of view of members of the group, taken together. I will argue that communal goods may be legitimate objects of rights-claims.

In chapter 3, I will also propose a methodology for the treatment of group rights-claims to communal goods that differs somewhat in its focus from that advocated by many proponents of group rights. In particular, it displaces the inquiry from one that concentrates primarily on the nature of groups capable of being rights-claimants to one that addresses, first, whether a claim can be characterized as communal (in that the good claimed can only be claimed by a group and not by individuals because it is not individualizable); second, whether the good claimed is one whose moral desirability can be expressed in terms which ultimately refer to benefits to, for or from the point of view of members of the group, taken together; and finally, whether protection or provision of the good which is the object of the rights-claim is necessary to give effect to the right or freedom which is asserted as the justifying basis or ground of the claim, judged by reference to Rawls's process of specification and adjustment and the concept of significance.

CHAPTER 1 KYMLICKA, RAWLS, AND CULTURE

Some liberal theorists are attempting to define a relationship of individual to community that reflects the place of and need for community in people's lives and its impact on individual goals, identity and agency. This redefinition of the relationship of individual to community necessarily requires a reassessment of the relationship of individual to collective rights.

Many liberals who reject an atomistic conception of liberalism do think a balancing of collective and individual rights is possible. For example, Will Kymlicka has argued persuasively that liberal theory can accommodate certain rights claimed by cultural minorities under particular historical circumstances. He contends that liberalism can accommodate collective rights concepts and that, in some circumstances, even in liberal theory, collective rights must limit individual rights.

A. Kymlicka and culture

Kymlicka takes the position that cultural membership is of fundamental importance for individuals because their cultural structure provides them with a "context of choice" essential to meaningful individual autonomy and their pursuit of a good life. The value of a culture and the justification for recognizing certain rights necessary to support a culture are rooted in the significance of cultural membership to individuals.

Kymlicka sees cultural membership, viewed as a context of choice, as a social primary good within John Rawls's theory of justice[1]. For this reason, and because he is also concerned that his argument not be used to protect a "particular preferred vision of what sort of *character* the community should have"[2] which could limit rather than promote the ability of members to judge the value of their life plans, he is careful to distinguish his endorsement of cultural structure as a "context of choice"[3] from the "character of a cultural community"[4]. For example, he states that

> cultural community enters our self-understandings by providing a context of choice within which to choose and pursue our conception of the good life. This understanding of cultural membership doesn't involve any necessary connection with the shared ends which characterize the culture at any given moment. The primary good being recognized is the cultural community as a context of choice, not the character of the community or its traditional ways of life, which people are free to endorse or reject.[5]

Cultural community as a context of choice is a social primary good "in its capacity of providing meaningful options for us, and aiding our ability to judge for ourselves the value of our life-plans"[6].

Kymlicka defines cultural community in this sense as "the existence of a viable community of individuals with a shared heritage (language, history, etc.)"[7].

Having shown that cultural community as a context of choice is vital to the ability of individual members of cultures to make meaningful choices about their goals and life-plans, and, therefore that liberal theory should accord cultural membership an important role, Kymlicka then argues that some minorities in liberal societies, notably Aboriginal communities, face inequalities in the security of their context of choice, and that these inequalities are a function of circumstances, not choices.[8]

According to Kymlicka, certain collective rights for Aboriginal people are necessary to correct the advantage that non-Aboriginal people have before anyone (notionally) makes their choices[9], and to ensure that the cultural structures of Aboriginal communities are as secure as those of non-Aboriginal communities[10]. For example, the preservation of a minority group's cultural existence might require recognition of its rights to limit the mobility and voting rights of members of a majority culture and to restrict property rights relating to land occupied by members of the group. It might also, in limited circumstances, require restrictions on the rights and liberties of members of the community.

Kymlicka's approach has not escaped criticism. Much of it is related in one way or another to his characterization of culture as a context of choice.

Kymlicka's characterization of culture as an instrumental good has been identified as one of the main vulnerabilities of his argument. Even if culture is capable of characterization as a social primary good, a purely instrumental or functional defence of culture makes it difficult to argue that it is not, for the same reasons, entirely fungible.[11]

Kymlicka does address this criticism in response to Bryan Schwartz's apparent assumption that the importance of cultural structure does not entail membership in any particular community[12]. But, in doing so, he seems to concede that members of cultures are committed to the ends of those cultures. As a result, he appears to undermine his own characterization of culture as a context of choice.

Furthermore, at this point, in arguing for the preservation of particular cultures because individuals' identities and agency are constituted by their culture, Kymlicka

appears to be pursuing to some degree a communitarian line of thinking which he had earlier rejected.

> People *are* bound, in an important way, to their own cultural community. We can't just transplant people from one culture to another, even if we provide the opportunity to learn the other language and culture. Someone's upbringing isn't something that can just be erased; it is, and will remain, a constitutive part of who that person is. Cultural membership affects our very sense of personal identity and capacity.
>
> The connection between personal identity and cultural membership is suggested by a number of considerations. Sociologists of language note that our language is not just a neutral medium for identifying the content of certain activities, but 'itself *is* content, a reference for loyalties and animosities', a 'marker of the societal goals, the large-scale value-laden arenas of interaction that typify every speech community'... . Likewise cultural heritage, the sense of belonging to a cultural structure and history, is often cited as a source of emotional security and personal strength. It may affect our very sense of agency.[13]
>
> This suggests that cultural structure is crucial not just to the pursuit of our chosen ends, but also to the very sense that we are capable of pursuing them efficiently.[14]
>
> In these and other ways, cultural membership seems crucial to personal agency and development: when the individual is stripped of her cultural heritage, her development becomes stunted... . And so respecting people's own cultural membership and facilitating their transition to another culture are not equally legitimate options. ...
>
> The constitutive nature of our cultural identity may be the result of contingent facts about existing forms of social life, rather than universal features of human thought and development. But whether universal or not, this phenomenon exists in our world, and is manifested in both the benefits people draw from their cultural membership, and the harms of enforced assimilation. ... So it seems that we should interpret the primary good of cultural membership as referring to the individual's own cultural community.[15]

In other words, Kymlicka seems to be arguing that culture is a social primary good on the basis of its instrumental[16] value to individuals, and that its value is

independent of specific cultural ends and, simultaneously, that particular cultures are of value to their members because the totality of the cultural ends which characterize the culture constitute their identity and are crucial to their capacity for agency[17]. Yet, once Kymlicka concedes the latter point, it is difficult to see how he can maintain the argument that protection of a culture does not involve protection of at least some cultural ends, even if only indirectly. It is also difficult to see how he can portray culture as being solely of instrumental value.[18]

According to Donald Lenihan, this tension between Kymlicka's objectives is fatal to the success of his enterprise.

> ... Kymlicka is labouring to fit what are, in the end, some genuinely communitarian intuitions into what is decidedly a Kantian mold. On the one hand, he wants to see the self as historically situated, genuinely able to identify with the world in which it finds itself. But, on the other, he wants to liberate it from the parochial and often repressive ties of the cultural world. His liberal commitment to autonomy convinces him that we must be free to stand apart so we may judge rationally and critically for ourselves what is good and what is not. But, as Kymlicka himself so often notes, by what standards will we judge if not those derived from our culture? And where will we find the values which shape our moral existence if not in the midst of those simple worldly relationships which brought us into being? From what other vantage point or position could we possibly survey the moral world other than our own surroundings?
>
> If Kymlicka's argument fails here - and I think it is clear that it does - it is because the philosophical resources of the moral theories he is working with are not adequate to the task he sets. Contemporary liberal theory, insofar as it can be used to protect cultural membership at all, conceives of it as an instrumental good whose value lies in the range of opportunities it makes available to particular individuals. In short, it has moral significance only insofar as it affects some individual's well-being[19]. But the moral category of individual welfare, it turns out, is very shaky ground on which to rest an argument for the protection of cultural membership. An adequate defense can be mounted, if at all, only by

> admitting that some forms of community - in particular, cultural membership - are intrinsic goods.[20]

Although Lenihan may be correct in identifying Kymlicka's dilemma, in my view, he is too quick to state that liberal theory is inadequate to the task Kymlicka sets. This paper will involve in part an exploration of the criticisms of Kymlicka's work and of the potential of liberal theory to deal with them and to build upon Kymlicka's insights.

In particular, in the following sections of this chapter, I will argue that Rawls's political conception of the person as a free and equal moral being constitutes the fundamental standard, or "deep assumption" in Waldron's terms, by which arguments for and against extension of Rawls's constructivist procedure within the boundaries of a modern constitutional democracy must be measured. I will argue that cultures are of intrinsic derivative, as well as instrumental, value to their members and, as such, are critical to their capacity for, and exercise of, their two moral powers, and their ability to have and pursue a determinate conception of the good. I will characterize the social primary good that protects cultural interests differently from Kymlicka, in a way that, I believe, may circumvent the dilemma in which his analysis placed him. Specifically, it is my contention that Rawls's constructivist procedure, when applied to the basic structure of an open, culturally heterogeneous modern constitutional democracy, must recognize that 'equal liberty to participate in, produce and enjoy one's own culture' is justified as a basic liberty. Finally, I will argue that refusal to recognize 'equal liberty to participate in, produce and enjoy one's own culture' as a basic liberty privileges the members of majority cultures arbitrarily from a moral perspective, and denies to persons

who are members of minority cultures recognition of their status as free and equal moral beings.

B. Rawls's political conception of the person

1. The sequence of Rawls's constructivist procedure

Rawls's procedure is constructivist[21], or nonfoundationalist. It does not begin with the assumption that there are first principles in moral theory. Nor does it claim universal authority for the principles of justice derived from its application to a particular subject.[22]

The subject to which Rawls applies his constructivist procedure in *Political Liberalism*, and that with which this paper is most concerned, is the basic structure of a constitutional democracy under modern conditions. Given the diversity of what he describes as "reasonable comprehensive doctrines"[23] in a modern constitutional democracy, Rawls limits the scope of his theory to a public conception of justice which is capable of being the subject of an overlapping consensus[24].

The principles of justice are the result of a process of construction with a specific sequence. It is important to distinguish three points of view in this sequence: "that of ourselves - of you and me who are elaborating justice as fairness and examining it as a political conception of justice"[25]; the political conception of citizens in a well-ordered society as free and equal moral beings which we (you and I) draw from the fundamental values implicit in our public culture; and the parties in the original position who represent the rational aspects of the political conception of citizens.

The sequence of construction is the following: "You and I" are faced with the task of settling the principles of justice from a structural perspective in a modern democratic society. The principles of justice must embody "the fair terms of social cooperation" in a modern democracy[26].

a) As a first step, we (you and I) draw the fundamental organizing idea "of society as a fair system of cooperation over time, from one generation to the next"[27], from fundamental ideals and values shared and implicit in the public culture of a democratic society[28]. This idea is developed in conjunction with two companion ideas, also implicit in our public culture: Rawls's political conception of the person and the idea of a well-ordered society. It is important to note that the ideas derived from our public culture are not merely empirical. They must conform "to our considered judgments about what kind of persons we would like to be and [produce] principles of justice which conform to our considered judgments about justice."[29]

According to Rawls's political conception of the person, citizens in a fair system of cooperation are, and recognize themselves to be, free and equal moral persons[30].

Rawls defines a 'well-ordered society' in a modern democracy as one that is effectively regulated by a public political conception of justice[31]. This means that (a) "it is a society in which everyone accepts, and knows that everyone else accepts, the very same principles of justice"[32]; (b) "its basic structure - that is, its main political and social institutions and how they fit together as one system of cooperation - is publicly known, and with good reason believed, to satisfy these principles"[33]; and (c) "its citizens have a normally effective sense of justice and so they generally comply with society's basic

institutions, which they regard as just. In such a society the publicly recognized conception of justice establishes a shared point of view from which citizens' claims on society can be adjudicated"[34].

These ideas can be united under the 'reasonable' and the 'rational' terms of social cooperation.[35]

b) At the second step, the 'reasonable' and the 'rational' are then represented in Rawls's original position. Rawls describes the original position as a "mediating conception", a "device of representation" that mediates between the idea of society as a fair system of cooperation, Rawls's political conception of the person and the idea of society as well-ordered on the one hand, and the definition of the principles of justice on the other.[36]

The 'reasonable' (including such features as the capacity to have a sense of justice and the freedom and equality of each) is used in the argument for the various constraints built into the original position. These include the formal constraints on the concept of right that any conception of justice must satisfy (such as the conditions of generality[37], universality[38], publicity[39], a principle of ordering of conflicting claims[40], and the condition of finality[41]), the veil of ignorance[42], the symmetry of the parties to the original position which follows from the description of the citizens as equal moral beings[43], and the fact that the parties are choosing principles that are to regulate the basic structure of society[44].

The "rational" (encompassing primarily the freedom of citizens in the well-ordered society and their capacity to form, revise, and pursue a conception of the good)

is represented in the original position in that the parties seek to secure the social primary goods necessary to realize the powers of moral personality, and adopt the maximin rule[45] as the suitable principle of rational choice under conditions of uncertainty.

c) Next, the parties to the original position select the principles of justice. Rawls describes the two principles of justice that would be chosen in the original position as follows:

> Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all [the Principle of Equal Liberty]
>
> Social and economic inequalities are to satisfy two conditions: First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society [the Difference Principle][46]

The descriptions of the well-ordered society and the political conception of the person, the original position, and the principles of justice must all coincide with "our considered judgments upon due reflection". Rawls describes this process as one of 'reflective equilibrium'[47].

d) The principles of justice selected in the original position govern each successive stage of decisionmaking, that is, the constitutional convention, legislative assembly, and judicial review stages.

The particular ordering of Rawls's constructivist procedure is important. For example, some of Rawls's critics have sought Rawls's conception of the person or moral subject in his description of the parties in the original position. However, this approach overlooks the role of Rawls's political conception of the person, which precedes the

original position in the constructivist process and which founds it as a device of representation from which the principles of justice emanate. It is in the description of the political conception of the person, rather than that of parties to the original position, that Rawls's moral subject can be found.[48]

2. A description of Rawls's political conception of the person

According to Rawls, the citizens in a well-ordered society are, and recognize themselves to be free and equal moral persons.

Citizens have two powers of moral personality, a capacity for a sense of justice and a capacity for a conception of the good.

> A sense of justice is the capacity to understand, to apply, and to act from the public conception of justice which characterizes the fair terms of social cooperation. Given the nature of the political conception as specifying a public basis of justification, a sense of justice also expresses a willingness, if not the desire, to act in relation to others on terms that they also can publicly endorse. ... The capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue a conception of one's rational advantage or good.
>
> In addition to having these two moral powers, persons also have at any given time a determinate conception of the good that they try to achieve. Such a conception must not be understood narrowly but rather as including a conception of what is valuable in human life. Thus, a conception of the good normally consists of a more or less determinate scheme of final ends, that is, ends we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations. These attachments and loyalties give rise to devotions and affections, and so the flourishing of the persons and associations who are the objects of these sentiments is also a part of our conception of the good. We also connect with such a conception a view of our relation to the world - religious, philosophical, and moral - by reference to which the value and significance of our ends and attachments are understood. Finally, persons' conceptions of the good are not fixed but form and

develop as they mature, and may change more or less radically over the course of life.[49]

Persons are regarded as free and equal by virtue of possessing to a requisite minimum degree the two moral powers (capacities for a sense of justice and for a conception of the good).[50] The two moral powers are "the necessary and sufficient condition for being counted a full and equal member of society in questions of political justice."[51]

Citizens are viewed as free in three respects:

> [C]itizens are free in that they conceive of themselves and of one another as having the moral power to have a conception of the good. This is not to say that, as part of their political conception, they view themselves as inevitably tied to the pursuit of a particular conception of the good that they affirm at any given time. Rather, as citizens, they are seen as capable of revising and changing this conception on reasonable and rational grounds, and they may do so if they so desire. As free persons, citizens claim the right to view their persons as independent from and not identified with any particular such conception with its scheme of final ends. Given their moral power to form, revise, and rationally pursue a conception of the good, their public identity [or institutional identity or their identity in basic law] as free persons is not affected by changes over time in their determinate conception of it.[52]

Citizens also view themselves as free in that they regard themselves as self-authenticating sources of valid claims, as distinct from situations where "their claims have no weight except insofar as they can be derived from the duties and obligations owed to society, or from their ascribed roles in a social hierarchy justified by religious or aristocratic values".[53]

> That is, they regard themselves as being entitled to make claims on their institutions so as to advance their conceptions of the good (provided these conceptions fall within the range permitted by the public conception of justice).[54]

> The third respect in which citizens are viewed as free is that they are viewed as capable of taking responsibility for their ends and this affects how their various claims are assessed. ... [G]iven just background institutions and given for each person a fair index of primary goods (as required by the principles of justice), citizens are thought to be capable of adjusting their aims and aspirations in the light of what they can reasonably expect to provide for. Moreover, they are viewed as capable of restricting their claims in matters of justice to the kinds of things the principles of justice allow.[55]

Citizens are equal in that "they each have, and view themselves as having, a right to equal respect and consideration in determining the principles by which the basic arrangements of their society are to be regulated".[56] Baynes notes that "[t]his notion of the equality of citizens in determining the principles of justice is more fundamental than (and the basis for) the ideals of equality that are institutionalized in the basic structure of society ... . It is based on their common status as moral beings."[57]

Rawls has increasingly relied in his recent work upon this political conception of the person to specify and justify the social primary goods, including the basic liberties contained in the first principle of justice. Moreover, it is invoked at each of the constitutional convention, legislature and judicial review stages. As Rawls notes, it also serves as the "criterion of significance" in light of which potentially conflicting basic liberties can be weighed and drawn into an adequate and coherent scheme.[58]

3. The relationship of Rawls's political conception of the person to the social primary goods

Rawls invokes the political conception of the person in order to specify and justify his list of social primary goods.

The list of social primary goods provides a criterion which, given the veil of ignorance[59], allows the parties in the original position to evaluate the available principles of justice by estimating how well they secure the social primary goods essential to realize the higher-order interests corresponding to the two moral powers and determinate conceptions of the good of the persons for whom they act as trustees[60].

> The main idea is that primary goods are singled out by asking which things are generally necessary as social conditions and all-purpose means to enable persons to pursue their determinate conceptions of the good and to develop and exercise their two moral powers.[61]

According to Rawls, the list of social primary goods "provides, given the fact of reasonable pluralism, the best available standard of justification of competing claims that is mutually acceptable to citizens generally."[62] The social primary goods and their justification by reference to Rawls's political conception of the person provide the basis, in Rawls's recent theory, for an overlapping consensus.[63]

The five kinds of social primary goods (which Rawls notes may be added to should it prove necessary)[64] are:

a. the basic liberties covered by the first principle of justice (which include liberty of conscience and freedom of thought, political liberty including the right to vote and be eligible for public office, freedom of the person along with the right to hold personal property[65] and freedom from arbitrary arrest and seizure, freedom of speech and association[66]): "these liberties are the background institutional conditions necessary for the development and the full and informed exercise of the two moral powers ...; these liberties are also indispensable for the protection

of a wide range of determinate conceptions of the good (within the limits of justice)".

b. freedom of movement and free choice of occupation against a background of diverse opportunities: "these opportunities allow the pursuit of diverse final ends and give effect to a decision to revise and change them, if we so desire".

c. powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure: "these give scope to various self-governing and social capacities of the self".

d. income and wealth: "income and wealth are needed to achieve directly or indirectly a wide range of ends, whatever they happen to be".

e. the social bases of self-respect: "these bases are those aspects of basic institutions normally essential if citizens are to have a lively sense of their own worth as persons and to be able to develop and exercise their moral powers and to advance their aims and ends with self-confidence".[67]

The list of social primary goods "may be made more specific at the constitutional and legislative stages, and interpreted even more specifically at the judicial stage"[68].

The argument in this paper will focus only upon the basic liberties covered by the first principle of justice.[69]

4. The subject of Rawls's constructivist procedure

Rawls's principles of justice are the outcome of a constructivist procedure applied to the basic structure of a constitutional democracy under modern conditions. By a

society's 'basic structure', Rawls means its "main political, social and economic institutions, and how they fit together into one unified system of social cooperation from one generation to the next"[70].

This concept is significant for a number of interlocking reasons. First, Rawls's political philosophy does not attempt, in Kai Nielsen's words, "to erect an ahistorical Archimedean point from which to assess social institutions generally and across cultures"[71]. Rawls is concerned only with principles of justice which are consistent with, and a reflection of, the basic conceptions of *our* political culture, that is, a constitutional democracy under modern conditions. Moreover, given the diversity of "reasonable comprehensive doctrines" in a modern constitutional democracy, Rawls limits the scope of his theory to a public conception of justice which is capable of being the subject of an overlapping consensus. He appeals to our firmly held convictions as "provisional fixed points that ... any reasonable conception [of justice] must account for"[72]. For these, we must look to our public political culture, including its main institutions and the historical traditions of their interpretation, "as the shared fund of implicitly recognized basic ideas and principles"[73].

According to Rawls, we must "collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organize the basic ideas and principles implicit in these convictions into a coherent political conception of justice"[74]. Rawls's hope is to

> formulate these ideas and principles clearly enough to be combined into a political conception of justice congenial to our most firmly held convictions. We express this by saying that a political conception of justice, to be acceptable, must accord with our considered convictions, at

> all levels of generality, on due reflection, or in what I have called ... "reflective equilibrium".[75]

This leads to a second point. A conception of justice will only achieve a basis for political agreement "if it provides a reasonable way of shaping into one coherent view the deeper bases of agreement embedded in the public political culture of a constitutional regime and acceptable to its most firmly held considered convictions"[76]. Any one of our considered judgments may be challenged in an attempt to gather them into a coherent whole.

The conception of justice which results assists us to find a public basis for political agreement in circumstances of disagreement. And this raises the issue of the nature of justification in Rawls's theory.

> [J]ustification is not regarded simply as valid argument from listed premises, even should these premises be true. Rather, justification is addressed to others who disagree with us. Therefore it must always proceed from some consensus, from premises that we and others publicly recognize as true; or better, publicly recognize as acceptable to us for the purpose of establishing a working agreement on the fundamental questions of political justice. ...
>
> Rawls thinks that by so proceeding, by so conceiving of justification and by so appealing to considered judgements in wide reflective equilibrium, he can vindicate his conception of justice as fairness over its rivals. An important reason for his confidence is his belief "that the basic ideas of justice as fairness ... [are] implicit or latent in the public culture of a democratic society." Justice as fairness, he believes, generalizes and makes explicit and more precise what we already implicitly believe in such societies. If that were not so, it would lack its power to justify. It would just be another philosopher's construction.[77]

Rawls's political liberalism does not claim to compete with the various traditional philosophies but "is constructed for a political theory, utilizable by people in constitutional democracies deliberating over fundamental issues of social justice and

social ordering"[78]. For Rawls, "the justification of a conception of justice is a practical social task rather than an epistemological or metaphysical problem"[79]. This social task involves identifying a reasonable public basis of political agreement[80]. In his recent work since *A Theory of Justice*, Rawls has explicitly avoided reliance upon "claims to universal truth, or claims about the essential nature and identity of persons"[81]. His reasoning is that, in a modern constitutional democracy, no consensus on metaphysical doctrines is possible. As Nielsen notes,

> [w]hatever may have been true for a person doing political philosophy at the height of the Middle Ages, where a certain reflective consensus could reasonably be assumed on metaphysical doctrines, no such consensus obtains, or is likely to obtain, in our secularized liberal societies. A public conception of justice, for a political philosophy must, if it is to have any hope at all of being publicly accepted, be a conception which is *philosophically neutral*. That is to say, applying the principle of toleration to philosophy itself, it must make no epistemological, metaphysical or meta-ethical claims or at least not make any such claims if they are the least bit controversial in contemporary democracies. If a political philosophy does not observe these constraints, it will have no chance of being an account of justice gaining any kind of extensive consensus. It is vital, Rawls argues, that justice as fairness or any political conception of justice that aspires to be more than idle utopian prattle, be *philosophically neutral*.[82]

According to Rawls, the moral concepts upon which he relies in *Political Liberalism*, including his political conception of the person, are valid for his purposes not because they are 'true', but because they are shared, and implicit, in the public culture of a modern democratic political tradition. Their validity lies in their moral objectivity, or 'reasonableness', rather than their moral truth.[83] However if, as Rawls states, "moral objectivity is to be understood in terms of a suitably constructed social point of view that all can accept"[84], then it is critical to the moral legitimacy and stability of the principles

of justice in *our* society[85] that they be the outcome of a constructivist process in which all are represented or, in other words, from which no category of persons, or conceptions of the good, has been excluded.

On this point, it is important to note that aspects of Rawls's description of the principles of justice are limited by certain restrictions that he places upon the scope of his analysis for purposes of simplicity. In *Political Liberalism*, he specifically acknowledges that his constructivist procedure focuses on only a few long-standing classical problems within liberal-democratic societies.

Rawls also uses certain simplifying assumptions to

> achieve a clear and uncluttered view of what, for us, is the fundamental question of political justice: namely, what is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal, and as normal and fully cooperating members of society over a complete life?[86]

An example, particularly relevant to the topic of this paper, is Rawls's identification of the subject of the constructivist procedure in *Political Liberalism* as the basic structure of a *closed and self-contained modern democratic society*.[87]

For the purposes of this argument, Rawls recognizes only those forms of social diversity that were historically generated from within liberal-democratic societies, such as competing religious, philosophical, and moral doctrines which have developed since the Reformation. He makes no apologies for doing so. Nor does he consider this a limitation of his analysis. Rather, he specifically contemplates that the conceptions and principles arrived at by the application of his constructivist procedure to classical problems and a simplified description of a modern democratic society will provide

guidelines to assist in applying the procedure to new problems and circumstances[88], parties and subjects.

For example, recently, in "The Law of Peoples"[89], Rawls has used his constructivist procedure to develop a conception of justice for a new subject, the law and practices of the society of political peoples (as opposed to the basic structure of a modern constitutional democracy considered in *Political Liberalism*). The parties to the original position are, therefore, representatives of peoples, including non-liberal or hierarchical societies (as opposed to the representatives of persons considered in *Political Liberalism*). The political conceptions that are relevant to the constructivist procedure, such as the description of a well-ordered society in such circumstances, are also different from those drawn from the public political culture of modern democratic societies.

My objective in this paper is not nearly as ambitious. I am simply concerned with applying Rawls's constructivist procedure to the basic structure of a culturally heterogeneous modern democratic society. In other words, the forms of social diversity that the procedure must accommodate are those generated in an open society by virtue of the contact of different cultural and ethnic communities, as well as those that were historically generated from within liberal-democratic societies. I will also argue that Rawls's treatment of the classical aspects of heterogeneity encountered in a closed, traditional liberal society (specifically, the diverse religious, philosophical and moral doctrines) provides a pattern of analysis for extension of the constructivist procedure to those forms of heterogeneity which arise in an open modern democratic society. So the subject of the constructivist procedure is the same, that is, the basic structure of a

modern democratic society; but the society is open instead of closed. I will assume, for the purposes of the argument, that Rawls's political conception of the person and his idea of a well-ordered society remain as described in *Political Liberalism.*

Rawls argues for the list of social primary goods by reference to his political conception of the person. I will argue that the redefinition of 'society' as open, and the notional inclusion of representatives of the members of different cultural communities in the original position, must have the result of expanding Rawls's list of social primary goods to include 'equal liberty to participate in, produce and enjoy one's own culture' as a basic liberty.

The role of Rawls's political conception of the person as a free and equal moral being is particularly important, therefore, because it underpins the constructivist analysis.[90] It constitutes the fundamental standard by which arguments for and against extension of Rawls's constructivist procedure within the boundaries of a modern constitutional democracy must be measured.

C. Problems identified with Kymlicka's characterization of culture as a social primary good

Peter Benson's criticism of the effectiveness of Kymlicka's categorial distinction between culture as a context of choice and the character of a culture goes to the core of Kymlicka's objective and analysis:

> Kymlicka never shows that a context of choice is anything other than the totality of forms of life, roles, and valuable options it offers: it is conceived as providing a *range* of options, which is never more than the

> sum of its parts. Viewed in itself, this conception of context does not incorporate any standpoint or category whatsoever that transcends, while preserving, its constituent parts. But these parts *are* values and ends, whose essential intelligibility lies in their being something to be chosen. There does not seem to be any basis for making the kind of categorial distinction that Kymlicka's argument requires.
>
> Certainly, from a psychological, sociological, or developmental standpoint, individuals may relate to their cultural context as something given and not chosen. Subjectively, it may thus be distinguishable from the character of their culture, which consists in particular evolving practices viewed as the outcome of its members' choices. But this difference between the two senses of culture is one that exists solely for the individual members of the culture taken one by one, and then only as part of a process that is differentiated on the basis of time: in culture as context, the particular ends and values are viewed as given by an individual who is about to choose, whereas, as constitutive of the character of the culture, the very same ends are represented as the achievements of individual choices. The crucial point is that the context is constituted through and through by features that are intelligible as ends-to-be chosen. Culture as context and the character of culture have exactly the same content.[91]

The significance of this criticism is that a failure to distinguish context and character means that one cannot argue that cultural membership, as defined by Kymlicka, is a social primary good within Rawls's theory of justice. In fact, Benson states that, "with the collapse of the distinction, there is no stopping short of the communitarian conception ..."[92]. The failure to distinguish context and character also, necessarily, has an impact on the legitimacy of viewing cultural membership as a good which may, in some circumstances, limit Rawls's basic liberties.[93]

Kymlicka's definition of culture as "the existence of a viable community of individuals with a shared heritage (language, history, etc.)" seems to concede that cultures have historically been constituted, at least in part, by specific shared ends and, presumably, continue to be so. Moreover, it does seem that if the value of culture, for

Kymlicka's purposes, lies in the fact it provides a range of options from which its members choose their goals and come to see their value[94], cultural ends are implicit in the fact that any given culture recognizes or gives significance to certain options and not others. And, although Kymlicka is concerned to point out that changes in the norms, values and their attendant institutions in a community do not amount to loss of a culture, the disintegration of a community must relate in some measure to the disintegration of the (totality of) ends which its members share.

However, in my view, while Benson's objection to Kymlicka's characterization of cultural context of choice as a social primary good is persuasive, it is not definitive of the question whether culture must be recognized and protected in some form as a social primary good. In the following section of the paper, I will show that Rawls characterizes 'equal liberty of conscience' as a social primary good and justifies this primary good by reference to his political conception of the person precisely *because of* its relationship to determinate conceptions of the good.

D. Rawls and equal liberty of conscience as a social primary good

As Rawls set out in *A Theory of Justice* and reiterates in *Political Liberalism*, the parties to the original agreement are subject to a veil of ignorance which deprives them of knowledge about their particular situations or conceptions of the good. They do know that many different religious, philosophical and moral beliefs and forms of conduct exist, and that some are minority views potentially subject to the will and whims of the

majority. They know that they and the persons they represent affirm specific religious, philosophical and moral views, but do not know what they are, or whether they are a majority or a minority in society. As a result, their responsibility is to secure principles of justice which will protect those forms of belief and the institutions which are necessary to them. The fact that specific (but as yet unknown) religious, philosophical, and moral beliefs and conduct amount to particular constellations of visions of the good does not preclude equal liberty of conscience from being a social primary good.[95] Quite the opposite. Equal liberty of conscience is a social primary good by virtue of the 'givenness' of the beliefs which it protects, their 'non-negotiability', "given an understanding of what constitutes a religious, philosophical, or moral view"[96]. According to Rawls, equal liberty of conscience is a social primary good precisely because the religious, philosophical, and moral views and forms of conduct which it protects exist as articulations of the relationship of individuals to the world, the points of reference which give rise to conceptions of the good, and by which conceptions of the good, aims and attachments are understood.[97]

> [W]hile the parties cannot be sure that the persons they represent affirm [religious, philosophical, and moral views of their relation to the world] I shall assume that these persons normally do so, and in any event the parties must allow for this possibility. I assume also that these religious, philosophical, and moral views are already formed and firmly held, and in this sense given. Now if but one of the alternative principles of justice available to the parties guarantees equal liberty of conscience, this principle is to be adopted. Or at least this holds if the conception of justice to which this principle belongs is a workable conception. For the veil of ignorance implies that the parties do not know whether the beliefs espoused by the persons they represent is a majority or a minority view. They cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a majority or dominant religion and will therefore have an even greater

> liberty. For it may also happen that these persons belong to a minority faith and may suffer accordingly. If the parties were to gamble in this way, they would show that they did not take the religious, philosophical, or moral convictions of persons seriously, and, in effect, did not know what a religious, philosophical, or moral conviction was.
>
> Note that, strictly speaking, this first ground for liberty of conscience is not an argument. That is, one simply calls attention to the way in which the veil of ignorance combined with the parties' responsibility to protect some unknown but determinate and affirmed religious, philosophical, or moral view gives the parties the strongest reasons for securing this liberty. Here it is fundamental that affirming such views and the conceptions of the good to which they give rise is recognized as non-negotiable ... .[98]

Rawls provides two other grounds for the protection and priority given equal liberty of conscience in his theory. Both concern the relationship of equal liberty of conscience to the moral capacity of persons to form, revise and pursue conceptions of the good. First, equal liberty of conscience is a precondition to the development and exercise of this capacity; and this capacity is a means to the development and pursuit of conceptions of the good.[99] Second, equal liberty of conscience is necessary to the affirmation of the religious, philosophical, or moral traditions that incorporate "ideals and virtues which meet the tests of our [deliberative] reason and which answer to our deepest desires and affections"[100]. On this approach, "this rationally affirmed relation between our deliberative reason and our way of life itself becomes part of our determinate conception of the good"[101].

According to Rawls, these three grounds for equal liberty of conscience are related as follows:

> In the first, conceptions of the good are regarded as given and firmly rooted; and since there is a plurality of such conceptions, each, as it were, non-negotiable, the parties recognize that behind the veil of ignorance the

> principles of justice which guarantee equal liberty of conscience are the only principles which they can adopt. In the next two grounds, conceptions of the good are seen as subject to revision in accordance with deliberative reason, which is part of the capacity for a conception of the good. But since the full and informed exercise of this capacity requires the social conditions secured by liberty of conscience, these grounds support the same conclusion as the first.[102]

In my view, therefore, Rawls's rationale for the protection of equal liberty of conscience as a social primary good undercuts any argument that would deny some form of recognition and protection of culture as a social primary good merely because of its relationship to determinate conceptions of the good.

At the foundation of Kymlicka's argument lies the recognition that conceptions of the good are situated within cultural horizons. I will argue in the following section of the chapter that the capacity to form, revise and pursue conceptions of the good is inescapably linked to what Joseph Raz describes as the "social forms"[103] which constitute each culture.

I will also draw the parallels between the social forms which constitute cultures[104] and the philosophical, religious, and moral beliefs and forms of conduct which Rawls considers worthy of protection in order to show that Rawls's grounds for the protection and primacy of equal liberty of conscience are indistinguishable from those applicable to questions of culture.

I should clarify my method at this point.

In the previous sections, I have demonstrated that a Rawlsian analysis requires that the social primary goods, including the equal basic liberties, be justified by reference to Rawls's political conception of the person as a free and equal moral being. In the next

section of the chapter, I will argue that, in an open, culturally heterogeneous society, 'equal liberty to participate in, produce and enjoy one's own culture' is justified as an equal basic liberty. To this end, I will argue that cultures are of intrinsic derivative, as well as instrumental, value to their members and, as such, are critical to their capacity for, and exercise of their two moral powers, and their ability to have and pursue determinate conceptions of the good.

It is important to emphasize, therefore, that in drawing parallels between the social forms which constitute cultures and philosophical, religious and moral doctrines, I am not asserting that an argument for 'equal liberty to participate in, produce and enjoy one's own culture' must be derived from an argument for 'equal liberty of conscience'. It can, and must, be justified entirely independently of any analogy to questions of conscience, by virtue of the role that cultures play with respect to individuals' moral powers and determinate conceptions of the good, informed by Rawls's concepts of reciprocity, mutual respect, and overlapping consensus. This is my primary argument.

To the extent I compare the social forms that constitute culture with philosophical, moral and religious doctrines in the paper, I do so only because the comparison highlights the identity of their roles vis-a-vis individuals' conceptions of the good. This secondary argument should be seen merely as a technique for underscoring the similarities in their roles and challenging the arbitrariness of contrasts in their status, not as a necessary element of an argument for cultural protection.[105]

E. Culture, social forms, and social primary goods

Every culture, at any moment in time, is a collection of the articulations shared by its members, as a cultural community, of their relationship to the world, the socially determined forms and standards upon which their conceptions of the good, aims and attachments are based and by which they are understood and measured. It is also the source from which new culturally determined social forms and standards emanate. Of course, within every culture, this constellation of group articulations, social forms and standards, is constantly shifting and changing.[106]

Social forms are public perceptions of forms of belief and action shared within a social community.[107] Joseph Raz describes social forms as "the public perception of common social forms of action"[108]. Elsewhere, he describes them as consisting of "shared beliefs, folklore, high culture, collectively shared metaphors and imagination, and so on."[109]

Raz argues that a person's well-being[110] is largely determined by his or her goals[111]; a person's important immediate goals are generally nested in larger comprehensive goals[112]; success in one's comprehensive goals is among the most important elements of one's well-being[113]; and a person can have comprehensive goals only if they are based on existing social forms[114].

Social forms "delineate the basic shape of the projects and relationships which constitute human well-being".[115]

It is important, at this stage of the discussion, to note a characteristic of social forms that can be perceived most clearly in their relationship to the goals of members of the community.

Social forms can recognize and accommodate 'variations on the common themes' that exist within a community. According to Raz,

> [t]he thesis that comprehensive goals are inevitably based on socially existing forms is meant to be consistent with experimentation, and with variations on a common theme and the like. It is no more possible to delimit in advance the range of deviations which still count as based on a social form than it is to delimit the possible relations between the literal and the metaphorical use of an expression.[116]

Raz states, for example, that

> [a] comprehensive goal may be based on a social form in being a simple instance of it. An ordinary conventional marriage in our society can be used to illustrate what marriage is like. It exemplifies a widely shared social form, while being also an instance of a comprehensive goal of the people whose marriage it is, and who want it to be (or remain) a success. Many marriages, perhaps all, are not that conventional. They are based on a shared perception of a social form while deviating from it in some respects. They are deviations on a common theme, and they can typically be that because the social form itself recognizes the existence of variations, or even their importance. A couple may evolve an 'open' marriage even though this form is unknown to their society. But an open marriage is a relation combining elements of a conventional marriage and of a sexual pursuit which is kept free of emotional involvement. It is a combination of elements of two socially recognizable forms.[117]

Social forms are incorporated into our individual conceptions of the good. We affirm social forms as part of our conceptions of the good. In this way, the social forms which constitute each community are intrinsically (derivatively), as well as instrumentally valuable to the individual members of that community.

Raz describes the significance of goals to the people that hold them in the following passage:

> I use the term [goals] broadly to cover [a person's] projects, plans, relationships, ambitions, commitments, and the like. Since they are his goals he guides his action towards them, they colour his perception of his environment and of the world at large, and they play a large part in his emotional responses and his imaginative musings. They play, in other words, a conscious role in his life. They are not merely unknown forces ... .[118]

In this section so far, I have shown that cultures are of intrinsic derivative, as well as instrumental, value to their members and are critical to their capacity for, and exercise of their two moral powers, and their ability to have and pursue determinate conceptions of the good. It is my contention that, in an open, culturally heterogeneous society, 'equal liberty to participate in, produce and enjoy one's own culture' is justified as an equal basic liberty by virtue of the role that cultures play with respect to individuals' moral powers and determinate conceptions of the good, informed by Rawls's concepts of reciprocity, mutual respect, and overlapping consensus.

At this point, I will pursue a secondary argument which compares the social forms that constitute culture with philosophical, moral and religious doctrines. This comparison is intended to highlight the identity of their roles vis-a-vis individuals' conceptions of the good and to challenge the arbitrariness of contrasts in their status.

The force of this secondary argument depends upon the degree to which the social forms which constitute culture and philosophical, moral and religious doctrines may legitimately be compared. In this context, three important related points should be noted.

First, Rawls's description of the general and comprehensive doctrines that the parties in the original position must protect by means of principles of justice which guarantee equal liberty of conscience is very broad, as it must be if it is to meet his ideals of reciprocity and mutual respect, and the requirements of overlapping consensus and the concept of free public reason.

For example, Rawls states that a workable conception of justice

> must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed incommensurable, conceptions of the meaning, value and purpose of human life (or what I shall call for short 'conceptions of the good') affirmed by the citizens of democratic societies.[119]

Rawls describes general and comprehensive doctrines in the following passage:

> A moral conception is general if it applies to a wide range of subjects, and in the limit to all subjects universally. It is comprehensive when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole. A conception is fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system; whereas a conception is only partially comprehensive when it comprises a number of, but by no means all, nonpolitical values and virtues and is rather loosely articulated. Many religious and philosophical doctrines aspire to be both general and comprehensive.[120]

In "Kantian Constructivism in Moral Theory", Rawls has observed that

> long historical experience suggests, and many plausible reflections confirm, that on [religious, philosophical, or moral doctrines] reasoned and uncoerced agreement is not to be expected. Religious and philosophical views express outlooks toward the world and our life with one another, severally and collectively, as a whole. Our individual and associative points of view, intellectual affinities and affective attachments, are too diverse, especially in a free democratic society, to allow of lasting and reasoned agreement. Many conceptions of the world can plausibly be

> constructed from different standpoints. Diversity naturally arises from our limited powers and distinct perspectives... .[121]

These passages also lead to a second point: Rawls's description of the general and comprehensive doctrines that the parties in the original position must protect by means of principles of justice which guarantee equal liberty of conscience is purposive in its nature. General and comprehensive doctrines must be protected by 'equal liberty of conscience' because of the particular roles they play with respect to conceptions of the good and Rawls's political conception of the person.[122]

It is important to note, therefore, that the only relevant point of comparison between philosophical, moral and religious doctrines and culture for the purposes of my secondary argument relates to similarities in their roles vis-a-vis Rawls's political conception of the person (most directly, the second moral power) and conceptions of the good, not to similarities in the nature of the doctrines and of culture[123].

The third point is that, in this regard, Rawls's limitation of his argument to the role that philosophical, moral and religious doctrines play with respect to conceptions of the good and his discussion of 'equal liberty of conscience' as a social primary good is a function of his methodology: he restricts the application of his constructivist procedure to classical aspects of heterogeneity generated from within a closed liberal society. For Rawls, the question of social primary goods (and the equal basic liberties), in fact the question of justice itself, is driven by the fact of pluralism in society. Where (and to the extent) there is no heterogeneity, where there are no competing claims, questions of justice do not arise.[124] In the closed society which Rawls uses as his model for the purposes of argument, with the exception of religious, philosophical and moral doctrines,

culture is assumed to be shared. By contrast, in an open, modern democratic society, pluralism extends beyond questions of religious, philosophical, and moral doctrine, to other areas of culture.[125] In other words, questions of justice are raised by the diversity of cultures in an open society.[126]

As Rawls stated in "Fairness to Goodness",

> the original position does not presuppose the doctrine of abstract individualism. ... [T]he parties in the original position are presumed to know whatever general truths characterize the dependence of individuals on their social background. The account of primary goods does not deny these facts, long recognized by social theory and common sense. The thin theory of the good holds that human wants have a certain structure which, in conjunction with the strategic feature of primary goods, supports the reasonableness of the motivation assumption, given the constraints of the original position. The required structure of wants and the strategic role of primary goods is not the doctrine of abstract individualism.[127]

To use Rawls's terms, then, the 'structure of human wants' which must be taken into account by parties in the original position who are selecting principles of justice for an open, modern democratic society would (and must) include culture and the conceptions of the good which cultures frame.

In particular, in the context of my secondary argument, I would argue that, in an open, culturally heterogeneous society, protecting the freedom and integrity of the internal life of cultural communities and the ability of members of those communities to form, pursue and revise their conceptions of the good by reference to, and in the context of, their own cultures has the same importance to members of minority cultures that protecting the integrity of religious, philosophical, and moral doctrines has to minorities in Rawls's otherwise culturally homogeneous society.

To recapitulate the secondary argument: According to Rawls, equal liberty of conscience is a social primary good because the religious, philosophical, and moral views which it protects exist as articulations of the relationship of individuals to the world, the points of reference which give rise to conceptions of the good, and by which conceptions of the good, aims and attachments are understood. The parties to the original position know that many different religious, philosophical and moral beliefs views exist, and that some are minority views potentially subject to the will and whims of the majority in the absence of a commitment by the parties to equal liberty of conscience.

For the reasons set out above, one can substitute for "religious, philosophical, and moral beliefs and conduct" the "social forms that constitute cultures", because they play identical roles with respect to conceptions of the good and Rawls's political conception of the person. In an open democratic society, different cultures, and the social forms which constitute them, exist, and some are in a minority.

It is my contention that 'equal liberty to participate in, produce and enjoy one's own culture' may be justified as a social primary good, having the same priority as equal liberty of conscience[128], on identical grounds.[129]

It should be noted that the outcome of both my primary and secondary arguments is one step removed from Kymlicka's attempt to distinguish culture as context from character of a culture, and his characterization of culture as context as a social primary good.

On my approach, culture as context (and the integrity of cultural communities) is not a social primary good, but rather is *part of what is being protected* by the social

primary good of 'equal liberty to participate in, produce and enjoy one's culture', as are the social forms that constitute culture. They bear the same relationship to this primary good that philosophical, religious, and moral beliefs and conduct do to the primary good of 'equal liberty of conscience'. This, I hope, circumvents the problems that Kymlicka had with his proposed social primary good of culture being perceived solely as a collection of ends, the risk of petrification and majority control if one protected the character of a cultural community as a social primary good, and the difficulties and limitations of his resulting instrumental characterization of culture.[130]

I also hope that the description of the social primary good as a liberty will clarify exactly what is at stake in the argument, and dispel any notion that members of minority cultures are claiming what are often disparagingly referred to by members of majority groups as 'special rights'. It also underscores that an 'assimilate or disintegrate' approach to minority cultures, such as Bryan Schwartz's, is untenable on a Rawlsian analysis.

The social primary good of 'equal liberty to participate in, produce and enjoy one's own culture' is justified by reference to the two moral powers and the determinate conceptions of the good that comprise Rawls's political conception of the person in the same way as 'equal liberty of conscience'. If, as I have argued, the social forms which constitute each culture play the same role with respect to conceptions of the good as 'religious, philosophical, and moral beliefs and forms of conduct', then it is difficult to justify on any principled basis their exclusion from recognition and protection if one recognizes 'equal liberty of conscience' as a social primary good. If the social forms which constitute each culture are of intrinsic derivative, as well as instrumental, value

to members of that culture and are critical to their capacity for, and exercise of, their two moral powers, and their ability to have and pursue a determinate conception of the good, then refusal to recognize 'equal liberty to participate in, produce and enjoy one's own culture' as a basic liberty privileges the members of majority cultures arbitrarily from a moral perspective, and denies to members of minority cultures recognition and protection of their status as free and equal moral beings.

According to Rawls's theory of justice, the selection and implementation of the principles of justice are done in a four-stage process, with increasing societal and personal information being available at each stage.[131]

In this chapter, I have argued that Rawls's constructivist analysis, when applied to the basic structure of an open, culturally heterogeneous modern constitutional democracy, must recognize 'equal liberty to participate in, produce and enjoy one's own culture' as a basic liberty included in the first principle of justice.

In the next chapter, I will examine Rawls's approach to the specification and adjustment of the basic liberties in the four-stage process. In particular, I describe how Rawls's constructivist analysis also requires that the basic liberties be specified (and adjusted if necessary) in the following sequence: At the constitutional stage, delegates to the constitutional convention must specify the basic liberties in the constitution in the form of rights or freedoms, or a combination of rights and freedoms. At the legislative stage of Rawls's four-stage process, legislators must develop legislation and policies concerning the protection and provision of the goods necessary to give effect to the rights and freedoms which specify the basic liberties. The judicial stage involves the assessment

and enforcement of claims that protection or provision of a particular good in a particular form is necessary to give effect to a right or freedom.

I will also examine some implications of Rawls's approach to the specification and adjustment of the basic liberties, and the principles which govern the four-stage process, for the recognition and interpretation of group rights and for the treatment of rights and freedoms in conflict.

In chapter 3, I will consider two issues that are raised uniquely by group rights-claims and are common to all such claims - the questions of the recognition of communal goods as legitimate objects of rights-claims, and of groups as rights-claimants. I will propose a methodology for the treatment of group rights-claims to communal goods that differs in its focus from that advocated by many proponents of group rights.

Described somewhat differently, the next two chapters will examine aspects of the equation: A has a right to X against B by virtue of Y.

The five main elements here are: first, the subject (A) of the right, or rights-holder; second, the nature of the right; third, the object (X) of the right, or what it is a right to; fourth, the respondent (B) of the right, or the persons who have the correlative duties; and fifth, the justifying basis or ground (Y) of the right.[132]

Chapter 2 will address Rawls's methodological approach to the specification and adjustment of the basic liberties in the form of rights, freedoms and institutional rules, which is preliminary to an examination of principles governing the justification of rights-claims, and the resolution of conflicts among rights and freedoms. In terms of the equation set out above, therefore, Chapter 2 will examine the justifying bases or grounds

of rights and rights-claims, and chapter 3 will address controversial questions relating to the subject of the right, or rights-holder (groups), and the object of the right (communal goods).

CHAPTER 2 THE SPECIFICATION AND ADJUSTMENT OF THE BASIC LIBERTIES IN RAWLSIAN ANALYSIS: SOME IMPLICATIONS

In the previous chapter, I have touched on the fact that, in Rawls's constructivist analysis, although the equal basic liberties are identified by the parties in the original position as essential all-purpose means to realize the objective of guaranteeing the political and social conditions for citizens to pursue their good and to exercise the moral powers that characterize them as free and equal, they are only implemented in any meaningful sense in the subsequent three stages of Rawls's four-stage process.

Rawls describes this process as one of 'specification' and 'adjustment' of the basic liberties. In other words, the basic liberties are implemented at the constitutional and legislative stages and are assessed and enforced at the judicial stage of the four-stage process, as increasing societal and personal information becomes available, to create a coherent and fully adequate scheme available to all on equal terms.[1]

In this chapter, I will examine how Rawls's constructivist analysis deals with the implementation of the basic liberties, the priority of rights and freedoms over societal interests, and the treatment of conflicting rights and freedoms.

My hope is that the discussion of these methodological questions, informed by Rawlsian analysis, may clarify the nature of government obligations to implement the basic liberties, and the standards for limiting and restricting the rights and freedoms of individual members of a group when they conflict with group rights (and vice versa). It may also assist in the development of an approach to the balancing of conflicting rights,

and of rights and societal interests, that differs somewhat from that currently confounding *Charter* analysis.

A. The specification and adjustment of the equal basic liberties in Rawls's four-stage process

The first principle of justice is:

> Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all.[2]

In this section of the chapter, I will examine what Rawls means by a "fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all". However, first, I must raise two preliminary points that are necessary to set the context of the discussion. The first addresses the priority and inalienability of the equal basic liberties. The second deals with Rawls's conception of the role of the four-stage sequence as it relates to the equal basic liberties.

1. The priority and inalienability of the equal basic liberties

The priority of the first principle over the second, and over societal interests, remains unchanged from that set out in *A Theory of Justice*.[3]

The priority of the equal basic liberties means that a basic liberty can be limited or denied only for the sake of one or more other basic liberties and never for reasons of public good or of perfectionist values.[4] This priority also means that the basic liberties cannot be justly denied to any person, or group of persons, or even to all citizens, "on

the grounds that such is the desire, or overwhelming preference, of an effective political majority, however strong and enduring".[5]

The basic liberties are also inalienable, with the result that any agreement by citizens which waives or violates a basic liberty has no legal force. Even though such an agreement may be entirely voluntary, it is ineffective to alter citizens' basic liberties in the context of the basic structure. In other words, the inalienability of the basic liberties does not prevent citizens, even in a well-ordered society, from attempting to circumscribe or alienate one or more of their basic liberties. However, the institutions of the basic structure will not enforce undertakings which waive or limit the basic liberties.[6]

Although I will discuss these points further below, I should emphasize here that the priority of the equal basic liberties is the priority of the *family* of basic liberties, not of any particular liberty; the basic liberties are specified and mutually adjusted at the stages of the four-stage sequence that follow the original position; and the processes of specification and adjustment are integrally connected and occur simultaneously.

2. The equal basic liberties and Rawls's four-stage process

According to Rawls, the objective of the parties in the original position is "to guarantee the political and social conditions for citizens to pursue their good and to exercise the moral powers that characterize them as free and equal".[7] The parties recognize the social primary goods, of which the equal basic liberties are a category, as essential all-purpose means to realize this objective.[8]

At each succeeding stage of Rawls's four stages, the decisionmaking parties are subject to fewer constraints on the information available to them, and the objective identified in the original position and its expression become more detailed and concrete.

It is important to note that this objective and its relationship to the moral powers and determinate conceptions of the good remain unchanged at the later stages, but their intricacies and implications become more apparent as the veil of ignorance is lifted and as the basic liberties are specified and adjusted to one another at each stage. Rawls's four-stage process might be described as one in which the objective identified in the original position is increasingly elaborated and refined as greater knowledge of social circumstances becomes available.[9]

In the original position, the parties identify the two principles of justice (including the equal basic liberties encompassed by the first principle of justice).

As noted earlier, the constraints of the 'reasonable' at the original position stage include the formal constraints on the concept of right (such as the conditions of generality, universality, publicity, a principle of ordering of conflicting claims, and the condition of finality), the symmetry of the parties to the original position which follows from the description of citizens as equal moral beings, the fact that the parties are choosing principles that are to regulate the basic structure of society, and the veil of ignorance.

At the constitutional stage, the equal basic liberties are specified and adjusted in the form of a just political procedure and constitutional guarantees of rights and freedoms

in such a way as to protect what Rawls describes as the 'central range of application' of the basic liberties.[10]

Because the parties to the constitutional convention are now constrained in their decisionmaking by the principles of justice[11], the veil of ignorance is partially lifted. The parties are aware of theoretical principles of social theory, the relevant general facts about their society, such as its natural circumstances and resources, its level of economic advancement and its political culture, but know nothing of personal particulars, such as the social positions, natural attributes and specific interests of individuals, or their conceptions of the good.[12]

Legislators' greater knowledge of the circumstances of society at the legislative stage, as it relates to the basic liberties, enables them to develop legislation and policies concerning the protection and provision of the goods necessary to give effect to the rights and freedoms identified at the constitutional stage in order to protect the 'central range of application' of the basic liberties.

The legislators are constrained in their decisionmaking by the principles of justice and constitutional limits.[13] They are aware of the full range of social and economic facts applicable to their society but know nothing of personal particulars.[14]

As it relates to the basic liberties, the judicial stage involves the assessment and enforcement of claims that particular goods should be the object of constitutional rights and freedoms or, in other words, that protection or provision of a particular good in a particular form is necessary to give effect to a right or freedom so as to protect the 'central range of application' of the basic liberty which that right or freedom specifies.

Judges are constrained by the principles of justice, the constitution, legislation and policy. As Rawls notes, "[a]t this stage everyone has complete access to all the facts. No limits on knowledge remain since the full system of rules has now been adopted and applies to persons in virtue of their characteristics and circumstances."[15]

3. The process of specification and adjustment of the equal basic liberties

In response to Hart's criticism in "Rawls on Liberty and its Priority"[16], Rawls, in "The Basic Liberties and Their Priority" and *Political Liberalism*, has attempted to provide satisfactory qualitative criteria for how the basic liberties are to be further specified and adjusted to one another as the first principle is applied at the constitutional, legislative, and judicial stages, and as social circumstances are made known.[17]

a) The steps in specifying and adjusting the equal basic liberties

The steps in specifying and adjusting the basic liberties to one another are the following:

1. The special role and central range of application of each basic liberty are identified in order to guide the processes of specification and adjustment at the later constitutional, legislative, and judicial stages.[18]

   The special role of each basic liberty is referable to some aspect of what is essential for the development and full and informed exercise of the two moral powers and for the protection of a wide range of determinate conceptions of the good.

> The central range of application of each basic liberty consists of the rights, freedoms and institutional rules necessary to the performance of that role, together with the conditions necessary for their effective exercise.[19]

2. The basic liberties are specified at the later stages in the form of rights, freedoms and institutional rules. These are self-limiting and adjusted to one another to create a coherent and fully adequate scheme of basic liberties.[20]

As Rawls notes, "once we have a number of [basic] liberties which must be further specified and adjusted to one another at later stages [as social circumstances are made known], we need a criterion for how this is to be done".[21]

The purpose of the exercise, to which such a criterion is related, is "to establish the best, or at least a fully adequate, scheme of basic liberties, given the circumstances of society".[22]

b) The purpose of specification and adjustment: the meaning of a 'fully adequate scheme'

The rights, freedoms and institutional rules which define the basic liberties must be adjusted so that they fit into a coherent scheme of liberties.

> Since the basic liberties may be limited when they clash with one another, none of these liberties is absolute; nor is it a requirement that, in the finally adjusted scheme, all the basic liberties are to be equally provided for (whatever that might mean). Rather, however these liberties are

> adjusted to give one coherent scheme, this scheme is secured equally for all citizens.[23]

To this end, the first principle of justice states that "each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all".[24]

It is important to note, therefore, that it is the *scheme* of equal basic liberties, not any individual basic liberty, which Rawls describes as 'fully adequate'; and that scheme must be compatible with a similar scheme of liberties for all.

c) The basis for identifying the best, or a fully adequate scheme

Rawls notes that

> it is tempting to think that the desired criterion should enable us to specify and adjust the basic liberties in the best, or the optimum, way. And this suggests in turn that there is something that the scheme of basic liberties is to maximize. ... But in fact, ... the scheme of basic liberties is not drawn up so as to maximize anything, and in particular, not the development and exercise of the moral powers.[25]

Rather, these liberties and their priority are

> *to guarantee equally for all citizens the social conditions essential for the adequate development and the full and informed exercise of these powers in ... "the two fundamental cases."*[26]

The concept of the 'two fundamental cases', then, sets the boundaries of the scope of the parties' objective in Rawls's four-stage process. Rawls defines the 'fundamental cases' in the following passage:

> The first of these [fundamental] cases is connected with a capacity for a sense of justice and concerns the application of the principles of justice to the basic structure of society and its social policies. ... The second fundamental case is connected with the capacity for a conception

> of the good and concerns the application of the principles of deliberative reason in guiding our conduct over a complete life. ... What distinguishes the fundamental cases is the comprehensive scope and basic character of the subject to which the principles of justice and of deliberative reason must be applied.[27]

The equal basic liberties are related to the two moral powers and to the two fundamental cases in which these powers are exercised in different and particular ways.

> The equal political liberties and freedom of thought are to secure the free and informed application of the principles of justice, by means of the full and effective exercise of citizens' sense of justice, to the basic structure of society. ... These basic liberties require some form of representative democratic regime and the requisite protections for the freedom of political speech and press, freedom of assembly, and the like. Liberty of conscience and freedom of association are to secure the full and informed and effective application of citizens' powers of deliberative reason to their forming, revising, and rationally pursuing a conception of the good over a complete life. The remaining (and supporting) basic liberties - the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation) and the rights and liberties covered by the rule of law - can be connected to the two fundamental cases by noting that they are necessary if the preceding basic liberties are to be properly guaranteed.[28]

d) 'Significance' as the criterion applied in order to produce a fully adequate scheme

The criterion which is applied to specify the basic liberties at the constitutional, legislative and judicial stages in the form of rights, freedoms and institutional rules, and to adjust these rights, freedoms and institutional rules in order to produce a fully adequate scheme is that of 'significance'.[29]

According to Rawls,

> a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a more or less necessary institutional means to protect, the full and informed and effective exercise of the moral

> powers in one (or both) of the two fundamental cases. Thus, the weight of particular claims to [rights, freedoms and institutional rules which specify the basic liberties] are to be judged by this criterion.[30]

The concept of significance is relevant to both specification and adjustment. It governs whether a claimed right or freedom is protected as specifying a basic liberty. For example, some kinds of speech, such as libel and defamation of private persons, as opposed to political figures, are not protected as specifying the basic liberty of freedom of thought (and in fact, as private wrongs, may be offenses) because they have "no significance at all for the public use of reason to judge and regulate the basic structure"[31]. In other words, such forms of speech have no significance to the first fundamental case, to which freedom of speech is relevant.

Rawls describes the role of significance in the adjustment process as follows:

> [w]e try to identify the more essential elements in the central range of application of [a] basic liberty. We then proceed to further extensions up to the point where a fully adequate provision for this liberty is achieved, unless this liberty has already become self-limiting or conflicts with more significant extensions of other basic liberties. As always, I assume that these judgments are made by delegates and legislators from the point of view of the appropriate stage in the light of what best advances the rational interest of the representative equal citizen in a fully adequate scheme of basic liberties.[32]

This raises the issues of the distinction between the regulation and the restriction of the rights, freedoms and institutional rules which specify the basic liberties; and within the category of regulation, the difference between self-limitation and mutual adjustment.

i) Regulation

Rawls states that

> [i]n understanding the priority of the basic liberties we must distinguish between their restriction and their regulation. The priority of these liberties is not infringed when they are merely regulated ... in order to be combined into one scheme as well as adapted to certain social conditions necessary for their enduring exercise. So long as ... "the central range of application" of the basic liberties is provided for, the principles of justice are fulfilled.[33]

In contrast to restriction, regulation does not restrict the content of the basic liberties and therefore is not inconsistent with their central role.

The basic liberties (as specified in the form of particular rights, freedoms and institutional rules) may be self-limiting and may also be adjusted to one another by regulation. The principles which apply to determine whether limitation by regulation is appropriate appear to be similar in both cases. In the case of a self-limiting freedom, right or institutional rule, reasonable regulation is appropriate in order to secure on a footing of equality the central range of the basic liberty (which it specifies) or, more precisely, the most significant liberty, in the fundamental case. In the case of mutual adjustment, the consideration is that the basic liberties constitute a family, the members of which have to be adjusted to one another to guarantee the central range of these liberties, or the most significant scheme of liberties, in the two fundamental cases. The regulation of rights, freedoms, and institutional rules (which specify a basic liberty) to safeguard the central range, and more significant extensions, of other freedoms, rights, or institutional rules (which specify other basic liberties) does not restrict the content of the liberties affected and therefore is consistent with their central role. The mutual adjustment of the basic liberties is "justified on grounds allowed by the priority of these liberties as a family, no one of which is in itself absolute".[34]

It is important to note that the self-limitation and mutual adjustment of the freedoms, rights and institutional rules which specify the basic liberties are grounded solely on the significance of those freedoms, rights and institutional rules as defined by their role in the two fundamental cases, and this adjustment is guided by the aim of specifying a fully adequate scheme of basic liberties.[35]

Self-limitation

Self-limitation of a basic liberty is necessary, according to Rawls, because "the requirement that the basic liberties are to be the same for everyone implies that we can obtain a greater liberty for ourselves only if the same greater liberty is granted to others".[36]

So, if the extension of a right, freedom or institutional rule (which specifies a basic liberty), when granted to all, would be so unworkable or socially divisive that it would reduce the effective scope of the basic liberty at issue in the fundamental case, that extension may be regulated, provided this is done on a footing of equality. As Rawls notes, in such circumstances, in order to secure the most significant liberty, delegates to a constitutional convention who are guided by the rational interest of the representative equal citizen in a fully adequate scheme of basic liberties will abandon claims to unregulated extensions of the liberty and adopt reasonable regulations.[37]

Mutual adjustment

Rawls also addresses the question of the regulation of basic liberties to guarantee the central range and more significant extensions of other liberties.

He emphasizes that "the basic liberties constitute a family, and that it is this family that has priority and not any single liberty by itself".[38] The processes of specification and adjustment are simultaneous. The basic liberties must be "adjusted to one another and cannot be specified individually".[39] Rawls notes that not to adjust some basic liberties in the light of others is to "fail to see a constitution as a whole and to fail to recognize how its provisions are to be taken together ... ."[40]

Rawls sets out a number of conditions that apply in circumstances where a right, freedom or institutional rule (which specifies a basic liberty) must be adjusted to secure the central range or more significant extension of a competing basic liberty. This mutual adjustment is a process of regulation, not restriction. So the first condition of adjustment is that there be no restrictions on the content of the right, freedom or institutional rule being limited. Second, the arrangements must not impose an undue burden on the various groups in society to which the right, freedom or institutional rule is relevant and must affect them all in an equitable manner. Finally, the various regulations of a right, freedom or institutional rule must be rationally designed to secure the central range or more significant extension of the competing basic liberty.[41]

ii) Restriction

The threshold for justifying restriction of the basic liberties is extremely high. According to Rawls, while the basic liberties

> are not absolute, they can be restricted in their content (as opposed to being regulated in ways consistent with maintaining a fully adequate scheme) only if this is necessary to prevent a greater and more significant loss, either directly or indirectly, to these liberties.[42]

For example, a constitutional doctrine which gives priority to the basic liberties must hold that to restrict or suspend political speech, which specifies the basic liberty of freedom of thought, "requires the existence of a constitutional crisis in which free political institutions cannot effectively operate or take the required measures to preserve themselves".[43]

B. Implications of Rawls's four-stage process and the priority of the equal basic liberties for the recognition and interpretation of group rights and for the treatment of rights and freedoms in conflict

1. The four-stage process is one of increasing elaboration. The objective of the parties in the original position remains unchanged throughout.

One of the implications of Rawls's four-stage process of specification and adjustment of the basic liberties is that it is a process of increasing elaboration, as the knowledge of social circumstances becomes increasingly available. The objective of the parties in the original position to guarantee the political and social circumstances for citizens to pursue their good and to exercise the moral powers that characterize them as free and equal does not change as knowledge becomes available, nor does the relationship of this objective

to the moral powers and determinate conceptions of the good. Rather, they are enhanced by the addition of new factors that are a function of the increased knowledge of social conditions. Moreover, elements such as the potential for conflict among the basic liberties and the concept of the two fundamental cases are implicit at the original position stage, but in an inchoate form. They exist in their full potential at the original position stage. Their nature and scope do not change at the later stages but, rather, are increasingly specified by reference to the particular circumstances of the society to which they are relevant. And in this process, as the veil of ignorance is lifted, their intricacies and ramifications become more apparent.

2. The specification of the basic liberties in the form of constitutional rights and freedoms or as, for example, institutional rules in legislation does not alter their status or priority.

Another important related implication of Rawls's four-stage process, when considered in conjunction with the priority of the basic liberties (as elements of the first principle of justice) over the second principle, non-basic legal rights and liberties, and societal interests, is that the *form* in which the basic liberties are specified is irrelevant to the issue of their status and priority. For example, the specification of the equal basic liberties in the form of legislation, regulation or other types of delegated authority would take priority over specifications of the second principle of justice, or non-basic legal rights and liberties, or societal interests, *independent of the form in which any of them appear*. It derives its status and priority from the basic liberty which it specifies.

Let me clarify:

Only the equal basic liberties are specified (and adjusted) at the constitutional stage in Rawls's analysis. Because legislators are constrained in their decisionmaking by constitutional limits, this underscores the status and priority of the equal basic liberties over the second principle of justice which is specified at the legislative stage, non-basic legal rights and liberties and societal interests. So, in this sense, as is conventionally understood by lawyers, the constitution takes priority over legislation in that legislation must be consistent with the constitution. However, it must also be understood that the priority of the constitution in Rawls's analysis is derived from the priority of the equal basic liberties (contained in the first principle of justice) which it embodies.

In this context, then, it is also important to recognize that the specification of the equal basic liberties is not exhausted at the constitutional stage. They are further specified (and adjusted) at the legislative stage, and are assessed and enforced at the judicial stage. Any such specification derives its status and priority from the basic liberty which it specifies, rather than from the form in which it is specified.

This, I think, explains why Rawls, in *Political Liberalism* and in "The Basic Liberties and Their Priority", uses the language of 'rights, freedoms (or liberties) and institutional rules' which specify the basic liberties interchangeably with the concept of 'basic liberties'. The former are not different in character from the basic liberties, but are simply specifications or institutionalizations of the basic liberties at each stage as social circumstances become known. In other words, if and to the extent legislative

provisions specify or institutionalize a basic liberty, they have the status and priority of that basic liberty, as its instantiation.

3. Constitutional delegates and legislators have a positive obligation to specify the equal basic liberties, and courts have a positive obligation to assess and enforce them.

On Rawls's analysis, constitutional delegates and legislators are *bound* to specify the basic liberties, subject to increasing constraints of the reasonable and informed by greater knowledge of societal facts.

In both cases, therefore, I would argue that a referendum process, if engaged in, must be tailored to ensure that constitutional delegates and legislators do not effectively circumvent their obligation to specify the basic liberties by referring the (often controversial) questions at issue to voters, in a process where the outcome is governed by a majority vote.

In the case of legislators, this also suggests the existence of a significantly more positive obligation to actively engage in the process of specification and adjustment of the equal basic liberties than the more conventional view, which is often interpreted as simply requiring that whatever decisions are made at this stage not be inconsistent with the constitution.

A corollary of this argument is that, if governments have an obligation to specify the basic liberties, they should not be capable of arguing that government inaction with respect to the specification of rights, freedoms and institutional rules insulates them from challenge.

Moreover, under section 1 of the *Charter*, rights and freedoms may only be limited by societal considerations if legislation is passed to limit the right and if it meets the section 1 test. A defence of inaction allows the government to circumvent this standard by simply not implementing rights and freedoms. In the case of rights and freedoms which may be controversial among the majority of the population, a defence of inaction enables the government to avoid its obligation to respect the rights and freedoms of unpopular minorities and to effectively give priority to societal considerations, preferences and even prejudices.

This positive obligation also has an impact at the judicial stage. If legislatures are seen as bound to specify the equal basic liberties, the societal (as distinct from the legal) onus on rights-claimants is shifted to some degree. In other words, the 'argument from anarchy' is untenable at the later stages of Rawls's four-stage sequence. Rights-claimants would not be obliged to show that their rights-claim should be 'accepted' or 'acceptable' in order to be added to a restricted (and relatively uncontroversial) list of goods that effect traditionally recognized rights and freedoms. Rather, the onus is on the legislature and the courts to actively guarantee and protect the central range of the equal basic liberties. All claimants must show is that the good claimed in the rights-claim is necessary for that protection, subject to self-limitation, adjustment or restriction if warranted.

Moreover, on Rawls's analysis, the courts have a positive obligation to interpret and enforce the family of equal basic liberties. In *Charter* cases, conflicting rights and freedoms are often not considered by the courts if neither a party nor an intervenor has

the resources or the inclination to raise them. As a result, a body of *Charter* jurisprudence is being built up that is defining rights raised in challenges to legislation while overlooking conflicting rights, often to the detriment of those conflicting rights.[44] On Rawls's approach, arguably, courts would have a positive obligation to consider whether and how a rights-claim would affect other rights and freedoms that specify the basic liberties, and to interpret and enforce the rights-claim before them in accordance with that information and the criteria governing the specification and adjustment of the equal basic liberties.

4. The priority of the equal basic liberties prohibits the balancing of the rights, freedoms and institutional rules which specify those basic liberties against societal interests when they come into conflict.

It is clear that provisions such as section 1[45] of the *Charter* which permit the balancing of societal interests against rights, freedoms and institutional rules which specify the equal basic liberties, (and *a fortiori* section 33[46] which permits the restriction of such rights and freedoms by legislatures without any substantive justification whatsoever) are inconsistent with the priority of the equal basic liberties in Rawlsian analysis.

However, given the existence of these sections, I will not pursue this issue but will consider whether the methodological approach taken by the courts to the balancing of conflicting rights and freedoms by reference to a section 1 analysis is consistent with a notion of the priority of rights and freedoms. I will argue that it is neither consistent

with the priority of rights and freedoms in Rawlsian analysis, nor with any concept of priority of rights and freedoms, however derived.

5. The priority of the equal basic liberties prohibits a conflict of the rights and freedoms which specify them from being resolved by reference to justificatory principles applicable to societal interests.

First, I will attempt to respond to two possible objections to my use of Rawls's analysis in the very specific context of a section 1 discussion. The first possible objection relates to whether it is appropriate to apply Rawls's theory to actual situations of juridical, legislative and constitutional decisionmaking. I would argue that the relevant question in this context is not *whether* it is appropriate, but *how* Rawls's theory may be used to come to judgments about whether the basic structure of our particular society and its institutions are just. The answer to this question may be discerned in Rawls's description of justice as fairness and the role of the original position as a device of representation. As Rawls notes,

> the conception of justice as fairness is addressed to that impasse in our recent political history shown in the lack of agreement on the way basic institutions are to be arranged if they are to conform to the freedom and equality of citizens as persons. ... It presents a way for [citizens in a constitutional regime] to conceive of their common and guaranteed status as equal citizens and attempts to connect a particular understanding of freedom and equality with a particular conception of the person thought to be congenial to the shared notions and essential convictions implicit in the public culture of a democratic society. Perhaps in this way the impasse concerning the understanding of freedom and equality can at least be intellectually clarified if not resolved.[47]
>
> Justice as fairness recasts the doctrine of the social contract ... : the fair terms of social cooperation are conceived as agreed to by those

> engaged in it, that is, by free and equal citizens who are born into the society in which they lead their lives. But their agreement, like any other valid agreement, must be entered into under the appropriate conditions. In particular, these conditions must situate free and equal persons fairly and must not allow some persons greater bargaining advantages than others.[48]

The original position, which sets these conditions, is a device of representation that

> models what we regard - here and now - as fair conditions under which the representatives of free and equal citizens are to specify the terms of social cooperation in the case of the basic structure of society; and since it also models what, for this case, we regard as acceptable restrictions on reasons available to the parties for favoring one political conception of justice over another, the conception of justice the parties would adopt identifies the conception of justice that we regard - here and now - as fair and supported by the best reasons.
>
> The idea is to use the original position to model both freedom and equality and restrictions on reasons in such a way that it becomes perfectly evident which agreement would be made by the parties as citizens' representatives. ... As a device of representation the idea of the original position serves as a means of public reflection and self-clarification. It helps us work out what we now think, once we are able to take a clear and uncluttered view of what justice requires when society is conceived as a scheme of cooperation between free and equal citizens from one generation to the next. The original position serves as a mediating idea by which all our considered convictions, whatever their level of generality - whether they concern fair conditions for situating the parties or reasonable constraints on reasons, or first principles and precepts, or judgments about particular institutions and actions - can be brought to bear on one another. This enables us to establish greater coherence among all our judgments; and with this deeper self-understanding we can attain wider agreement among one another.[49]

So justice as fairness, the original position, and the stages of the four-stage sequence which follow it enable us to clarify and integrate our shared public values and principles, to tease out their implications, and provide us with a principled and coherent "framework of deliberation" or a "guiding framework"[50] to which we may compare the

existing basic structure of our particular society and its institutions, and judge their justice.

The second possible objection to my use of Rawls's theory in a discussion of section 1 is that, because Rawls's analysis of the scope and content of the basic liberties, as specified at the later stages of the four-stage process, is different from that adopted by the Supreme Court of Canada in its interpretation of *Charter* rights and freedoms, in practical terms, a comparison of his approach to their limitation and restriction with the Court's treatment of conflicting rights in a section 1 context would be minimally useful.

In response, I would observe that in this thesis I have drawn upon Rawls's analysis as an influential example of what a liberal theory of justice requires in terms of the recognition and treatment of rights and freedoms. In this section of the paper, I have not assumed that the *Charter* exemplifies Rawls's approach but rather, as indicated above, that Rawls's approach provides a basis for coming to judgments about the justice of the *Charter* and Canadian legal, social, and political institutions.

Rawls's analysis of the specification of rights and freedoms, in view of the public nature of political liberalism itself, the two fundamental cases and the criterion of significance, may be analogized to a substantively and procedurally principled version of what Peter Hogg describes as 'purposive interpretation'[51]. For example, not all forms of speech would be protected under Rawls's approach, but only those forms that are significant to the two fundamental cases. However, my argument does not rely upon Rawlsian analysis being identical to judicial analysis of *Charter* rights and freedoms. Once one asserts that rights and freedoms have priority over societal interests (however

that priority is derived) and that no priority is assigned to any particular right or freedom as against any other, it should be obvious that the priority of some rights and freedoms is infringed if, in cases where they are invoked *in support of* a law challenged under the *Charter*, their status in the conflict is resolved by reference to justificatory principles applicable to societal interests.[52]

In addition, in my view, the onus on the government to meet the requirements of section 1 may be appropriate for government justifications for the infringement of guaranteed rights and freedoms if the nature of the societal interests it is asserting is unrelated to rights but, if one assumes that rights and freedoms have priority over societal interests and that no priority is assigned to any particular right or freedom against any other, neither the onus nor the rationale for the *Oakes*[53] test (or variations on it) is appropriate when assessing conflicting rights and freedoms.[54]

One of the most important insights that Rawls offers, and that differs from the conventional thinking of many lawyers, is that the basic liberties are specified and adjusted at each stage of the four-stage process. This means that the specification of the basic liberties in the form of constitutional rights and freedoms or as institutional rules in legislation does not alter their status or priority, and that legislatures have a positive obligation to specify the basic liberties.

The implications of this aspect of Rawls's theory for section 1 analysis is that, when a right or freedom is protected, promoted, or 'specified' in Rawls's terms, by means of legislation, government justifications for 'infringing' guaranteed rights or freedoms in the process of 'specifying' conflicting rights or freedoms must be treated

conceptually and procedurally differently from justifications involving societal interests unrelated to rights. In other words, they must be treated as conflicting rights independent of section 1 regardless of the fact the government is the effective actor.[55] In Rawls's terms, if legislatures are bound to specify the basic liberties, they should be capable of promoting or protecting rights and freedoms by means of legislation (and delegated legislation) without that legislation being governed by section 1, provided it can be shown that the legislation embodies a specification of a basic liberty.

Finally, Rawls's analysis of the process, principles and criteria governing the specification, self-limitation, mutual adjustment and restriction of the basic liberties provides an example of a framework for a principled approach to 'definitional balancing' independent of a section 1 analysis, as a solution to conflicts between constitutional rights and freedoms.

6. Rawls's analysis of the process, principles and criteria governing the specification, self-limitation, mutual adjustment and restriction of the equal basic liberties helps clarify the thresholds, processes and standards applicable to the limitation and restriction of the rights and freedoms of individual members of a group in the event of conflict with specifications of the 'equal liberty to participate in, produce and enjoy one's own culture' (or vice versa). It also clarifies that claims by non-members to an entitlement to share in the benefits associated with group rights-claims, despite their non-membership (by reference to concepts of universality and anti-discrimination), are groundless.

In *Liberalism, Community and Culture*, Kymlicka acknowledges that, in limited circumstances, the preservation of a minority group's cultural existence might require restrictions on the rights and freedoms of members of the community. He states that

> [n]othing in my account of minority rights justifies the claim that a dominant group within the cultural minority has the right to decide how the rest of the community will use or interpret the community's culture. My theory supports, rather than compromises, the rights of individuals within the minority culture.[56]

> [A]ny liberal argument for the legitimacy of measures for the protection of minority cultures has built-in limits. Each person should be able to use and interpret her cultural experiences in her own chosen way. That ability requires that the cultural structure be secured from the disintegrating effects of the choices of people outside the culture, but also requires that each person within the community be free to choose what they see to be the most valuable from the options provided (unless temporary restrictions are needed in exceptional circumstances of cultural vulnerability).[57]

Kymlicka also seems to contemplate the possibility of constraints on rights and freedoms in non-ideal situations if a community would disintegrate unless a right or freedom of its members were restricted so that, presumably, the very existence of the cultural community as a context of choice is at risk.[58]

Both situations raise the spectre of cultural protection justifying what Kymlicka describes as "illiberal measures".

> If certain liberties really would undermine the very existence of the community, then we should allow what would otherwise be illiberal measures. But these measures would only be justified as temporary measures, easing the shock which can result from too rapid change in the character of a culture (be it endogenously or exogenously caused), helping the culture to move carefully towards a fully liberal society. The ideal would still be a society where every individual is free to choose the life she thinks best for her from a rich array of possibilities offered by the cultural structure. ...

> This short-term strategy of restricting liberties in order to promote the longer-term ideal of full liberal freedoms has its dangers. Measures that are initially defended as unavoidable temporary restrictions on individual liberty may come to be defended as inherently desirable. Should it be the case that temporary restrictions are likely to be seen as desirable in themselves, rather than as necessary measures to achieve the ideal state of affairs in which they are absent, then the strategy must be reassessed. We need to know more about how societies disintegrate, and about how we can reduce the birth-pangs of liberalization, before we can make any general statement about when illiberal measures can be justified on the grounds of respecting cultural membership. ...
>
> In any event, this possibility - that in rare cases certain temporary illiberal measures can be justified by appeal to the importance of cultural membership - does nothing to warrant the pervasive liberal fear about recognizing that importance. It has no application to most cultures, and anyway does nothing to challenge the view that the long-term goal - the ideally just cultural community - is one in which every individual has the full range of civil and political liberties to pursue the life she sees fit.[59]

I would like to pursue Kymlicka's concern about "illiberal measures" briefly in the context of my argument that 'equal liberty to participate in, produce and enjoy one's own culture' is an equal basic liberty having the same priority as the other basic liberties contemplated by Rawls's first principle of justice. If the 'equal liberty to participate in, produce and enjoy one's own culture' has the same priority as the other basic liberties, specifications of the other basic liberties may be limited and even restricted in appropriate circumstances when protection of the family of basic liberties, of which the 'equal liberty to participate in, produce and enjoy one's own culture' is a member, requires it.

It may be useful here, as well, to recall Rawls's distinction between regulation and restriction. Most conflicts between specifications of the equal basic liberties may be resolvable by means of self-limitation and mutual adjustment (as opposed to restriction),

in such a way as to respect the status and priority of the family of equal basic liberties. If one accepts the argument in this paper that 'equal liberty to participate in, produce and enjoy one's own culture' may be justified as an equal basic liberty, then it follows that it and the other basic liberties may be self-limiting and mutually adjusted in accordance with Rawls's criteria and that, rather than derogating from liberal values, this self-limitation and mutual adjustment promotes the "fully adequate scheme of equal basic liberties" required by the first principle of justice.

Moreover, even if the equal basic liberties must be restricted, provided that restriction is justified by Rawls's criteria, it cannot be described as "illiberal", because it is "necessary to prevent a greater and more significant loss ... to the equal basic liberties".[60]

On this point, as well, it should be noted that all the basic liberties are potentially in conflict, as Rawls indicates in his discussion of freedom of political speech and the fair value of the equal political liberties. Questions of self-limitation, mutual adjustment and restriction are not raised uniquely, or even primarily, by group rights.

Finally, I will argue in chapter 3 that group rights must purport to secure goods whose moral desirability can be expressed in terms which refer to benefits to, for, or from the point of view of individual members of a group considered together. This location of the value of communal goods in their worth to members of the group considered together (and, in the context of the particular argument made in chapter 1, the characterization of 'equal liberty to participate in, produce and enjoy one's own culture' as a basic liberty by reference to Rawls's political conception of the person as

free and equal) should help allay concerns about any 'innate illiberalism' of group rights, and about the incommensurability of values and considerations relevant to the resolution of conflict between group and individual rights.

Two related points remain to be made about group rights, and specifically, given the focus of chapter 1, about specifications of the 'equal liberty to participate in, produce and enjoy one's own culture'. The equal basic liberty itself is universal. Every individual is entitled to an equal liberty to participate in, produce and enjoy her own culture. However, each culture, like each religion, is different. So it follows that the equal liberty associated with each culture may require the provision, protection or, in Rawls's terms, the 'specification' of different goods as necessary to effect it. Whereas at some level of abstraction (for example, at a constitutional level), the equal liberty and even broad categories of goods necessary to specify the equal liberty may be characterized in universal terms, at subsequent stages of specification (for example, at the legislative and judicial stages), some of the particular goods necessary to guarantee the central range of application of the liberty to each unique culture may be different.

This has implications for the self-limitation, mutual adjustment and restriction of the rights and freedoms that specify the basic liberties. Although the processes and criteria governing specification, self-limitation, mutual adjustment and restriction are universal despite differences in cultures, the end-result of such processes and the application of Rawls's criteria for the family of basic liberties guaranteed to the members of each culture may be somewhat different between cultures, because the specifications

of some of the basic liberties and thus their interaction, regulation, and even restriction, will be unique to each culture to some degree.

It also has important implications for those situations where non-members dispute their exclusion from benefits associated with communal goods enjoyed as a function of the exercise of a group right to those goods by a group of which they are not members (often ostensibly on the basis of claims to the universality of rights and anti-discrimination concepts). This objection exhibits a misunderstanding of the concepts of group rights and communal goods, and a distortion of the locus of universality, upon which the claim of discrimination is then founded.

For the reasons set out above, the concept of universality cannot be understood to found an individual claim to enjoy the benefits associated with communal goods necessary to effect the basic liberty to participate in, produce and enjoy a culture of which one is not a member (especially given the fact that, at the same time, one is entitled to enjoy the benefits of the particular communal goods necessary to effect the basic liberty in relation to one's own culture). Similarly, concepts of discrimination cannot apply to the exclusion of persons from the benefits of the communal goods necessary to effect the basic liberty to a culture of which they are not members. Put bluntly, non-members cannot use the concept of equality rights to free ride on interests in communal goods they do not share.

CHAPTER 3 CONSTITUTIONAL RIGHTS, GROUPS, AND COMMUNAL GOODS

A. Group rights-claims: communal goods, and groups as rights-claimants

It is important to recognize that the substantive questions of the criteria governing the justification of rights-claims and the treatment of conflicting rights and freedoms examined in the previous chapter are distinct from issues relating to the nature of claimable goods and the entities which can claim them.

In order to respond effectively to those who would assert that only individuals are capable of being rights-holders, proponents of group rights must also address the following questions: Can groups uniquely make claim to certain categories of goods? Are there such things as communal goods that cannot be the subject of individual rights claims? Are groups morally capable of being rights-claimants?

1. Communal goods

Some goods, by their nature, may only be claimed by groups. An approach to rights that only recognizes claims to goods that are individualizable[1] is incapable of accommodating such claims. On this view, the substantive question concerning the moral

importance of the interests asserted in such non-individualizable goods to groups and their members is never addressed. In my opinion, if non-individualizable goods (such as culture) can be contemplated as having moral importance to individuals, as I argue in chapter 1, then the legitimacy of any refusal to recognize the possibility of rights-claims to such goods must be subject to careful assessment.

As a first step, at this point of the paper, I will identify the characteristics of goods that are non-individualizable, to which rights-claims may only be made by groups, if at all. This discussion draws heavily from Denise Réaume[2] and, to a lesser extent, Jeremy Waldron[3].

a) Public and communal goods

Joseph Raz defines *"public goods"* as those goods from whose benefits no member of society can involuntarily be excluded[4]. If a good is provided at all everyone will be able to benefit from its enjoyment. This may be described as a *non-excludability* criterion[5]. In this context, the designation of a good as public requires a prior delineation of the entity or group for whom it is public.

As Réaume notes, some public goods apply to groups which are *naturally defined*. For example, "[a]ll Canadians and Americans benefit in non-excludable ways from a healthy Great Lakes system, but everyone else in the world can be excluded from those benefits."[6]

Other public goods apply to groups which are *conventionally or rule-defined*, rather than naturally defined. In such cases, membership in the groups is defined by

social rules, not natural facts. For example, "[n]ational defence is a public good for all Canadians, but we can and do exclude anyone not resident in the region politically defined as 'Canada'."[7]

Public goods may be either universal or partial. Goods that apply to all members of a given society are *universal public goods*. *Partial public goods* are public only for those who are members of an independently defined group within a given society.

Partial public goods may be defined by reference to natural facts or positive rules. An example of a partial public good involving a naturally defined group is the control of a contagious disease to which only one segment of the population has a genetic susceptibility. An example of a rule-defined group is a private club. As Réaume notes,

> [f]or all those who are members, the club's facilities are a public good, though they are not public for those who do not meet the membership criteria. Cases involving rule-defined groups may present the further issue of the justifiability of the criteria for inclusion in the group. For any given good it might be argued that the group should be expanded or contracted. This normative question may be very important, but it does not change the public nature of the good. To treat something as a public good presupposes some previously defined group for whom it is a good; but it is an independent moral question whether that definition is justified.[8]

Public goods may be inherent or contingent. An *inherent* public good "is one from which it is logically impossible to exclude anyone. The diffuse benefits arising from an open and tolerant society provide an example. A *contingent* public good is one from which it is logically possible to exclude some, but because of additional, contingent constraints this is not a practical possibility."[9]

Goods may be also be contingently public where, although the physical or technological means to exclude people exist, a rule or rules create normative barriers to using them. In other words, the rule creates a public good.[10]

Réaume notes that "[t]here is a further defining characteristic of a public good, namely that it be non-rival in consumption: it must be the case that consumption of the good by one individual does not reduce the level of consumption by others."[11] This is a necessary feature of public goods.[12]

While not technically a feature of pure public goods, the feature of being jointly or publicly produced is characteristic of many of them.[13] Goods that are publicly produced require many participants in their production.

Raz's argument against the existence of an individual right to public goods relies on the fact that public goods usually cannot be individually produced, and on the resulting difficulty of justifying the imposition on others of either very onerous duties or duties affecting a large number of people. However, as Réaume notes, while this consideration may be relevant at the stage of the substantive moral argument, "it ignores the prior structural condition for a sound claim of individual right that the good be individually enjoyable."[14]

Réaume defines an individual right as a claim which a single human being is entitled to assert even if no one else benefits from the exercise of that right and even if it requires some sacrifice from others.

> Therefore such a right can be claimed only with respect to goods or opportunities that can be individualized, that is, a good in which one's interest can be distinguished from, and possibly opposed to, that of others.
> ...

> Whether one can have a right as an individual to any good depends upon whether it is one which is individualizable in the above sense, that is, whether it is a good the *enjoyment* of which should, and therefore can, be satisfied even at the expense of some interest of everyone else.[15]

According to Réaume, this condition can be met in the case of public goods that may be enjoyed individually (even in cases where they cannot be produced individually)[16] and are therefore valuable for a completely individualizable aspect of one's being.

By contrast, a category of public goods such as, for example, a cultured society, which are both *produced and enjoyed* jointly are not individualizable. Réaume describes these as "participatory goods". For the purposes of the paper, I will describe them as "communal goods".

> By far the greatest value in a cultured society inherently involves the presence of others who have similar interests and with whom one can interact and share that culture. The value of such a good is partly constituted by a particular kind of participation. Such goods, which I shall call 'participatory goods', involve activities that not only require many in order to produce the good but are valuable only because of the joint involvement of many. The publicity of production itself is part of what is valued - the good *is* the participation.[17]

According to Réaume, the nature of aspects of a public participatory good (such as the good of minority language education) that considered on their own, could be individually enjoyed (such as, for example, access to the physical facilities of a school) is dictated by the public participatory nature of the core good:

> [The] core good [of a minority language education] is participatory. It involves an activity which, at least in part, requires a group both for its provision and for its enjoyment. ...
>
> The participatory nature of the core good of a bilingual education system must colour our understanding of the other aspects of the good ... . Access to the physical facilities, the furtherance of the larger group's linguistic identity, and greater cultural diversity depend for their existence

> on the health of an activity which inherently requires participation. ... I have argued that an individual cannot claim a right to a participatory good. For these reasons there can be no individual rights to any of the package of goods which make up a comprehensive education system in a minority language. Since the core good is good only for a group, any right to a bilingual education system can be held, if at all, only by a minority language group.[18]

In brief, Réaume is arguing that

- public goods are goods that are non-excludable, non-rival in consumption, and often jointly or publicly produced;
- public goods may be naturally or rule-defined. They may be universal or partial. If partial, their partiality may be defined by reference to natural facts or positive rules. They may be inherent or contingent;
- public goods which may be individually enjoyed may be the subject of claims of individual rights, even though they may be jointly produced;
- however, there are certain public goods - public participatory (or communal) goods, that is, those whose production and enjoyment are joint - to which a claim of individual right is untenable because they are not individualizable;
- public participatory (or communal) goods can give rise to a claim of a group right.
- if the core good is participatory (or communal), other aspects of the good which, considered on their own could be individually enjoyed, must also be considered communal.

2. Groups as rights-claimants

Assuming, then, that there are goods which, by their nature, may only be claimed by groups, the next question that must be addressed is whether there is something in the nature of groups (as distinct, for example, from individuals) that inherently, or from a moral perspective, precludes them from being rights-claimants with respect to such goods.

In this section of the paper, I will address the interrelated questions, which have plagued proponents and opponents of group rights alike, of the moral status of groups and whether there are limits to the types of groups that are capable of being rights-claimants. I will argue that assessment of the moral status of groups as a precondition to their characterization as entities capable of being rights-claimants is inappropriate and unnecessary. In my view, in the context of group rights-claims, the critical (and only relevant) questions from a moral point of view are whether the communal good being claimed by the group is defined by reference to its worth to members of the group, and whether, in any given case or category of cases, protection or provision of the particular good claimed is necessary to give effect to the right or freedom at issue.

a) The moral value of communal goods

I will assume for the purposes of the paper, in agreement with Jeremy Waldron[19], that the language of rights should not simply be used to express the moral desirability of some object or state of affairs.

I will also assume that rights must purport to secure goods whose moral desirability can be expressed in terms which refer to benefits to, for, or from the point of view of individuals.[20]

However, it does not follow, as many believe, from the premise that rights must purport to secure goods whose moral desirability can be expressed in terms which refer to benefits to, for, or from the point of view of *individuals* that this moral desirability related to individual well-being must be capable of being characterized *individualistically* or, in other words, that these goods must be capable of enjoyment or enforcement by separate individuals.

The value of communal goods lies in their worth to members of the group considered together and not as individual recipients of benefit.[21]

In my view, locating the value of communal goods in their worth to members of the group makes a search for an independent moral value of groups superfluous and inappropriate. Furthermore, as I will argue in the next section of the paper, attempts to delineate and delimit the nature of groups which have sufficient moral value to be capable of being rights-claimants and to have rights are flawed in both theory and application.

b) The moral status of groups and groups capable of being rights-claimants

Much of the academic analysis of group rights has focused on identifying and delimiting the nature of entities that are capable of characterization as rights-claimants. The question of what entities qualify as groups has become inextricably linked to the

questions of which entities are capable of being rights-claimants, and which should have rights.[22]

The discussion has been largely informed by a social ontology which, as Iris Young notes, presumes the individual is ontologically prior to the social.[23]

As a result, much of the discussion of the nature of groups has focused on models of aggregates and associations, both of which are individualistic concepts. Some writers, usually opponents of collective rights, see all groups as aggregates or associations, whereas others, most often proponents of group rights, have used the models of aggregates and associations to contrast and distinguish certain entities that qualify as groups capable of being rights-claimants.

In both cases, the debate has been driven by what Darlene Johnston describes as "the argument from anarchy"[24], the concern that, if all groups were capable of claiming rights, the very concept of rights would be meaningless. It has also been driven by the related concern that individual rights not be overwhelmed by group interests.

i) Aggregates

Iris Young describes aggregates as "merely arbitrary classifications of individuals according to attributes which are external to or accidental to their identities"[25]. As a result, the aggregate model conceives of individuals as ontologically prior to the collective.

Owen Fiss distinguished between "groups" and haphazard aggregates as follows:

> I use the term "group" to refer to a social group, and for me, a social group is more than a collection of individuals, all of whom, to use a polar example, happen to arrive at the same street corner at the same moment.[26]

Michael McDonald has suggested a set of left-handed goalies or red-headed defence men in a hockey league as examples of an aggregate.[27]

All commentators agree that aggregates cannot be rights-holders. However, some writers suggest that all groups are only aggregates. For example, George Sher "uses the arbitrariness of aggregate classification as a reason not to give special attention to groups"[28]:

> There are really as many groups as there are combinations of people; and if we are going to ascribe claims to equal treatment to racial, sexual, and other groups with high visibility, it will be mere favoritism not to ascribe similar claims to these other groups as well.[29]

However, I think it is fair to say that, among legal theorists, the view that all groups are simply aggregates is a minority one.

ii) Associations and groups capable of being rights-claimants

One identifying aspect of associations, at least in a rights context, is that their members are similarly situated individual rights-holders. Individualizable claims that may be made by the association on behalf of its members cannot be said to be claims to communal goods, in the sense described above.

Recently, Michael McDonald has distinguished between groups that are capable of functioning as collective rights-holders and associations which are only capable of claiming rights on a "class action" basis:

> I draw a distinction between a group's having a right and its members having that right. ... The existence of similarly situated rights-holders does not then make a group which can hold, exercise, and benefit from collective rights. I reject ... as a candidate for collective rights what I have described as a *class action concept of collective rights*. On the class action concept, the group as a right-holder serves as a convenient device for advancing the multiple discrete and severable interests of similarly situated individuals. ... A major aim of group rights is to protect interests which are not thus severable into individual interests for the rights in question benefit the group itself by providing a collective benefit. Moreover, group rights paradigmatically involve the collective exercise of rights through the use of group decision-making mechanisms. Collective benefit and collective exercise are not then captured by the class action conception of collective rights.[30]

Unlike the aggregate model, "the association model recognizes that groups are defined by specific practices and forms of association."[31] Yet, like the aggregate model, the association model conceives of individuals as ontologically prior to the collective.

There is considerable confusion in the literature in the concepts governing the characterization of associations and groups[32] because of the linkage made between the question of what entities may be characterized as groups with those of which groups are capable of being rights-claimants, and which should have rights.

Because many writers are reluctant to see associations as rights-holders, they have attempted to characterize them as excluded from the category of groups. Opponents of collective rights tend to characterize all groups that are not simply aggregates as associations incapable of having rights[33]. Upon closer examination, what proponents of collective rights appear to be attempting to do, in excluding associations from the category of groups, is to exclude them from the category of groups that have sufficient moral importance to be rights-claimants.

Yet, in my view, when considered in accordance with the very criteria adopted by these writers, the category of groups cannot be distinguished on a principled basis from the category of associations. The resulting risk is that claims to morally valuable goods may be excluded from rights-protection based upon an arbitrary preliminary determination of the status of the entity claiming the good on behalf of its members.

Some proponents of collective rights describe groups capable of being rights-holders as bound by shared understandings and rules. For example, McDonald argues that

> [a group's] members must see themselves as normatively bound to each other such that each does not act simply for himself or herself but each plays her or his part in effectuating the shared normative understanding. Shared understandings cover such key aspects of group life as membership and decision-making rules. That there is a shared understanding is a matter of social fact and not merely a matter of legal assignment or ascription. ...
>
> Similarly, the material or "objective" factors that give rise to the existence of a group must be distinguished from the understanding itself or "subjective factors". Subjective factors are crucial; it is the existence of a shared understanding that makes diverse individuals into a group. This is not to deny the important fact that shared understandings can both be positively correlated with certain objective features like a shared heritage, language, belief or social condition, and also focused on such objective conditions in various ways. Thus, a group-constituting understanding may well be created amongst individuals who have been selected for oppression because of their ethnicity, race or language. Since objective factors may thus provide a focus for a shared understanding, they are often important in correctly interpreting a shared understanding because they help the interpreter to *see the point of* various norms that arise out of a group-constituting understanding.
>
> There is then a tendency of each group member to see herself as part of an *us* rather than just as a separate *me*.[34]

However, although criteria such as rule-following and shared understandings distinguish associations and groups from aggregates, they do not appear sufficient to definitively distinguish groups from associations.

Another criterion developed to distinguish groups from associations relates to the voluntariness of the relationship of the individual to the collective entity.

For example, in 1986, McDonald devised a notion of "self-collection"[35] to distinguish collectivities from aggregates which are "other collected". He also identified two forms of self-collection, one based on will or choice (W), and the other based on internal recognition of some significant commonality (R). The former would produce "artificial" collectivities such as clubs, teams and governments. The latter produces "natural" collectivities which include, for example, families, communities and societies. According to McDonald, "natural" collectivities have a stronger claim to recognition or moral importance than collectivities that are "artificial" because "R-factors are more basic or deeper than W-factors in the determination of identity and welfare of the collectivity and, through it, its individual members".[36]

In my view, although a voluntariness factor might provide a basis for distinguishing some types of associations from groups, it is ineffective to distinguish the category of associations from that of groups and, moreover, inappropriate if the consequence of the distinction is to exclude entities which fail to meet the required threshold from being considered capable of claiming rights.

In a recent article, McDonald suggests "purposelessness" as a criterion for distinguishing associations from groups capable of being rights-claimants:

> [T]he most important candidates for collective rights, families, minority groups, nations and the like, could well be described as *purposeless*. Their goals are extremely broad; their shared understandings encompass ways of life and a set of social meanings for their members. That is, shared understandings in this case provide a context for shared purposes. They are purposeless too in the sense that they standardly have goals which do not refer to ulterior purposes; a primary goal is simply being together. Think of friendships and the like in this connection. In brief, there is an important subcategory of groups that it is harder to describe or define in terms of ulterior purposes. I will describe these as communities, in contrast with other groups that can largely be defined in terms of their purposes, such as corporations, labour unions, and sports associations.[37]

It strikes me that the assertion that groups capable of being rights-claimants are purposeless depends entirely upon the definition of "purpose" one adopts. In other words, one can construct the content of the criterion in such a way that it is self-fulfilling.[38] A distinction made between groups capable of being rights-claimants and associations based upon a criterion of purposelessness/purpose (or, for that matter, upon one of choice) also relies upon the very form of social ontology about which McDonald expresses scepticism.[39]

Frances Svensson invokes multi-dimensionality as a distinguishing factor:

> Surely there is a politically and morally significant difference between the American Medical Association or the National Rifle Association on the one hand, and the French-speakers of Québec or the Amish in Pennsylvania on the other.[40]

She sees the distinction in dimensional complexity:

> [The multidimensional group] is a group with many interlocking dimensions or facets shared by its members - in an ideal case, for example, language, religion, ethnicity, race *and* historical experience. It is comprehensive, in that members express virtually all of their social identities through the group.[41]
>
> Generally speaking, ... the more dimensions a group has, the stronger its claim to special status. It is dimensional complexity which produces such

> characteristics as endurance over time, stability of identity, systemic interdependence, and relative autonomy, and these in turn play a crucial role in qualifying groups for special status while avoiding the problem of open-endedness.[42]

The difficulty with Svensson's argument, like McDonald's, is not that her criteria would include such groups in the category of group rights-claimants - most persons who are prepared to contemplate group rights at all would agree with Svensson that a group which shares a common language, religion, ethnicity, race and historical experience is likely to be a strong candidate for group rights. The problem is that the same standards serve as criteria for exclusion.[43]

Both McDonald and Svensson, in these excerpts, appear to be using factors such as voluntariness, multi-dimensionality and purposelessness as positive correlates for group constitution of individual identity. In other words, they seem to be linking the capacity of a group to be a rights-claimant with the moral value of that group to its membership. They appear to link the moral value of a group to the fact that it constitutes (to some degree) the individual identities of its members.

This link is made more clearly in McDonald's recent work:

> If we distinguish between our shallower and deeper social allegiances, it is plausible to describe the object of the latter as an identifying group. Allegiance to an identifying group structures personal identity; it indicates who I am. At its most profound level, the loss of membership in an identifying group is a loss or shattering of personal identity. This could alternatively be labelled as a *communitarian* feature or an *identifying* one. Even in a highly pluralistic context like our own, it will be the case, contrary to received liberal dogma, that the most profound sorts of self-identification are non-voluntary and not a matter of choosing to identify with some group or other. And even for voluntary identification, our individual options for identification are most often strongly limited by deeply rooted objective and subjective factors including those set by such processes as socialization and acculturation.[44]

Similarly, Iris Young states that

> [g]roup meanings partially constitute people's identities in terms of the cultural forms, social situation, and history that group members know as theirs, because these meanings have either been forced upon them or forged by them or both.[45]
>
> Unlike the aggregate model of groups, the association model recognizes that groups are defined by specific practices and forms of association. Nevertheless it shares a problem with the aggregate model. The aggregate model conceives the individual as prior to the collective, because it reduces the social group to a mere set of attributes attached to individuals. The association model also implicitly conceives the individual as ontologically prior to the collective, as making up, or constituting, groups.
>
> A contract model of social relations is appropriate for conceiving associations, but not groups. Individuals constitute associations, they come together as already formed persons and set them up, establishing rules, positions, and offices. The relationship of persons to associations is usually voluntary, and even when it is not, the person has nevertheless usually entered the association. The person is prior to the association also in that the person's identity and sense of self are usually regarded as prior to and relatively independent of association membership.
>
> Groups, on the other hand, constitute individuals. A person's particular sense of history, affinity, and separateness, even the person's mode of reasoning, evaluating, and expressing feeling, are constituted partly by her or his group affinities.[46]

I do not dispute that groups that constitute individual identity have moral value. I do, however, question the feasibility and utility of attempting to draw a clear distinction between "groups" and "associations" for the purposes of assigning moral value.

In my view, there is no principled basis for definitively distinguishing between associations and groups as identity constituting entities. Assuming a collective entity is seen to have moral value because it constitutes individual identity, the category of associations (as entities that do not constitute individuals) can only be excluded from the

category of groups capable of being rights-claimants (as entities that constitute individuals) if one

- asserts that it is theoretically possible to draw a clear line between the category "associations" and the category "groups" based upon a social ontology that presumes individuals are ontologically prior to associations but not to groups, and that it is empirically possible to distinguish accurately between them; and/or
- regardless of the social ontology espoused, is prepared to draw an arbitrary line between the category "associations" and the category "groups" on the basis, presumably, of a determination of value associated with the degree to which these entities are seen to constitute individual identity.[47]

Collective rights theorists must ask themselves the following questions: If the moral value of groups lies in the fact they constitute individual identity, to what degree and in what ways must they constitute individual identity in order to have moral value? It is indisputable that certain entities constitute identity in a more fundamental way than others, but how does one draw the line in any principled way to exclude some and include others as morally valuable? This would appear especially problematic when the persons drawing the line are most often not even members of the groups affected.

I should clarify that I am not engaging in this exercise for the purpose of demonstrating that associations should have collective rights. In fact, for reasons related to the nature of communal goods and the substantive moral assessment of the importance of interests claimed as rights, I think it most unlikely that groupings typically conceived of as associations can claim collective rights. In my view, however, any argument that

an entity is unable to claim rights should not be based upon its lack of status as a group or as a group having moral value, but should be founded upon less arbitrary criteria that relate to the nature of claims and rights, rather than to the nature of groups. Otherwise, one risks excluding claims to morally valuable goods from rights-protection.

I am raising the issue of the characterization of associations because it highlights the theoretical problems and arbitrariness of the existing methodological approach to the discussion of groups as rights-claimants.[48] A methodological approach that focuses upon the nature of groups as a preliminary to assessing whether they can and should be rights-holders is also problematic in its application[49]:

- The process of definition and representation is almost always engaged in by persons external to the groups being defined.
- The impetus to define the nature of groups is driven by considerations and in accordance with criteria external to the groups.
- The purpose for which the definition of the nature of a group is sought dictates and, in a rights context generally restricts, the nature and scope of the definition.
- The definition risks being frozen, as the only definition of a group's nature for all time.
- The definition risks being frozen, as the only definition of a group's nature for all purposes.
- The definition may not reflect a group's own consciousness of its identity, or may reflect at most only one aspect of a group's sense of identity.

- Ultimately, this approach results in the depoliticization of the issue of collective rights because the focus becomes fixed on and distracted by the question of the nature of groups rather than on injustice suffered by groups and the claims or rights necessary to remedy or avoid injustice.

Finally, and most importantly, if one assumes, as I do, that for the purposes of rights analysis, goods must be of value to individuals, (although not individualizable in terms of enjoyment or enforcement), then the independent moral value of the group that claims the good on behalf of its membership is incidental. The moral entities at issue, the entities for whom communal goods must ultimately be sufficiently important to be characterized as rights, the entities who benefit from collective rights and the associated imposition of duties upon others are individuals, as members of the group considered together.

This being said, it should be noted that, in practical terms, groups that are in a position to claim communal goods at all, and in particular to claim rights to communal goods, will generally, *by that relationship of group, members and goods alone*, be groups that constitute in part the identities of their individual members.

B. A proposed methodology for group rights-claims to communal goods

Given that, in my view, the existing methodological approach to group rights is flawed in both theory and application, and that these difficulties appear to lie in the attempt to delineate and delimit the nature of groups that can be rights-claimants and

should have rights, I will propose a methodology that displaces the inquiry from one that focuses primarily on the nature of groups capable of being rights-claimants to one that addresses, first, the nature of collective claims that may be made by groups and, second, the types of claims that may qualify as something to which the claimant has a right.

I should note first, though, that aspects of membership may raise critical threshold issues in the context of group rights-claims.

For example, there is some controversy about whether the number of members within a group is relevant to the strength of a group right once that right has been established, or only to the initial establishment of the right. Réaume's view, which I share, is that the number of members within a group is relevant only to the establishment of a right, and not to the strength of the right:

> [N]umbers count in the first instance because we are concerned with the provision of goods which inherently require participation amongst members of the group both for the provision of the good and for its enjoyment. The sorts of goods which fit this description tend to be things like the communal practice of a religion or a language which are complex group practices requiring a certain number of members in order to be viable at all. This is most obvious in the case of a language. ... [T]he survival of a language requires a certain critical mass of speakers. It seems likely that the same is true of religious, cultural, and ethnic groups. Under these circumstances there can be a group right only if there is a group - that is, enough participants to make the group practice a viable one. This constitutes an important difference between group and individual rights - the latter are often thought to be so valuable precisely because the number of those who share one's interest is irrelevant to whether it ought to be protected. However, although numbers are important to group rights in this respect, I would argue, against Raz, that they have no further relevance. If the group meets the viability test, numbers are irrelevant in establishing the weight of its right. They go towards the existence condition for a group (as right-holder), but not to the weight of its interest. As long as the group is viable it does not matter whether it has one hundred or one million members. Rather, the strength of its claim

> depends on how important the continued existence of the group is to its members. This does not vary with the number of participants.[50]

If a person claims an entitlement to membership in a group from which he or she is excluded, he or she may raise questions of the moral legitimacy of the exclusionary criteria for membership.[51] If a person is a member of a group making a rights-claim, he or she may dispute the representativeness of those who articulate and make the claim to a communal good on behalf of the group, or the process of definition and representation.[52] Where some members of a group are unwilling to participate in the production and enjoyment of the communal good claimed, and the right to the good cannot be effected without duties being imposed upon them which require their active participation, they may assert that the nature of the good as a communal good requires that which cannot be compelled - willing participation[53].

These issues, if raised, must be addressed as a preliminary to the assessment of a group rights-claim, because they go to the root of the elements required for a claim: the existence of a group and the validity, as a communal good, of the good to which the group lays claim.[54]

Once these preliminary issues have been resolved, if raised, I propose that the focus of the inquiry be shifted to the following:

a) The first question would be whether a *claim* is one that can be characterized as communal: is the good claimed one that can only be claimed by a group and not by individuals because it is not individualizable.

In other words, the inquiry is shifted from the nature and characteristics of the group to the nature of the claim (such as a claim related to culture) as one which can

only be made by a group. Only limited types of claims may be characterized as communal.

In this context, as described below, in any given case, one would also have to examine whether the particular group can make a claim to the particular good claimed.

b) The good claimed must be one whose moral desirability can be expressed in terms which ultimately refer to benefits to, for, or from the point of view of members of the group, taken together.

c) If these two requirements are met, the question would be whether the claim may be characterized as something to which the claimant has a *right*. Not all claims qualify as rights-claims. Protection or provision of the good which is the object of a rights-claim pursuant to a constitutional right (such as, for example the right 'to participate in, produce and enjoy one's own culture') must be necessary to give effect to the right or freedom which is asserted as the justifying basis or ground of the claim. Determination of the relationship of a particular good claimed to the right or freedom at issue would be judged by reference to Rawls's process of specification and adjustment, and the criterion of significance discussed in chapter 2.[55]

This substantive moral assessment rebuts the "argument from anarchy". I should explain this comment. The argument from anarchy is untenable given that the particular good claimed in a rights-claim must be necessary to effect a right or freedom, which in turn specifies a basic liberty. Protection or provision of the good at issue in any given case or category of cases is a specification of a basic liberty in accordance with Rawls's

process of specification and adjustment and the criterion of significance (and is traceable back to that basic liberty). In other words, there is no 'anarchy' to argue from.[56]

I see this methodology as having a number of advantages:

I believe it is capable of creating meaningful space for groups to self-define and shape representation, rather than itself imposing structures and categories of definitions upon them. It should be capable of enabling groups to be subjects, rather than objects, of discourse.[57] This addresses two issues: who defines the group, and who sets the framework within which the definition is made.

I recognize that, regardless of the methodology adopted, any inquiry directed to the recognition, interpretation and enforcement of group rights (or even to the societal recognition of group claims that are not rights) would be, at least in part, externally driven because the processes of recognition, interpretation and enforcement themselves implicate a larger social (and constitutional) order[58]. However, a decentering of the existing focus upon the nature of groups capable of being rights-holders and the consequent reassessment and reorientation of the role that the larger social order may legitimately claim would enable groups both to self-define and to have more autonomy to control the process and purposes of representation.[59]

The group self-definition and representation in the methodology that I propose relate to the nature of the claim made at any given time and only incidentally to the

nature of the group making the claim. For example, if the collective claim made is a claim to cultural preservation, the group making the claim would have to represent at least one aspect of its identity in a way that is relevant to the cultural claim being made. In other words, the representation in a particular case would be relative only to the nature of the collective claim being made. Moreover, it could be different in the event a claim of a different nature were made.

In my view, a decentering of the focus on the nature of groups capable of being rights-holders to the nature and scope of collective claims also allows group representations to shift according to changing circumstances, internal and external, and in accordance with different purposes.[60]

By focusing on collective claims rather than the nature of groups, the methodology may be more responsive to the needs and priorities of groups than one which makes the meeting of needs conditional upon a prior external evaluation of the nature of the group asserting the need.

A focus on collective claims rather than the nature of groups might also contribute to making the invisibility of the collective privileges of majority groups in the social order visible. For example, if culture is a good that can only be collective, the preeminence of the majority culture(s) can only be explained in collective terms. As such, it can be argued that a majority culture enjoys privileges as a favoured culture as

a function of its being the culture of a favoured collective entity. This might help to discredit the generally derogatory assertion that rights claimed by "minority" groups are "special rights", by highlighting the enjoyment by majority groups of similar rights.

CONCLUSION

In this paper, I argue that Rawls's political conception of the person as a free and equal moral being constitutes the fundamental standard by which arguments for and against extension of Rawls's constructivist procedure within the boundaries of a modern constitutional liberal democracy must be measured. I argue that cultures are of intrinsic derivative, as well as instrumental, value to their members and, as such, are critical to their capacity for, and exercise of, their two moral powers, and their ability to have and pursue a determinate conception of the good. I contend that Rawls's constructivist procedure, when applied to the basic structure of an open, culturally heterogeneous modern constitutional democracy, must recognize that 'equal liberty to participate in, produce and enjoy one's own culture' is justified as a basic liberty within the meaning of his first principle of justice. I also attempt to show that refusal to recognize 'equal liberty to participate in, produce and enjoy one's own culture' as a basic liberty privileges the members of majority cultures arbitrarily from a moral perspective. In other words, refusal to recognize an 'equal liberty to participate in, produce and enjoy one's own culture' does not mean that the cultures of all groups are equally unprotected. It means that the culture(s) of any group(s) in a majority are exclusively privileged.

My hope is that rooting the extension argument in Rawls's first principle of justice will avoid the various controversies surrounding Rawls's second principle of justice and its priority. It should also circumvent some of the objections made to aspects of Kymlicka's analysis, such as the controversial issue of compensation for cultural

circumstances independent of Rawls's Difference principle. The argument should avoid the problems that Kymlicka had with his proposed social primary good of culture being perceived solely as a collection of ends, the risk of petrification and majority control if one protected the character of a cultural community as a social primary good, and the difficulties and limitations of an instrumental characterization of culture.

By giving the status of a liberty to aspects of culture, and by showing that culture is a communal good, I hope to have achieved several objectives. The first is to make culture visible to members of majority cultures, to clarify that culture can only be communal, and therefore that the preeminence of majority cultures in any society is a function of the preeminence of majority communities.

Second, I have also attempted to underscore the pervasive quality of culture - that culture is a feature of our existence in communities. We actively create and enjoy culture by our very involvement in communities. But majority cultural communities are more able to create the culture of our social and public institutions than minority communities. One need only consider the ways in which it is almost exclusively majority cultures that are represented and created in the communications media or, for that matter, any medium or structure (including political structures) which rely upon individuals as consumers (or upon numbers of individuals). When culture is invisible, this pervasive quality results in the quiet and inevitable imposition of majority cultures upon members of minority groups. Therefore, regardless of the particular nature of protection provided by a liberty to culture, I would argue that making culture and its processes visible in the context of a liberty is itself of value to minority communities.

I think, however, that it is possible to view the creation of majority culture(s) in our society as something actively (and disproportionately) promoted by many of our social and political institutions. If so, the 'equal liberty to participate in, produce and enjoy one's own culture' of minority cultural groups may require that they be provided with forms of protection or promotion that will guarantee the liberty to them in a meaningful way. Aboriginal cultures, in my view, have an additional, unique claim on government. Active attempts by governments, over a considerable period of time, to assimilate Aboriginal peoples and eradicate Aboriginal cultures and languages represent an interference with Aboriginal peoples' equal liberty to participate in, produce and enjoy their own cultures and demand a remedy.

The study of Rawls's four-stage process and the priority of the equal basic liberties in chapter 2 provides principles to guide the specification of the basic liberties in legislation and the assessment of rights-claims (including group rights-claims). First and, from a political perspective perhaps most importantly, it provides a rebuttal to the 'argument from anarchy' that has been influential in preventing the recognition of group rights. I argue that the argument from anarchy is untenable given that the particular good claimed in a rights-claim must be necessary to effect a right or freedom, which in turn specifies a basic liberty. Protection or provision of the good at issue in any given case or category of cases is a specification of a basic liberty in accordance with Rawls's process of specification and adjustment and the criterion of significance (and is traceable back to that basic liberty).

This phase of Rawls's constructivist analysis also has several implications for the nature of the obligations placed upon governments and the courts to implement the basic liberties.

Specifically, I argue that constitutional delegates and legislators have a positive obligation to specify the equal basic liberties in order to actively guarantee and protect their central range. I also argue that courts have a positive obligation to assess and enforce the family of equal basic liberties.

Rawls's analysis of the process, principles and criteria governing the specification, self-limitation, mutual adjustment and restriction of the basic liberties also provides principles and criteria to guide the resolution of conflict between rights and liberties, which may help alleviate the concerns about cultural rights requiring "illiberal" constraints on individual rights and freedoms that have plagued efforts to provide meaningful protection to Aboriginal cultural rights. In particular, I argue that, if the 'equal liberty to participate in, produce and enjoy one's own culture' has the same priority as the other basic liberties, specifications of the other basic liberties may be limited and even restricted in appropriate circumstances when protection of the family of basic liberties, of which 'equal liberty to participate in, produce and enjoy one's own culture' is a member, requires it. Rawls's discussion also helps clarify the thresholds, processes and standards applicable to the limitation and restriction of the rights and freedoms of individual members of a group in the event of conflict with specifications of the 'equal liberty to participate in, produce and enjoy one's own culture' (or vice versa).

I also address some implications of Rawls's analysis for conventional approaches under the *Charter* to the resolution of conflict between rights and freedoms, and between rights and freedoms on the one hand and societal interests on the other.

In particular, I argue that the form in which the basic liberties are specified is irrelevant to the issue of their status and priority. In other words, the specification of the equal basic liberties is not exhausted at the constitutional stage. They are further specified at the legislative stage, and are assessed and enforced at the judicial stage. Any such specification derives its status and priority from the basic liberty which it specifies, rather than from the form in which it is specified.

Rawls's approach to the priority of the equal basic liberties would also prohibit the balancing of the rights, freedoms and institutional rules which specify those basic liberties against societal interests when they come into conflict. Similarly, it follows that the priority of the equal basic liberties prohibits a conflict of the rights and freedoms which specify them from being resolved by reference to justificatory principles applicable to societal interests. (I would also observe that once one asserts that rights and freedoms have priority over societal interests and that no priority is assigned to any particular right or freedom as against any other, the priority of some rights and freedoms is infringed if, in cases where they are invoked in support of a law challenged under the *Charter*, their status in the conflict is resolved by reference to justificatory principles applicable to societal interests.)

The arguments that the specification of the basic liberties in the form of constitutional rights and freedoms or as institutional rules in legislation does not alter

their status or priority, and that legislatures have a positive obligation to specify the basic liberties, when considered together, have the following result: If legislatures are bound to specify the basic liberties, government justifications for 'infringing' guaranteed rights and freedoms in the process of 'specifying' conflicting rights and freedoms must be treated conceptually and procedurally differently from justifications involving societal interests unrelated to rights. Provided legislation can be shown to embody a specification of a basic liberty, it must be treated as a conflicting right independent of section 1 of the *Charter* regardless of the fact the government is the effective actor.

I also suggest that Rawls's analysis of the process, principles, and criteria governing the specification, self-limitation, mutual adjustment and restriction of the basic liberties provides an example of a framework for a principled approach to 'definitional balancing' independent of a section 1 analysis, as a solution to conflicts between constitutional rights and freedoms.

The study of Rawls's four-stage process and the priority of the equal basic liberties also challenges certain commonly held misconceptions about the requirements of the concept of universality. Specifically, I argue that the 'equal basic liberty to participate in, produce and enjoy one's own culture' itself is universal. Every individual is entitled to an equal liberty to participate in, produce and enjoy her own culture. However, each culture is different, and the equal liberty associated with each culture may require the provision, protection, or specification of different goods as necessary to effect it. In other words, some of the particular goods necessary to guarantee the central range of application of the liberty to each unique culture will be different.

This argument has the following implications: Although the processes and criteria governing specification, self-limitation, mutual adjustment and restriction are universal despite differences in cultures, the end-result of such processes and the application of Rawls's criteria for the family of basic liberties guaranteed to the members of each culture may be somewhat different between cultures, because the specifications of some of the basic liberties and thus their interaction, regulation, and even restriction will be unique to each culture to some degree.

This also means that the concept of universality (which often founds claims to discrimination) cannot be understood to found an individual claim to enjoy the benefits associated with communal goods necessary to effect the basic liberty to participate in, produce and enjoy a culture of which one is not a member (especially given the fact that, at the same time, one is entitled to enjoy the benefits of the particular communal goods necessary to effect the basic liberty in relation to one's own culture).

In chapter 3, I define communal goods as goods whose production and enjoyment are joint - to which a claim of individual rights is untenable because they are not individualizable. I assume that rights must purport to secure goods whose moral desirability can be expressed in terms which refer to benefits to, for, or from the point of view of individuals. I locate the moral value of communal goods in their worth to members of the group considered together and not as individual recipients of benefit.

This has allowed me to argue that the assessment of the moral status of groups as a precondition to their characterization as entities capable of being rights-claimants is inappropriate and unnecessary, and that the critical (and only relevant) questions from

a moral point of view are whether the communal good being claimed by a group is defined by reference to its worth to members of the group, and whether, in any given case or category of cases, protection or provision of the particular good claimed is necessary to give effect to the right or freedom which is asserted as the justifying basis or ground of the claim, judged by reference to Rawls's process of specification and adjustment and the criterion of significance. I also argue that a methodological approach which focuses on the nature of groups which may be rights-claimants is theoretically arbitrary and problematic in its application, and that this militates in favour of a methodology that displaces the inquiry to one that addresses the nature of claims asserted by groups. My hope is that this methodology is capable of creating meaningful space for groups to self-define and shape representation, rather than itself imposing structures and categories of definitions upon them. It should be capable of enabling groups to be subjects, rather than objects of discourse. It should allow group representations to shift according to different circumstances, internal and external, and in accordance with different purposes. It would also be more responsive to the needs and priorities of groups than a methodology which makes the meeting of needs conditional upon a prior external evaluation of the group asserting the need.

Finally, I see the arguments for group rights in this paper, as they relate to Aboriginal communities, situated within a larger context. My purpose in the paper is limited to showing that certain categories of group rights must be recognized within a liberal democratic society. I focus on recognition of the category of group rights whose justification is derived from the existence of pluralism in an open, culturally

heterogeneous modern constitutional democracy. In other words, I am dealing with what might be described as rights derived from 'equal citizenship' in a pluralistic society.

I should not be taken to suggest that categories of group rights, such as Aboriginal rights related to self-determination or sovereignty, which are derived from prior occupation, cannot have a basis for recognition independent of the principles governing 'equal citizenship'. Quite the opposite. Recognition of such rights might result in the exercise of exclusive sovereignty in some areas and shared sovereignty in others (which might be conceived of as recognizing 'overlapping citizenships') as well as 'equal citizenship' in yet others. I do not address this issue directly in the paper because it is not necessary to the particular argument I am making. However, I would note that, in my view, Rawls's recent article, "The Law of Peoples"[1], lays the foundation for an argument that his constructivist procedure challenges the conventional, virtually unexamined, assumption in Canada that Aboriginal rights derived from prior occupation must be subject to the *Charter*[2] (provided one first argues for an extension, on a constructivist analysis, of his identification of peoples with existing states.[3])

I would also suggest that those Aboriginal cultural rights protected by virtue of the 'equal citizenship' principles discussed in the paper are distinct from and (by virtue of and to the extent of this distinction) would continue to be protected independently of, and in addition to, cultural guarantees provided by arrangements reached on the basis of rights derived from prior occupation.

Finally, I have assumed that there is a value to challenging the resistance to the recognition of group rights on the basis of principles applicable to 'equal citizenship', in an attempt to challenge the legitimacy of the hurdle they appear to present to the recognition of Aboriginal rights in any form.

Notes to Introduction

1. I use the terms 'group rights' and 'collective rights' interchangeably throughout the paper. I use these terms to mean rights claimed by groups to communal goods. I do not mean to suggest that certain individual rights which may be claimed by members of groups may not be equally important to the welfare of the groups of which they are a part. However, this paper is limited to examining the place of the more controversial category of group or collective rights in liberal theory.

2. According to Eisenberg, the result of the dominant perspective in constitutional jurisprudence is that

> [t]he conceptual, political or legal power attributed to individual rights means that much less power for collective rights (or vice versa) so that communities are based either on the paramountcy of individual rights or on that of collective rights.
>
> The first result of framing conflicts in terms of a competition between individual and collective rights is that doing so poses conflicts between individuals and communities in terms of fundamental values. Rights are instruments intended to protect the most important and basic values. Therefore, a choice must be made in cases of conflict to determine whether the individual right is more fundamental than the group claim, or vice versa. Not all accounts cast rights as absolute claims which cannot be violated under any but the most extreme circumstances. Nonetheless, the rhetoric of rights is used to invoke a different and less flexible set of rules than is invoked when we speak of mere "interests" or "claims". The supposition is that the absolute values supposedly captured by individual rights, on the one hand, and collective rights, on the other hand, are incommensurable. Thus, using the dominant perspective ..., one is led to ask which kind of right should have primacy ... .
>
> A second result of the dominant perspective is that the values at stake appear to be incommensurable. No agreed-upon list ranks different rights. Nor, in the case of conflicts resolved in the courts, is there any democratic procedure by which priorities can be set. Therefore, the dominant perspective frames the courts' role in terms of deciding between incommensurable and fundamental values - between an individual right and a collective right. A third consequence is that, within this framework, courts' decisions will likely appear to be either biased or arbitrary. ("The Politics of Individual and Group Difference in Canadian Jurisprudence", (1994) 27 Canadian Journal of Political Science 3, at 7)

3. For example, the possible trumping effects of the text of the Canada clause and its location outside the *Charter* were hotly debated. The text of the Canada clause is as follows:

1. The *Constitution Act, 1867* is amended by adding thereto, immediately after section 1 thereof, the following section:

2. (1) The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics:

(a) Canada is a democracy committed to a parliamentary and federal system of government and to the rule of law;

(b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;

(c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;

(d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;

(e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;

(f) Canadians are committed to a respect for individual and collective human rights and freedoms for all people;

(g) Canadians are committed to the equality of female and male persons; and

(h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

(2) The role of the legislature and the Government of Quebec to preserve and promote the distinct society of Quebec is affirmed.

(3) Nothing in this section derogates from the powers, rights and privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language.

(4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.

4. *A mess that deserves a big No*, Speech given at the 11th Cité Libre dinner (Toronto: Robert Davies Publishing, 1992) at 57 (emphasis in original)

5. *A mess*, note 4, at 12

6. *A mess*, note 4, at 38 (emphasis in original)

7. *A mess*, note 4, at 43

8. Deborah Coyne and Robert Howse/Canada for All Canadians, *No Deal, Why Canadians should reject the Mulroney Constitution* (Hull, Quebec: Voyageur Publishing, 1992); see also Deborah Coyne/Canada for All Canadians, "The five myths of the yes campaign, Notes for remarks made in Alberta and Manitoba", October 22-23, 1992; Deborah Coyne/Canada for All Canadians, Press Release, "Publication of Legal Text confirms fatal flaws in the Charlottetown Accord", n.d.

9. *No Deal*, note 8, at 14 (emphasis in original)

10. *No Deal*, note 8, at 15

11. The following is a summary (partly in the form of excerpts) of the points made in this context by Lorraine Eisenstat Weinrib, A.N. Stone, P.E. Benson, R.J. Cook, R.J. Daniels, B.M. Dickens, R.E. Fritz, J.P. Humphrey, H.N. Janisch, R. St. J. MacDonald, W.H. McConnell, C. Valcke, E.J. Weinrib and G. Triantis in "Legal Analysis of the Draft Legal Text Constitutional Proposals, October 12, 1992 and the Canadian Charter of Rights and Freedoms", released to the press October 21, 1992:

- The Canada clause shifts the ground from individual rights against the state, as now embodied in the Charter, to the primacy of collective concerns.

- The collective rights referred to in the Canada clause are the collective powers of the aboriginal communities to make laws to forward their collective interests and the power of the Quebec government to make laws to forward the province's collective interests.

- In addition, subsection 2(1)(d) of the Canada clause states that "Canadians and their governments are committed to the vitality and development of official minority communities throughout Canada". The clause addresses the life of the communities, rather than their members. It does not in clear terms endorse the language *rights* guaranteed under the Charter, s. 16 to 23, nor does it affirm other rights, for example, to freedom of expression, that support an individual's ability to choose the language of, e.g., commerce. It is the community's, not the individual's, interests that are the subject of commitment.

- Subsection 2(1)(f) of the Canada clause states that "Canadians are committed to respect for individual and collective human rights and freedoms of all people". The reference to individual rights presumably refers to the Charter itself. But the only collective rights referred to in the Canada clause are the collective powers of aboriginal communities and the Quebec government. This clause seems to affirm what the Charter was put in place to qualify: the political power of law-making bodies to infringe Charter guarantees to individuals.

• This affirmation of collective and political power greatly diminishes the force of both of the equality clauses. Subsection 2(1)(e) offers the fundamental characteristic of racial and ethnic equality and subsection 2(1)(g) of gender equality. Both garner the commitment of Canadians, not of governments. But this weaker formulation is not the only failing of these clauses. They are so narrow that they put in jeopardy the broader reading of equal citizenship that is the cornerstone of a just society.

• Turning first to the gender equality clause, one can only hope that it could not diminish the Charter's clear statements of gender equality now found in sections 15 and 28 of the Charter. By privileging collective values over individual rights throughout the Canada clause, the amended Canadian Constitution would invite judges to privilege the priorities of the political majority or the internal, traditional norms of a community defined by language, culture or ethnicity. Majoritarian preferences and community traditions often denigrate or ignore the needs of women.

• The full flourishing of women as equal members of Canadian society depends on much more than similar treatment of male and female persons ... . None of the Charter equality cases have been litigated or decided on the narrow concept of "equality of female and male persons" as listed in the Canada clause. They have arisen in the context of a legal system that recognizes all Charter rights, including freedom of expression, security of the person, and fairness in the criminal process, for example, to be the entitlements of all Canadians. In giving priority to other ideas of social ordering, the Canada clause may jeopardize these uses of the Charter.

• The commitment of Canadians to "racial and ethnic equality" and the reference to a "strong Canada that reflects its cultural and racial diversity" must be understood in its place in the Canada clause's hierarchy of values. This subsection is afforded less importance than that of the two cultural communities, which will enjoy political power to preserve cultural hegemony at the expense of Charter rights, and also less than that of the "official language minority communities". The Canada clause allows culture and ethnicity to guide government distribution of burdens and benefits. The underlying idea of the Canada clause is that governments may, and indeed should, have priorities in respect to the personal characteristics, often immutable, that identify people with various cultures and traditions. In so doing, the clause retreats from the Charter's vision of a society made up of equal individuals.

12. For example, in his discussion of the collective aspects of the Charlottetown Accord, Trudeau states that "[m]y family is a collectivity, we at *Cité libre* [the magazine with which Trudeau is associated] are a collectivity with majorities and minorities." (*A mess*, note 4, at 57)

Eisenstat Weinrib et al. also downplay the fundamental nature of group rights by equating them with governmental powers and, thus, limiting the concept of group rights to what they describe as "the political power of law-making bodies to infringe Charter guarantees to individuals". Their approach confuses group rights with action necessary to preserve or promote group rights, which may or may not be manifested as governmental action. By simply equating group rights with governmental power, they overlook and thus deny their fundamental character and validity and position them in inevitable conflict with individual rights which are seen to constitute a limit on state power in order to prevent abuse and the possibility of coercion by majoritarian or government interests. Furthermore, in part as a result of this approach to group rights, the assessment that the Canada clause creates a hierarchy of rights is largely dictated by their premise that the status quo must not be altered by group rights considerations.

While I am on this point, it should be noted that Trudeau asserts that he supports Aboriginal self-government. I can only assume that his approach to the concept of collectivities and group rights also informs his definition of the nature of self-government:

> Now, on my Yes to 'do I favour aboriginal self-government', not only do I favour it, but I *proposed it* first in a White Paper back in 1969 when I proposed the abolition of the Indian Act. But the Indians were not ready for it, They said no, no, no, not yet, give us time. They were psyched out. And in the 80's, I introduced a bill in the House of Commons, my government did, which precisely offered self-government to the native people, to those who wanted to exercise it and even to the Métis. So that's, you know, that's old hat. Difference is, we put it in a law, and it's a law which was taken up by those Indian tribes who wanted to take it up. But it is wrong to put it in the Constitution until we work out the quirks, to put it in the Constitution, with this kind of vague project about a third order of government without explaining it to us. (*A mess*, at 72 (emphasis in original))
>
> ... [I]f you want peace and quiet, you should vote NO to constitutional negotiations. The problem of Aboriginal peoples can be resolved in the legislatures. And once things have settled down, we can talk about how to put that in the Constitution. (at 33)

See Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1991) at 141-146 for a more accurate description of the 1969 White Paper and the reactions to it, set it in the context of the particular liberal principles which informed it.

13. This would appear to be borne out, for example, in the case of Deborah Coyne, by the fact that she initiated a court challenge to the proposed constitutional amendment guaranteeing equal status and privileges to New Brunswick's English and French communities. The amendment tracks the language that was proposed in the Charlottetown Accord for a new s. 16.1 of the *Charter*:

> (1) The English and French linguistic communities in New Brunswick have equality of status and equal rights and privileges including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of these communities.
>
> (2) The role of the legislature and Government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

The amendment requires only the approval of the New Brunswick legislature and Parliament. However, Coyne is challenging the right of the New Brunswick and federal governments to proceed bilaterally. Coyne's position is that, because the amendment introduces the concept of collective or group rights into the *Charter* and, thereby undermines the principle of the equality of individuals, it affects all Canadians, not just residents of New Brunswick. (See Ottawa Citizen, December 8, 9, 12, 1992; Globe and Mail, January 30, 1993)

Coyne is reported to have said that "entrenching the idea that communities, rather than individuals, have rights is unprecedented", and that "the federal government is blithely ignoring the

central messages Canadians sent during the referendum - they don't want collective rights in the Charter and they don't want governments alone to determine the country's constitutional future." (Ottawa Citizen, December 8, 9, 1992)

Coyne filed pleadings in the Federal Court Trial Division on February 15, 1993. (Globe and Mail, February 16, 1993).

14. "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", (1982) 44 Journal of Politics 21, at 40; See also Alan Cairns, "Roadblocks in the Way of Constitutional Change", (1991) 2 Constitutional Forum 54, at 55-56

15. According to Waldron,

> If meta-ethical realism is untenable, then rationally resolvable disputes in ethics become possible only between those who share certain fundamental values or principles in common. So it becomes important, in the area of rights as elsewhere, for philosophers to identify clearly the deep assumptions on which their theories depend. If, for example, two different theories of rights rest on a common commitment to the importance of individual liberty, there is in principle no reason why any detailed disagreements between them should not be rationally resolvable. But if the theories are based on different fundamental values - if, for example, one is based on liberty and the other on a commitment to equality - then, to the extent that there is an incompatibility between these deep commitments, there may be no way of resolving their surface disagreements. ("Introduction", Jeremy Waldron ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 1, at 3)

16. (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971)

17. Note 12.

18. My purpose in the paper is limited to showing that certain categories of group rights must be recognized within a liberal democratic society. I focus on recognition of the category of group rights whose justification is derived from the existence of pluralism in an open, culturally heterogeneous modern constitutional democracy. In other words, I am dealing with what might be described as rights derived from 'equal citizenship' in a pluralistic society.

I should not be taken to suggest that categories of group rights, such as Aboriginal rights related to self-determination or sovereignty, which are derived from prior occupation, cannot have any basis for recognition independent of the principles governing 'equal citizenship'. I do not address this issue directly in the paper because it is not necessary to the particular argument I am making.

However, I would emphasize that those Aboriginal cultural rights protected by virtue of the 'equal citizenship' principles discussed in the paper are distinct from and (by virtue and to the extent of that distinction) would continue to be protected regardless of, and in addition to, cultural guarantees provided by arrangements reached on the basis of rights derived from prior occupation.

19. Darlene M. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation", (1989) 2 Canadian Journal of Law and Jurisprudence 19, at 22

Notes to Chapter 1

1. Briefly stated, in *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971), Rawls sought to identify the principles of justice which would apply to the basic structure of society. These principles of justice are those

> that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. (at 11)

Rawls has developed and modified aspects of his theory in his work since *A Theory of Justice*. (See e.g. "Fairness to Goodness", (1975) 84 Philosophical Review 536; "Kantian Constructivism in Moral Theory", (1980) 77 Journal of Philosophy 515; "The Basic Liberties and their Priority", S. McMurrin, ed., *The Tanner Lectures on Human Values*, vol. 3 (Salt Lake City: University of Utah Press, 1982) 1; "Social Unity and Primary Goods", Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982) 159; "Justice as Fairness: Political not Metaphysical", (1985) 14 Philosophy and Public Affairs 223; "The Idea of an Overlapping Consensus", (1987) 7 Oxford Journal of Legal Studies 1; "The Priority of Right and Ideas of the Good", (1988) 17 Philosophy and Public Affairs 251; "The Domain of the Political and Overlapping Consensus", (1989) 64 New York University Law Review 233; *Political Liberalism* (New York: Columbia University Press, 1993); "The Law of Peoples", Stephen Shute and Susan Hurley, eds., *On Human Rights, The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993) 41.) Many of these developments will be discussed in this paper. This note, however, is intended to provide the background to the discussion in the text and, unless otherwise stated, is limited to a description of Rawls's original argument in *A Theory of Justice*.

Rawls describes this hypothetical initial position of equality of the choosing parties as the 'original position'. Among the essential features of the original position is that the parties are in ignorance of their own abilities, their psychological propensities and conceptions of the good, of their status and positions in society and the level of development of the society of which they are to be members. Rawls describes this as the 'veil of ignorance' (at 12) The purpose of having the parties choose principles of justice from behind the veil of ignorance is to eliminate consideration of morally arbitrary contingencies, to ensure

> that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain. For given the circumstances of the original position, the symmetry of everyone's relations to each other, this initial situation is fair between individuals as moral persons ... . The

> original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reached in it are fair. (at 12)

Rawls maintains that persons in the initial situation would choose the following 'general conception' of justice:

> All social values - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless the unequal distribution of any, or all, of these values is to everyone's advantage.
>
> Injustice, then, is simply inequalities that are not to the benefit of all. (at 62)

The 'social values' which Rawls describes above are all primary goods. Primary goods are those goods that are identified as desirable by persons in the original position because they are

> things which it is supposed a rational man wants whatever else he wants. Regardless of what an individual's rational plans are in detail, it is assumed that there are various things which he would prefer more of rather than less. With more of these goods men can generally be assured of greater success in carrying out their intentions and in advancing their ends, whatever these ends may be. The primary social goods, to give them in broad categories, are rights and liberties, opportunities and powers, income and wealth. (A very important primary good is a sense of one's own worth ... .)
>
> ... The main idea is that a person's good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances. A man is happy when he is more or less successfully in the way of carrying out this plan. To put it briefly, the good is the satisfaction of rational desire. We are to suppose, then, that each individual has a rational plan of life drawn up subject to the conditions that confront him. This plan is designed to permit the harmonious satisfaction of his interests. It schedules activities so that various desires can be fulfilled without interference. It is arrived at by rejecting other plans that are either less likely to succeed or do not provide for such an inclusive attainment of aims. Given the alternatives available, a rational plan is one which cannot be improved upon; there is no other plan which, taking everything into account, would be preferable.
>
> Now the assumption is that though men's rational plans do have different final ends, they nevertheless all require for their execution certain primary goods, natural and social. Plans differ since individual abilities, circumstances, and wants differ; rational plans are adjusted to these contingencies. But whatever one's system of ends, primary goods are necessary means. Greater intelligence, wealth and opportunity, for example, allow a person to achieve ends he could not rationally contemplate otherwise. The expectations of representative men are, then, to be defined by the index of primary social goods available to them. While the persons in the original position do not know their conception of the good, they do know, I assume, that they prefer more rather than less primary goods. (at 92)

(It should be noted that, in his more recent work, Rawls has revised his justification for the list of social primary goods and now argues for it by reference to a political conception of the person. Rawls's political conception of the person and its relationship to the social primary goods will be discussed at some length in the paper.)

Rawls is mainly concerned with social primary goods, because they are most directly under the control of the basic structure of society. (at 62)

Most of *A Theory of Justice* is concerned with a special interpretation of the general conception of justice, described as a 'special conception' of justice. The special conception governs societies which have been developed to the point that "the basic wants of individuals can be fulfilled" (at 543) and social conditions allow the effective establishment of the equal basic liberties (at 152, 542).

The main features of this special conception are the two principles of justice.

First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

Social and economic inequalities are to be arranged so that they are both:
(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
(b) attached to offices and positions open to all under conditions of fair equality of opportunity. (at 302)

(Note that, in response to H.L.A. Hart's criticism in "Rawls on Liberty and its Priority", Norman Daniels, ed., *Reading Rawls, Critical Studies on Rawls' A Theory of Justice* (New York: Basic Books Inc., 1974) 230, Rawls has modified the description of the first principle of justice somewhat in his later work. It now reads:

> Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all. (*Political Liberalism*, at 291))

These principles are ordered serially by Rawls in what he describes as 'lexical priority'.

> First Priority Rule (The Priority of Liberty)
>
> The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. ...
>
> Second Priority Rule (The Priority of Justice over Efficiency and Welfare)
>
> The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the

> difference principle. There are two cases:
>
> (a) an inequality of opportunity must enhance the opportunity of those with the lesser opportunity;
>
> (b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship. (at 302)

So, when Rawls asks how the different social primary goods are to be weighed, his answer is the following:

> Assuming that the two principles of justice are serially ordered, this problem is greatly simplified. The fundamental liberties are always equal, and there is fair equality of opportunity; one does not need to balance these liberties and rights against other values. The primary social goods that vary in their distribution are the powers and prerogatives of authority, and income and wealth. (at 93)

Two final points remain to complete this summary description of Rawls's principles of justice and the social primary goods. First, according to Rawls, the two principles are not only justified by the fact they would be chosen by persons in the original position, but also by their general accord with our considered convictions of justice, "which we now make intuitively and in which we have the greatest confidence" (at 19). This accord is reached by a process which Rawls describes as 'reflective equilibrium'.

> By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, ... we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. (at 20)

Hart's description of the process of reflective equilibrium is particularly clear: "[Rawls] envisages that where there are initial discrepancies between [principles and ordinary judgments] we have a choice of modifying the conditions of the initial [original] position in which principles are chosen or modifying in detail the judgments". (Hart, at 232, note 3) The process of reflective equilibrium, then, is critical to Rawls's goal of identifying principles which illuminate "our ordinary judgments and help to reveal a basic structure and coherence underlying them". (Hart, at 232) If, for example, in the process of reflective equilibrium, commitment to our judgments requires a change in the conditions of the original position, the nature of the change required will assist to highlight whether the judgment is reasonable or unreasonable.

Second, the selection and implementation of the principles of justice are done in a four-stage process, with increasing societal and personal information available to the parties at each stage:

> [A]fter the first stage, when the parties in the original position have chosen the principles of justice, they move to a constitutional convention. There, in accordance with the chosen principles, they choose a constitution and establish the basic rights and liberties of citizens. The third stage is that of legislation, where the justice of laws and policies is considered; enacted statutes, if they are to be just, must satisfy both the limits laid down in the constitution and the originally chosen principles of justice. The

fourth and last stage is that of the application of rules by judges and other officials to particular cases. (Hart, at 233)

According to Kymlicka,

while culture is ... a crucial component of Rawls's own argument for liberty, he never includes cultural membership as one of the primary goods with which justice is concerned. While he asks about the relative importance of liberty compared with other primary goods, he doesn't ask about its relation to the primary good of cultural membership. Perhaps ... he implicitly assumes that the political community is culturally homogeneous, and hence that no exercise of liberty within the basic structure of the community could affect cultural membership. But cultural membership is still a primary good, consideration of which is an important part of showing equal concern for individuals. This importance would have been recognized by the parties in Rawls's original position. The relationship between cultural membership and self-respect gives the parties to the original position a strong incentive to give cultural membership status as a primary good. As Rawls says, 'the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect' (... p. 440); the loss of cultural membership is one such condition. Rawls's own argument for the importance of liberty as a primary good is also an argument for the importance of cultural membership as a primary good. (Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1991) at 166)

2. *Liberalism, Community and Culture*, note 1, at 168 (emphasis in original).

3. Kymlicka uses the term "cultural community", "cultural structure" and "cultural membership" interchangeably to describe culture as a context of choice. (See e.g. *Liberalism, Community and Culture*, note 1, at 166-167)

4. Peter Benson describes Kymlicka's analysis of culture as a primary good, and the constraints this characterization places on the definition of culture in the following excerpt:

... Kymlicka argues that, on a liberal view, collective rights must not be justified on the basis that they are necessary for the promotion of certain particular ends and practices, however desirable and valuable they may be. Ends are to be treated always as matters of free individual choice, not as something given or found, nor as something to be furthered by coercive means. Collective rights, it must not be forgotten, are legal rights enforced by the state's coercive powers. Thus Kymlicka acknowledges the central importance of the basic liberties (as specified, for example, in Rawls' first principle of justice), and he seeks to elaborate a conception of collective rights that can be justified consistent with their importance.

... Kymlicka adduces the reason why a liberal conception of justice views the basic liberties as centrally important and he suggests that this reason also establishes the importance of what he calls the good of cultural membership. Indeed, cultural membership, he concludes, must be deemed a primary good (in Rawls' sense of the

term), just as the basic liberties are. Now the primary good of cultural membership must be framed consistent with the liberal premise that the pursuit of ends is a matter of free individual choice. To meet this requirement, Kymlicka introduces a distinction between culture viewed as a "context of choice", and culture defined in terms of "the character of a historical community". It is only culture in the first sense that constitutes a primary good. Conceived as a context of choice, culture consists in the *range of options*, the different ways of life, which individuals take as *given* and from which they must choose when they decide upon their preferred conception of their good. The thought here is that individuals do not begin *de novo* in fashioning their goals and in deciding how to lead their lives: the process of deliberation and choice is situated in an inherited context which provides them with a determinate range of values and forms of life. Culture as context is thus not itself chosen. In contrast, the character of a particular culture is constituted by shared practices and ends that are (potentially) always subject to revision or rejection. On a liberal view, they must be freely chosen.

In the light of this distinction, Kymlicka argues that cultural membership (as it relates to the context of choice) can and must be recognized as a primary good if we are to take seriously the very reason that justifies our ascribing fundamental importance to the basic liberties. Briefly stated, the reason why we consider the basic liberties to be so important is, according to Kymlicka, that they guarantee social conditions that are needed if persons are to choose conceptions of their good freely and intelligently. As conscious and purposive agents, individuals try to achieve goals based on the beliefs they have about what is valuable. It is crucial to them that it at least be possible to form beliefs that are both genuinely their own and rationally informed. The basic liberties answer this concern. But individuals do not form these beliefs *de novo*; they always result from a process of selecting what seems to be most valuable from the various options available, that is, from culture viewed as a context of choice. Consequently, respect for cultural membership is also needed if their concern is to be adequately met. The existence of a rich and secure cultural structure is also an essential precondition of the intelligent and meaningful formation of beliefs about the good life. ("The Priority of Abstract Right, Constructivism, and the Possibility of Collective Rights in Hegel's Legal Philosophy", (1991) 4 Canadian Journal of Law and Jurisprudence 257, at 287 (emphasis in original))

5. *Liberalism, Community and Culture*, note 1, at 172. Kymlicka states that, if culture is interpreted as the character of a cultural community, "changes in the norms, values, and their attendant institutions in one's community ... would amount to loss of one's culture". (at 166)

> Protecting people from changes in the character of the culture can't be viewed as protecting their ability to choose. On the contrary, it would be a limitation of their ability to choose. Concern for the cultural structure as a context of choice, on the other hand, accords with, rather than conflicts with, the liberal concern for our ability and freedom to judge the value of our life-plans. (at 167)

6. Kymlicka, *Liberalism, Community and Culture*, note 1, at 166

7. *Liberalism, Community and Culture*, note 1, at 168

8. Kymlicka states that

> [c]ontemporary theories of liberal equality seek, in Dworkin's terms, to be 'endowment-insensitive' and 'ambition-sensitive'; that is, they seek to ensure that no one is penalized or disadvantaged by their natural or social endowment, but allow that people's fates vary with their choices about how to lead their lives ... . But if that is the goal, then it must be recognized that the members of minority cultures can face inequalities which are a product of their circumstances or endowment, not their choices or ambitions. (*Liberalism, Community and Culture*, note 1, at 190)

> [W]e can defend aboriginal rights as a response, not to shared choices, but to unequal circumstances. Unlike the dominant French or English cultures, the very existence of aboriginal cultural communities is vulnerable to the decisions of the non-aboriginal majority around them. They could be outbid or outvoted on resources crucial to the survival of their communities, a possibility that members of the majority cultures simply do not face. As a result, they have to spend their resources on securing the cultural membership which makes sense of their lives, something which non-aboriginal people get for free. And this is true regardless of the costs of the particular choices aboriginal or non-aboriginal individuals make. (at 187)

Note that the language of bids and votes on resources used in this passage is drawn from Dworkin's "auction" or equality of resources scheme, which Kymlicka describes at 187-188.

9. *Liberalism, Community and Culture*, note 1, at 189

10. *Liberalism, Community and Culture*, note 1, at 190

Wesley Cooper describes Kymlicka's position as turning on "an abstract argument that a presumption in favor of equal life-prospects should, first, be maintained by compensating people for circumstances that handicap them in pursuit of these prospects, and second, be departed from according to the principle that people are responsible for their choices". ("Critical Notice, Will Kymlicka, *Liberalism, Community and Culture*", (1993) 23 Canadian Journal of Philosophy 433, at 443) Cooper expresses concern that the distributive obligation related to cultural membership is "an extra obligation to transfer resources to the disadvantaged, on top of the obligation derived from [Rawls's] difference principle". (at 442)

Kymlicka's definition of a right to cultural membership does seem to be unique in the sense that it is not simply an extension of either Rawls's first or second principle of justice. Kymlicka defends a right to cultural membership on the same basis as Rawls's argument for liberties of equal citizenship under the first principle of justice, that is, by reference to the ability of citizens to form and revise their beliefs about value as a precondition to pursuing their essential interest in leading a good life. (See e.g. *Liberalism, Community and Culture*, at 163) However, he differs from Rawls in his reliance on distributive principles. He also requires proof of disadvantage as a precondition to establishment of the right. (See e.g. 162, 219, note 7)

Kymlicka's particular analysis of cultural membership as a primary good has implications for its priority relative to the equal basic liberties in the event of conflict. It seems, from his discussion of the need to restrict basic liberties in the event the very existence of a culture is threatened, that Kymlicka contemplates situations where the equal basic liberties would not have priority over culture. I am unclear whether this is because he sees cultural membership as constituting a basic liberty, as being a primary good that is not a basic liberty but has the same priority as the basic liberties, or because he rejects the strict lexical priority of the basic liberties vis-a-vis culture. Kymlicka must address the priority issue in one of these ways, otherwise, as Peter Benson observes, even if he is limiting his discussion of conflict to non-ideal situations, unless the existence of an institutional framework protecting the basic liberties is threatened, the lexical priority of the basic liberties would require that they be respected even if culture could not withstand the challenge. ("The Priority of Abstract Right", note 4, at 289, note 55) Kymlicka's discussion of principles governing conflict at 198-199 suggests that he is describing non-ideal situations. This may explain his apparent discomfort with constraints on individual rights and freedoms in the event of conflict, and his description of measures necessary to protect cultural membership as "illiberal". (at 170-171)

In this paper, I take a somewhat different approach. I argue that 'equal liberty to participate in, produce and enjoy one's own culture' is justified as an equal basic liberty within the meaning of Rawls's first principle. In other words, I am arguing for an extension of Rawls's list of equal basic liberties. If my argument is successful, this has several implications. For example, it circumvents the choice/circumstances debate (at least at the stage of establishing the basic liberty), the various controversies surrounding Rawls's second principle of justice and its priority, and questions relating to the appropriateness of compensation, such as those raised by Wesley Cooper. Proof of disadvantage would not be a precondition to establishment of the equal basic liberty, but would be one (important) factor relevant to the articulation of the rights, freedoms and institutional rules which specify it, and the duties associated with them. Conflict between the 'equal basic liberty to participate in, produce and enjoy one's own culture' and other basic liberties would be resolved by reference to Rawls's conflict principles, and therefore would not raise the spectre of "illiberal" measures.

11. On this point, Guyora Binder observes that

> [b]y limiting his definition of culture to common history rather than common ends, Kymlicka hopes to explain cultural preservation as a means to individual rather than group autonomy. By thus defining all cultures as neutral with respect to ends, Kymlicka hopes to square cultural preservation with value-neutral liberalism. ...
>
> [But] Kymlicka's conception of culture ... explains why all individuals need membership in some culture, but it doesn't explain why they need to be members of any *particular* culture. ... By offering a *functional* defense of culture, Kymlicka makes cultures *fungible*. ... Treating all cultures as fungible, Kymlicka's instrumental account of cultures justifies the assimilation, not the preservation, of distinctive cultures. ("The Case for Self-Determination", (1993) 29 Stanford Journal of International Law 223, at 252 (emphasis in original))

Binder also appears to be arguing that perpetuation of a culture requires acknowledgement of and action consistent with (or at least not inconsistent with) at least some cultural ends.

> ... Kymlicka's instrumental conception of culture does not just discourage us from preserving distinctive cultures - it implies that there are no distinctive cultures to preserve. If any choice I make is informed by my cultural history, and no response to my cultural history can be inconsistent with my culture, I perpetuate my culture no matter what choices I make. [But d]oes every reaction to my culture, no matter how hostile, perpetuate it?
>
> No doubt between orthodoxy and apostasy there is a continuum of adaptation which the concept of cultural preservation somewhere arbitrarily severs. But to avoid this line-drawing problem by defining all cultures as value-neutral is to prevent the drawing of lines between cultures. If cultures are indistinguishable, the right of cultural preservation is reduced to nonsense. (at 253)

Finally, Binder maintains that "Kymlicka's value-neutral notion of culture relies on an unrealistic distinction between past traditions and future goals". (at 254)

> ... On one hand, as Kymlicka himself acknowledges, we choose among goals defined and made meaningful by tradition. Even in assessing the consequences of our actions for posterity, we populate the future with people committed to the same traditions to which we are committed. On the other hand, in choosing a future, we also interpret tradition and so choose a past. Just as we make the future meaningful by linking it to the past, we make the past meaningful by imagining it as the portal to a better future. (at 254)
>
> In reducing tradition to a value-neutral, decision-making technology, Kymlicka imagines a temporal gap between the bonds of common culture and the contingency of individual choice. He thereby forgets that culture, although common, is itself an arena of contingency. The choices that culture informs are never merely private, because they affect the identity of every participant in the culture. Why do participants in a culture so often contest the meaning of its constitutive traditions instead of politely agreeing to disagree about future goals? The answer lies in the fact that by contesting a common past they are asserting political claims over one another's powers. They refuse to separate their individual ends from their shared history because they refuse to separate from one another - they refuse to treat the collective determination of their selves as a matter of individual choice.
>
> Any argument for group autonomy based on a right of cultural preservation must acknowledge that cultural traditions are not simply inherited by individuals. They are common property that we can make use of only by invoking - or inventing - a common purpose. Cultures cannot be disentailed. (at 255)

12. *Liberalism, Community and Culture*, note 1, at 173

13. *Liberalism, Community and Culture*, note 1, at 175 (emphasis in original)

14. *Liberalism, Community and Culture*, note 1, at 176

15. *Liberalism, Community and Culture*, note 1, at 176. This excerpt reflects Kymlicka's perception of his dilemma. As Donald Lenihan notes,

> Kymlicka's attempt to fill in the gap he has found in his Rawlsian argument seems to me to run afoul of his own distinction between the character of a culture and its function as a context of choice. For his argument rests squarely on the claim that the *character* of cultural communities has a unique moral significance which political institutions and practices must respect. But this is precisely what the character/context distinction seems to deny. ("Liberalism and the Problem of Cultural Membership: A Critical Study of Kymlicka", (1991) 4 Canadian Journal of Law and Jurisprudence 401, at 416 (emphasis in original))

However, Kymlicka's resulting willingness to see the constitutive nature of cultural identity as "the result of contingent facts about existing forms of social life, rather than of universal features of human thought and development" (Kymlicka, at 176), and his suggestion that this connection between personal identity and cultural membership may be explained in terms of "sociological considerations about language, psychological considerations about how well people adjust to change, etc." (Lenihan, at 417) provide a weak foundation for a claim to cultural membership as a primary good. (Lenihan, at 417-418)

16. Joseph Raz describes the difference between instrumental and intrinsic value (and derivative and ultimate value) in his discussion of capacity for rights.

> Being of ultimate, i.e. non-derivative [that is, not deriving its value from its contribution to something else], value is being intrinsically valuable, i.e. being valuable independently of one's instrumental value. Something is instrumentally valuable to the extent that it derives its value from the value of its consequences, or from the value of the consequences it is likely to have, or from the value of the consequences it can be used to produce. Having intrinsic value is being valuable even apart from one's instrumental value. But not everything which is intrinsically valuable is also of ultimate value.
>
> Consider a man who has a deep attachment to his dog. I share many people's feeling that the relationship is valuable and the man's life as [sic] richer and better because of it. Many feel that the relationship is intrinsically valuable. Its value is not just that of a cause of a feeling of security and comfort in the man. Such feelings may be produced by tranquillizers. The relationship is not valued just as a tranquillizer. Its value is in its being a constitutive part of a valuable form of life. Those who share these views believe that the existence of the dog is intrinsically valuable. It is a logically necessary condition of the relationship and one which contributes to its value (it is more valuable for being a relationship to a living - rather than a dead - dog). But so far as the story goes the intrinsic value of the dog is not ultimate for it derives from the dog's contribution to the well-being of the man. The man's well-being is here taken as the ultimate value. The dog non-instrumentally contributes to it. Hence his existence is intrinsically but derivatively valuable.
>
> ...

> My proposed principle of capacity for rights entails that those who regard the existence and well-being of (some) dogs as merely derivatively valuable (even if they believe them to be intrinsically valuable) are committed to the view that dogs can have no rights though we may have duties to protect or promote their well-being. For such people dogs have the same moral standing that many ascribe to works of art. Their existence is intrinsically valuable inasmuch as appreciation of art is intrinsically valuable. But their value is derivative and not ultimate. It derives from their contribution to the well-being of persons.
>
> ... [O]nly those whose well-being is of ultimate value can have rights ... . (*The Morality of Freedom* (Oxford: Clarendon Press, 1986) at 177)
>
> But ... rights [of which freedom of expression is an example] can be based on the instrumental value of the interests of such people. (at 180)

17. For example, in a note to his discussion of Charles Taylor's position on historical communities, Kymlicka states that

> [p]erhaps Taylor only meant to emphasize the way that community is important to individuals *intrinsically* as well as instrumentally. Since individuals are constituted by and through interaction with others in a network of cultural practices, there is no such thing as an individual prior to society. The value that society has to individuals is a non-contingent one.
>
> All of that is true. But it doesn't warrant Taylor's abandonment of the plateau of individual equality. For the claim that individuals, not communities, are the ultimate bearers of moral value is simply a recognition of the separateness of consciousness. It may well be that membership in a community partially defines my identity, and hence defines the conditions of my flourishing. But it is still *me* who suffers or flourishes, and it is *my* (and other individuals') suffering or flourishing that gives community its moral status. As Galston says, 'While the formative power of society is surely decisive, it is nevertheless *individuals* that are being shaped. I may share everything with others. But it is *I* that shares them - an independent consciousness, a separate locus of pleasure and pain, a demarcated being with interests to be advanced or suppressed ... . Acceptance of this fact of the separateness of consciousness does not foreclose the question of the ways in which community forms our interests and identity. If Taylor's concern was with the importance of community to individual welfare, then he has no reason to abandon the egalitarian plateau. (*Liberalism, Community and Culture*, note 1, at 244, note 3 (emphasis in original))

18. According to Allen Buchanan,

> [w]hat Kymlicka neglects to observe - and what renders his view vulnerable to charges of excessive individualism - is that cultural membership is valuable also because, at least for most individuals, *participation in community* is *itself* an important ingredient in the *content* of the good life, not just a part of its structure. Participation

> in community, for many people, at least, is a fundamental intrinsic good, not merely a structural condition for the successful pursuit of other goods or a means of acquiring them. In many cases the community that is most important in the individual's life will be a cultural (as opposed to a political, professional, or aesthetic) community. Nothing in liberalism or its understanding of human good precludes it from acknowledging this basic truth. (*Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder, Colorado: Westview Press, Inc., 1991) at 54 (emphasis in original))

19. Note that Lenihan uses the term 'well-being' differently from, and more narrowly than, Raz. I describe Raz's approach to well-being later in this chapter.

20. According to Lenihan,

> when communitarians say that Rawls is too 'individualistic' or too 'rationalistic', they need not be interpreted as saying that he has *no* place for culture, society and history. It is rather that his unequivocal commitment to the primacy of autonomy pitches moral discussion about the self at a level which is simply too abstract to take account of its intimate connection with some particular historical situation. Culture, to a pure rational will, can have no significance beyond the function of providing options - a *context* - in which it can exercise its autonomy. What both communitarians and Kymlicka have recognized, is that our particular relation to a particular culture has moral significance which the abstract level of description does not touch. This is the gap in the argument Kymlicka is trying to fill.
>
> Kymlicka is thus trying to make sense of something very important. In a nutshell, he is trying to situate the self and still preserve its autonomy, something he fears communitarians cannot do. And, indeed, no one these days denies that there is *something* right about 'situating' the self. The real issue is this: how far away from rationalist conceptions of the self can you go before the notion of autonomy disappears altogether? How particularized can we make the self before the will just dissolves in a welter of social forces? Kymlicka knows that if he gives the self over to history, its (history's) multifarious, sometimes chaotic forces will rush in and overwhelm it. Detaching the autonomous liberal will from its Kantian foundations is a tricky business. If we go too far, we leave it naked before the elements. Then it will be lost. Kymlicka, I think, sees a storm on the horizon. He fears the loss of a firm foundation for both the self's right and its power to act according to self-imposed, rationally justified, standards of morality. Rawls, while claiming to eschew Kant's ontology, retains enough of the framework to provide a rudder for such an argument. But, the clear lesson of Kymlicka's inspiring if unsatisfactory effort, is that hanging on too tightly to autonomy steers one away from, not toward, a deeper understanding of the moral significance of cultural membership. ("Liberalism and the Problem of Cultural Membership", note 15, at 419 (emphasis in original))

21. Rawls describes the idea of 'political constructivism' in the following passage:

> The principles of political justice are the result of a procedure of construction in

which rational persons (or their representatives), subject to reasonable conditions, adopt the principles to regulate the basic structure of society. The principles that issue from a suitable procedure of construction, one that properly expresses the requisite principles and conceptions of practical reason, I think of as reasonable. The judgments those principles support are also reasonable. When citizens share a reasonable political conception of justice, they have a basis on which public discussion of fundamental political questions can proceed and be reasonably decided, not of course in all cases but we hope in most cases of constitutional essentials and matters of basic justice. (*Political Liberalism*, note 1, at xx)

22. As Rawls states,

a constructivist view such as justice as fairness, and more general liberal ideas, do not begin from universal first principles having authority in all cases. In justice as fairness the principles of justice for the basic structure of society are not suitable as fully general principles: They do not apply to all subjects, not to churches and universities, or to the basic structures of all societies, or to the law of peoples. Rather, they are constructed by way of a reasonable procedure in which rational parties adopt principles of justice for each kind of subject as it arises. Typically, a constructivist doctrine proceeds by taking up a series of subjects, starting, say, with principles of political justice for the basic structure of a closed and self-contained democratic society. That done, it then works forward to principles for the claims of future generations, outward to principles for the law of peoples, and inward to principles for special social questions. Each time the constructivist procedure is modified to fit the subject in question. In due course all the main principles are on hand, including those needed for the various political duties and obligations of individuals and associations. Thus, a constructivist liberal doctrine is universal in its reach once it is extended to give principles for all politically relevant subjects, including a law of peoples for the most comprehensive subject, the political society of peoples. Its authority rests on the principles and conceptions of practical reason, but always on these as suitably adjusted to apply to different subjects as they arise in sequence; and always assuming as well that these principles are endorsed on due reflection by the reasonable agents to whom the corresponding principles apply. ("The Law of Peoples", note 1, at 46)

23. Rawls describes 'comprehensive doctrines' in the following excerpt from *Political Liberalism*, note 1:

A [moral] conception is said to be general when it applies to a wide range of subjects (in the limit to all subjects); it is comprehensive when it includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our nonpolitical conduct (in the limit our life as a whole). There is a tendency for religious and philosophical conceptions to be general and fully comprehensive; indeed, their being so is sometimes regarded as an ideal to be realized. A doctrine is fully comprehensive when it covers all recognized values and virtues within one rather precisely articulated scheme of thought; whereas a doctrine is only partially comprehensive when it comprises certain (but not all) nonpolitical values and virtues and is rather loosely articulated. Note that, by definition, for a

conception to be even partially comprehensive, it must extend beyond the political and include nonpolitical values and virtues. (at 175)

He then sets out the definition of 'reasonable comprehensive doctrines':

[Reasonable comprehensive doctrines] have three main features. One is that a reasonable doctrine is an exercise of theoretical reason: it covers the major religious, philosophical, and moral aspects of human life in a more or less consistent and coherent manner. It organizes and characterizes recognized values so that they are compatible with one another and express an intelligible view of the world. Each doctrine will do this in ways that distinguish it from other doctrines, for example, by giving certain values a particular primacy and weight. In singling out which values to count as especially significant and how to balance them when they conflict, a reasonable comprehensive doctrine is also an exercise of practical reason. Both theoretical and practical reason (including as appropriate the rational) are used together in its formulation. Finally, a third feature is that while a reasonable comprehensive view is not necessarily fixed and unchanging, it normally belongs to, or draws upon, a tradition of thought and doctrine. Although stable over time, and not subject to sudden and unexplained changes, it tends to evolve slowly in the light of what, from its point of view, it sees as good and sufficient reasons. (at 59)

Rawls notes that

the diversity of reasonable comprehensive religious, philosophical, and moral doctrines found in modern democratic societies is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy. Under the political and social conditions secured by the basic rights and liberties of free institutions, a diversity of conflicting and irreconcilable - and what's more, reasonable - comprehensive doctrines will come about and persist if such diversity does not already obtain.

The fact of reasonable pluralism must be distinguished from the fact of pluralism as such. It is the fact that free institutions tend to generate not simply as a variety of doctrines and views, as one might expect from peoples' various interests and their tendency to focus on narrow points of view. Rather, it is a fact that among the views that develop are a diversity of reasonable comprehensive doctrines. These are the doctrines that reasonable citizens affirm and that political liberalism must address. They are not simply the upshot of self- and class interests, or of peoples' understandable tendency to view the political world from a limited standpoint. Instead, they are in part the work of free practical reason within the framework of free institutions. Thus, although historical doctrines are not, of course, the work of free reason alone, the fact of reasonable pluralism is not an unfortunate condition of human life. In framing the political conception so that it can, at the second stage, gain the support of reasonable comprehensive doctrines, we are not so much adjusting that conception to brute forces of the world but to the inevitable outcome of free human reason. (at 36)

Finally, he emphasizes that "[w]e avoid excluding doctrines as unreasonable without strong grounds based on clear aspects of the reasonable itself. Otherwise our account runs the danger of being arbitrary and exclusive". (at 59)

> [R]easonable persons will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own. (at 60)

> Since many doctrines are seen to be reasonable, those who insist, when fundamental political questions are at stake, on what they take as true but others do not, seem to others simply to insist on their own beliefs when they have the political power to do so. Of course, those who do insist on their beliefs also insist that their beliefs alone are true: they impose their beliefs because, they say, their beliefs are true and not because they are their beliefs. But this is a claim that all equally could make; it is also a claim that cannot be made good by anyone to citizens generally. So, when we make such claims others, who are themselves reasonable, must count us as unreasonable. And indeed we are, as we want to use state power, the collective power of equal citizens, to prevent the rest from affirming their not unreasonable views.

> ... [R]easonable persons see that the burdens of judgment set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought. (at 61)

A comprehensive doctrine, although reasonable most of the time, may lead to unreasonable conclusions when it does not support "a reasonable balance of political values". (at 243; see also 243, note 32 where Rawls argues that a comprehensive doctrine which denies the right to abortion, at least in the first trimester, violates the ideal of public reason and thus leads to an unreasonable conclusion.)

24. Rawls characterizes political liberalism and how it understands the ideal of constitutional democracy in the following passage:

> [T]hree conditions seem to be sufficient for society to be a fair and stable system of cooperation between free and equal citizens who are deeply divided by the reasonable comprehensive doctrines they affirm. First, the basic structure of society is regulated by a political conception of justice; second, this political conception is the focus of an overlapping consensus of reasonable comprehensive doctrines; and third, public discussion, when constitutional essentials and questions of basic justice are at stake, is conducted in terms of the political conception of justice. (*Political Liberalism*, note 1, at 44)

An overlapping consensus "consists of all the reasonable opposing religious, philosophical, and moral doctrines likely to persist over generations and to gain a sizable body of adherents in a more or less just constitutional regime, a regime in which the criterion of justice is that political conception itself". (at 15)

These reasonable comprehensive doctrines endorse the political conception of justice "as giving the content of their political judgments on basic institutions". (at 39)

> [T]he consensus goes down to the fundamental ideas within which justice as fairness is worked out. It supposes agreement deep enough to reach such ideas as those of society as a fair system of cooperation and of citizens as reasonable and rational, and free and equal. As for its breadth, it covers the principles and values of a political conception (in this case those of justice as fairness) and it applies to the basic structure as a whole. (at 149)

Rawls distinguishes an overlapping consensus from a *modus vivendi*. In an overlapping consensus, the object of consensus, the political conception of justice, is a moral conception. It is also affirmed on moral grounds, "that is, it includes conceptions of society and of citizens as persons, as well as principles of justice, and an account of the political virtues through which those principles are embodied in human character and expressed in public life". (at 147) These two aspects of an overlapping consensus are linked to a third, that of stability. "This means that those who affirm the various views supporting the political conception will not withdraw their support of it should the relative strength of their view in society increase and eventually become dominant". (at 148)

25. Rawls, *Political Liberalism*, note 1, at 28; see also Rawls, "Kantian Constructivism", note 1, at 533

26. Rawls, *Political Liberalism*, note 1, at 98

27. Rawls, *Political Liberalism*, note 1, at 14. According to Rawls,

> [t]he fundamental organizing idea of justice as fairness, within which the other basic ideas are systematically connected, is that of society as a fair system of cooperation over time, from one generation to the next. We start the exposition with this idea, which we take to be implicit in the public culture of a democratic society. ...
>
> We can make the idea of social cooperation more specific by noting three of its elements:
>
> a. Cooperation is distinct from merely socially coordinated activity, for example, from activity coordinated by orders issued by some central authority. Cooperation is guided by publicly recognized rules and procedures that those cooperating accept and regard as properly regulating their conduct.
> b. Cooperation involves the idea of fair terms of cooperation: these are terms that each participant may reasonably accept, provided that everyone else likewise accepts them. Fair terms of cooperation specify an idea of reciprocity: all who are engaged in cooperation and who do their part as the rules and procedure require, are to benefit in an appropriate way as assessed by a suitable benchmark of comparison. A conception of political justice characterizes the fair terms of cooperation. Since the primary subject of justice is the basic structure of society, these fair terms are expressed by principles that specify basic rights and duties within its main institutions and regulate the arrangements of background justice over time, so that the benefits produced by everyone's efforts are fairly distributed and shared from one generation to the next.
> c. The idea of social cooperation requires an idea of each participant's rational advantage, or good. This idea of good specifies what those who are engaged in

cooperation ... are trying to achieve, when the scheme is viewed from their own standpoint. (at 15)

28. Rawls, *Political Liberalism*, note 1, at 15

The 'public political culture' of a democratic society

comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary), as well as historic texts and documents that are common knowledge. Comprehensive doctrines of all kinds - religious, philosophical, and moral - belong to what we may call the "background culture" of civil society. This is the culture of the social, not of the political. It is the culture of daily life, of its many associations: churches and universities, learned and scientific societies, and clubs and teams, to mention a few. In a democratic society there is a tradition of democratic thought, the content of which is at least familiar and intelligible to the educated common sense of citizens generally. Society's main institutions, and their accepted forms of interpretation, are seen as a fund of implicitly shared ideas and principles. (at 13)

29. Denise Réaume, "Is There a Liberal Conception of the Self?", (1984) 9 Queen's Law Journal 352, at 362. In this context, Réaume notes that

"[i]n addressing the public culture of a democratic society, Kantian constructivism hopes to invoke a conception of the person implicitly affirmed in that culture, or else one that would prove acceptable to citizens once it was properly presented and explained." Although Rawls does not do so, one might rephrase this by saying that the conception of the free and moral person is itself justified through the process of reflective equilibrium. On the one hand the conception must conform to our considered judgments about what kind of persons we are, and on the other it must produce a choice situation which itself produces principles of justice that match our considered judgments.

This interpretation of the original position is an answer to the dilemma Sandel posed for Rawls: can we avoid the equally unacceptable poles of transcendentalism and empiricism while maintaining deontology and the primacy of justice. This interpretation is not a transcendental one, but neither is it empirical. It depends upon contingent facts - that we live in a democratic society in which freedom and equality are implicitly held values - but it is not merely empirical. It is not just the fact that people happen to agree with Rawls' conception of the person (if they do) which grounds the original position, but that this conception conforms to our considered judgments about what kind of persons we would like to be and produces principles of justice which conform to our considered judgments about justice. The principles of justice are themselves justified in the same way - by conforming to considered judgments of justice on the one hand, and to the most reasonable conception of the person on the other. (at 362, quoting Rawls, "Kantian Constructivism", note 1, at 518)

Kenneth Baynes makes a similar point:

> The principles of justice are ... not justified by a direct appeal to just any set of widely shared views, but by an appeal to views that have been critically refined and adjusted in a process of reflective deliberation. (*The Normative Grounds of Social Criticism, Kant, Rawls, Habermas* (Albany: State University of New York Press, 1992), at 73)

30. *Political Liberalism*, note 1, at 19

31. *Political Liberalism*, note 1, at 14

32. *Political Liberalism*, note 1, at 35

33. *Political Liberalism*, note 1, at 35

34. *Political Liberalism*, note 1, at 35. According to Baynes, "this public conception of justice is based upon reasonable beliefs established by widely accepted methods of inquiry (i.e., it does not presuppose controversial metaphysical or religious doctrines)". (*The Normative Grounds of Social Criticism*, note 29, at 55, quoting Rawls, "Kantian Constructivism", note 1, at 537)

35. Rawls notes that

> knowing that people are rational we do not know the ends they will pursue, only that they will pursue them intelligently. Knowing that people are reasonable where others are concerned, we know that they are willing to govern their conduct by a principle from which they and others can reason in common; and reasonable people take into account the consequences of their actions on others' well-being. The disposition to be reasonable is neither derived from nor opposed to the rational but it is incompatible with egoism, as it is related to the disposition to act morally. (*Political Liberalism*, note 1, at 48, note 1)

According to Rawls,

> [p]ersons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them; and they are ready to discuss the fair terms that others propose. The reasonable is an element in the idea of society as a system of fair cooperation and that its fair terms be reasonable for all to accept is part of its idea of reciprocity. (at 49)

> By contrast, people are unreasonable in the same basic aspect when they plan to engage in cooperative schemes but are unwilling to honor, or even to propose, except as a necessary public pretense, any general principles or standards for specifying fair terms of cooperation. They are ready to violate such terms as suits their interests

when circumstances allow. (at 50)

The rational is ... a distinct idea from the reasonable and applies to a single, unified agent (either an individual or corporate person) with the powers of judgment and deliberation in seeking ends and interests peculiarly its own. The rational applies to how these ends and interests are adopted and affirmed, as well as to how they are given priority. It also applies to the choice of means, in which case it is guided by such familiar principles as: to adopt the most effective means to ends, or to select the more probable alternative, other things equal.

Yet rational agents are not limited to means-ends reasoning, as they may balance final ends by their significance for their plan of life as a whole, and by how well these ends cohere with and complement one another. Nor are rational agents as such solely self-interested: that is, their interests are not always interests in benefits to themselves. Every interest is an interest of a self (agent), but not every interest is in benefits to the self that has it. Indeed, rational agents may have all kinds of affections for persons and attachments to communities and places, including love of country and of nature; and they may select and order their ends in various ways. (at 50)

In justice as fairness the reasonable and the rational are taken as two distinct and independent basic ideas. They are distinct in that there is no thought of deriving one from the other; in particular, there is no thought of deriving the reasonable from the rational. (at 51)

Justice as fairness rejects this idea. It does not try to derive the reasonable from the rational. Indeed, the attempt to do so may suggest that the reasonable is not basic and needs a basis in a way the rational does not. Rather, within the idea of fair cooperation the reasonable and the rational are complementary ideas. Each is an element in this fundamental idea and each connects with its distinctive moral power, respectively, with the capacity for a sense of justice and the capacity for a conception of the good. They work in tandem to specify the idea of fair terms of cooperation, taking into account the kind of social cooperation in question, the nature of the parties and their standing with respect to one another.

As complementary ideas, neither the reasonable nor the rational can stand without the other. Merely reasonable agents would have no ends of their own they wanted to advance by fair cooperation; merely rational agents lack a sense of justice and fail to recognize the independent validity of the claims of others. (at 52) (Rawls notes in note 6, at 52, that "[t]his is not to deny that given special loyalties or attachments, they would recognize each others' claims, but not as having a validity independent of those bonds".)

A further basic difference between the reasonable and the rational is that the reasonable is public in a way the rational is not. This means that it is by the reasonable that we enter as equals the public world of others and stand ready to propose, or to accept, as the case may be, fair terms of cooperation with them. (at 53)

36. According to Rawls,

> [the idea of the original position] is introduced in order to work out which traditional conception of justice, or which variant of one of these conceptions, specifies the most appropriate principles for realizing liberty and equality once society is viewed as a fair system of cooperation between free and equal citizens. (***Political Liberalism***, note 1, at 22)

> Justice as fairness recasts the doctrine of the social contract ...: the fair terms of social cooperation are conceived as agreed to by those engaged in it, that is, by free and equal citizens who are born into the society in which they lead their lives. But their agreement, like any other valid agreement, must be entered into under the appropriate conditions. In particular, these conditions must situate free and equal persons fairly and must not allow some persons greater bargaining advantages than others. Further, such things as threats of force and coercion, deception and fraud must be excluded. ...
>
> The reason the original position [by means of the veil of ignorance] must abstract from and not be affected by the contingencies of the social world is that the conditions for a fair agreement on the principles of political justice between free and equal persons must eliminate the bargaining advantages that inevitably arise within the background institutions of any society from cumulative social, historical, and natural tendencies. These contingent advantages and accidental influences from the past should not affect an agreement on the principles that are to regulate the institutions of the basic structure itself from the present into the future. ... (at 23)
>
> [F]rom what we have said it is clear that the original position is to be seen as a device of representation and hence any agreement reached by the parties must be regarded as both hypothetical and nonhistorical. But if so, since hypothetical agreements cannot bind, what is the significance of the original position? The answer is implicit in what has already been said: it is given by the role of the various features of the original position as a device of representation. (at 24)

37. See ***Political Liberalism***, note 1, at 25, note 28, where Rawls discusses the constraints on arguments for principles of justice modeled in the original position by reference to their discussion in ***A Theory of Justice***, note 1.

Rawls describes the generality principle in ***A Theory of Justice***:

> [P]rinciples should be general. That is, it must be possible to formulate them without the use of what would be intuitively recognized as proper names, or rigged definite descriptions. Thus the predicates used in their statement should express general properties and relations. ... [S]ince the parties have no specific information about themselves or their situation, they cannot identify themselves anyway. Even if a person could get others to agree, he does not know how to tailor principles to his advantage. The parties are effectively forced to stick to general principles, understanding the notion here in an intuitive fashion.

> The naturalness of this condition lies in part in the fact that first principles must be capable of serving as a public charter of a well-ordered society in perpetuity. Being unconditional, they always hold (under the circumstances of justice), and the knowledge of them must be open to individuals in any generation. Thus, to understand these principles should not require a knowledge of contingent particulars, and surely not a reference to individuals or associations. (at 131)

38. According to Rawls, "principles are to be universal in application. They must hold for everyone in virtue of their being moral persons". (*A Theory of Justice*, note 1, at 132)

39. Rawls describes the condition of publicity as arising

> naturally from a contractarian standpoint. The parties assume that they are choosing principles for a public conception of justice. They suppose that everyone will know about these principles all that he would know if their acceptance were the result of an agreement. Thus the general awareness of their universal acceptance should have desirable effects and support the stability of social cooperation. ... The point of the publicity condition is to have the parties evaluate conceptions of justice as publicly acknowledged and fully effective moral constitutions of social life. (*A Theory of Justice*, note 1, at 133; see also Rawls, "*Kantian Constructivism*", note 1, at 537.)

40. According to Rawls,

> [a] further condition is that a conception of right must impose an ordering on conflicting claims. This requirement springs directly from the role of its principles in adjusting competing demands. ... It is clearly desirable that a conception of justice be complete, that is, able to order all the claims that can arise (or that are likely to in practice). ... [The ordering must be] based on certain relevant aspects of persons and their situation which are independent from their social position, or their capacity to intimidate and coerce. (*A Theory of Justice*, note 1, at 133)

41. Rawls states that

> [t]he parties are to assess the system of principles as the final court of appeal in practical reasoning. There are no higher standards to which arguments in support of claims can be addressed; reasoning successfully from these principles is conclusive. If we think in terms of the fully general theory which has principles for all the virtues, then such a theory specifies the totality of relevant considerations and their appropriate weights, and its requirements are decisive. They override the demands of law and custom, and of social rules generally. We are to arrange and respect social institutions as the principles of right and justice direct. Conclusions from these principles also override considerations of prudence and self-interest. This does not mean that these principles insist upon self-sacrifice; for in drawing up the conception of right the parties take their interests into account as best they can. The claims of personal prudence are already given an appropriate weight within the full system of principles. The complete scheme is final in that when the course of practical reasoning it defines

> has reached its conclusion, the question is settled. The claims of existing social arrangements and of self-interest have been duly allowed for. We cannot at the end count them a second time because we do not like the result. (*A Theory of Justice*, note 1, at 135)

42. The veil of ignorance ensures that the parties deciding the principles of justice in the original position are uninfluenced by advantages stemming from morally arbitrary contingencies of nature and social circumstances (Rawls, *A Theory of Justice*, note 1, at 137, 252; Rawls, "Kantian Constructivism", note 1, at 523) or by particular information that "is not part of their representation as free and equal moral persons with a determinate (but unknown) conception of the good, unless this information is necessary for a rational agreement to be reached". ("Kantian Constructivism", at 549)

Rawls describes the veil of ignorance in *A Theory of Justice*:

> The idea of the original position is to set up a fair procedure so that any principles agreed to will be just. The aim is to use the notion of pure procedural justice as a basis of theory. Somehow we must nullify the effects of special contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage. Now in order to do this I assume that the parties are situated behind a veil of ignorance. They do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations. (at 136)

According to Rawls, among the essential features of the original position is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, his conception of the good, the particulars of his rational plan of life, his special psychological propensities such as aversion to risk or liability to optimism or pessimism, and the like. Nor do the parties know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. Nor do they know to which generation they belong. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. The aim is to rule out those principles that it would be rational to propose for acceptance only if one knew certain things that are irrelevant from the standpoint of justice. (at 12, 18, 137)

> Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain. (at 12, 137)

> [T]he only particular facts which the parties know [in the original position] is that their society is subject to the circumstances of justice and whatever this implies. [Rawls describes the circumstances of justice in *Political Liberalism*, note 1, at 66 as the objective circumstances of moderate scarcity, and the subjective circumstances of pluralism. See also *A Theory of Justice*, at 126-127.] It is taken for granted, however, that they know the general facts about human society. They understand political affairs and the principles of economic theory; they know the basis of social organization and

> the laws of human psychology. ... [T]he parties are presumed to know whatever general facts affect the choice of the principles of justice. (at 137)

In *Political Liberalism*, Rawls clarifies that people's particular comprehensive doctrines are also subject to the veil of ignorance.

> We seek a political conception of justice for a democratic society viewed as a system of fair cooperation between free and equal citizens who, as politically autonomous ..., willingly accept the publicly recognized principles of justice specifying the fair terms of cooperation. However, the society in question is one in which there is diversity of comprehensive doctrines, all perfectly reasonable. This is the fact of reasonable pluralism, as opposed to the fact of pluralism as such. ... Now if all citizens are freely to endorse the political conception of justice, that conception must be able to gain the support of citizens who affirm different and opposing though reasonable comprehensive doctrines, in which case we have an overlapping consensus of reasonable doctrines. This suggests that we leave aside how people's comprehensive doctrines connect with the content of the political conception of justice and regard that content as arising from the various fundamental ideas drawn from the public political culture of a democratic society. We model this by putting people's comprehensive doctrines behind the veil of ignorance. This enable [sic] us to find a political conception of justice that can be the focus of an overlapping consensus and thereby serve as a public basis of justification in a society marked by the fact of reasonable pluralism. (at 24, note 27)

43. We simply describe all the parties in the same way and situate them equally, that is, symmetrically with respect to one another. Everyone has the same rights and powers in the procedure for reaching agreement. Now it is essential to justice as fairness that the original position be fair between equal moral persons so that this fairness can transfer to the principles adopted. (Rawls, "Kantian Constructivism", note 1, at 550)

> That the parties are symmetrically situated is required if they are to be seen as representatives of free and equal citizens who are to reach an agreement under conditions that are fair. (Rawls, *Political Liberalism*, note 1, at 24)

44. By the basic structure, Rawls means

> a society's main political, social, and economic institutions, and how they fit together into one unified system of cooperation from one generation to the next. The initial focus, then, of a political conception of justice is the framework of basic institutions and the principles, standards and precepts that apply to it, as well as how those norms are to be expressed in the character and attitudes of the members of society who realize its ideals. (*Political Liberalism*, note 1, at 11)

According to Baynes, "the basic structure is specified as the subject of justice because in so doing it insures that each citizen is accorded equal concern and respect as a moral person". (*The Normative Grounds of Social Criticism*, note 29, at 61; see also Rawls, "Kantian Constructivism", note 1, at 529, 530, 550)

45. Since the parties have no knowledge of what their social position will be once the veil of ignorance is lifted and since, given the list from which they must choose, there is reason for them to believe that the worst outcome is not so bad and the best is not so much better, it is reasonable for them to choose that principle or set of principles in which they will fare best if they turn out to be in the position of the worst off. (Baynes, *The Normative Grounds of Social Criticism*, note 29, at 60)

46. *Political Liberalism*, note 1, at 291. The principles of justice are ordered serially by Rawls in 'lexical priority'. (For a discussion of lexical priority, see note 1.)

Because this paper is concerned only with expanding the category of equal basic liberties, it will not address the various controversies surrounding Rawls's treatment of the difference principle.

47. According to Baynes, "Rawls works from a certain "ideal" of the person [the political conception] that he takes to be less controversial and more widely accepted - though not morally neutral - than the more substantive conclusions about the principles of justice at which he arrives". (*The Normative Grounds of Social Criticism*, note 29, at 127)

Baynes states that

> [t]he original position does not introduce any further moral assumptions than those already provided by the model-conceptions of the person and the well-ordered society; but neither does it shift the context of argument to the morally neutral framework of rational choice. Rather, it is part of an exercise to help clarify ideas that you and I who have been asked to find principles of justice already recognize, or at least would recognize upon due reflection. It is an argumentative device that Rawls introduces in a public dialogue quite literally with us. It thus becomes less important (and is not surprising) that the parties in the original position unanimously choose that two principles - after all, they were constructed to select them. What matters is whether we as free and equal citizens ... acknowledge the ideas employed in the construction of the original position as well as in its particular design. The reasoning that goes on inside the original position is part of a more general argument that we should accept the principles that would be chosen there, and it is this more general argument that appeals to the presence of an overlapping consensus in our public culture. (at 73)

For a discussion of reflective equilibrium, see note 1.

48. As Rawls notes, the parties to the original position represent only limited aspects of the political conception of the person. The rational autonomy of the parties is not the same as the full autonomy of citizens in a well-ordered society.

> Two different parts of the original position must be carefully distinguished. These parts correspond to the two powers of moral personality, or to what I have called "the capacity to be reasonable" and "the capacity to be rational". While the original position as a whole represents both moral powers, and therefore represents the full conception of the person, the parties as rationally autonomous representatives

of persons in society represent only the rational: the parties agree to those principles which they believe are best for those they represent as seen from these persons' conceptions of the good and their capacity to form, revise, and rationally to pursue such a conception, so far as the parties can know these things. The reasonable, or persons' capacity for a sense of justice, which here is their capacity to honor fair terms of social cooperation, is represented by the various restrictions to which the parties are subject in the original position and by the conditions imposed on their agreement. When the principles of justice which are adopted by the parties are affirmed and acted upon by equal citizens in society, citizens then act with full autonomy. ... Fully autonomous persons ... publicly acknowledge and act upon the fair terms of social cooperation moved by the reasons specified by the shared principles of justice. The parties, however, are only rationally autonomous, since the constraints of the reasonable are simply imposed from without. Indeed, the rational autonomy of the parties is merely that of artificial agents who inhabit a construction designed to model the full conception of the person as both reasonable and rational. It is equal citizens in a well-ordered society who are fully autonomous because they freely accept the constraints of the reasonable, and in so doing their political life reflects that conception of the person which takes as fundamental their capacity for social cooperation. It is the full autonomy of active citizens which expresses the political ideal to be realized in the social world. (*Political Liberalism*, note 1, at 305)

49. Rawls, *Political Liberalism*, note 1, at 19

50. Rawls, *Political Liberalism*, note 1, at 34

51. Rawls, *Political Liberalism*, note 1, at 302

52. Rawls, *Political Liberalism*, note 1, at 30.

Rawls also notes that

> There is a second sense of identity specified by reference to citizens' deeper aims and commitments. Let's call it their noninstitutional or moral identity. Citizens usually have both political and nonpolitical aims and commitments. They affirm the values of political justice and want to see them embodied in political institutions and social policies. They also work for the other values in nonpublic life and for the ends of the associations to which they belong. These two aspects of their moral identity citizens must adjust and reconcile. It can happen that in their personal affairs, or in the internal life of associations, citizens may regard their final ends and attachments very differently from the way the political conception supposes. They may have, and often do have at any given time, affections, devotions, and loyalties that they believe they would not, indeed could and should not, stand apart from and evaluate objectively. They may regard it as simply unthinkable to view themselves apart from certain religious, philosophical, and moral convictions, or from certain enduring attachments and loyalties.

> These two kinds of commitments and attachments - political and nonpolitical - specify moral identity and give shape to a person's way of life, what one sees oneself as doing and trying to accomplish in the social world. If we suddenly lost them, we would be disoriented and unable to carry on. In fact, there would be, we might think, no point in carrying on. But our conceptions of the good may and often do change over time, usually slowly but sometimes rather suddenly. When these changes are sudden, we are likely to say that we are no longer the same person. We know what this means: we refer to a profound and pervasive shift, or reversal, in our final ends and commitments; we refer to our different moral (which includes our religious) identity. On the road to Damascus Saul of Tarsus becomes Paul the Apostle. Yet such a conversion implies no change in our public or institutional identity, nor in our personal identity as this concept is understood by some writers in the philosophy of mind. (at 30)

53. Rawls, *Political Liberalism*, note 1, at 33

54. Rawls, *Political Liberalism*, note 1, at 32

55. Rawls, *Political Liberalism*, note 1, at 33

56. John Rawls, "A Kantian Conception of Equality", (1975) 96 Cambridge Review 94, at 94. See also Rawls, *Political Liberalism*, note 1, at 19; Rawls, *A Theory of Justice*, note 1, at 504-512.

57. *The Normative Grounds of Social Criticism*, note 29, at 56

58. *Political Liberalism*, note 1, at 335; "The Basic Liberties", note 1, at 50

I will discuss the role of the political conception of the person in the context of the resolution of conflicts of rights in Chapter 2.

59. The overall aim of the parties in the original position

> is to fulfill their responsibility and to do the best they can to advance the determinate good of the persons they represent. The problem is that given the restrictions of the veil of ignorance, it may seem impossible for the parties to ascertain these persons' good and therefore to make a rational agreement on their behalf. (Rawls, *Political Liberalism*, note 1, at 307)

The solution is to define an index of primary goods which are things all citizens need as free and equal persons.

60. Rawls, *Political Liberalism*, note 1, at 75. On this point, Rawls states that

> [s]ince citizens are regarded as having the two moral powers, we ascribe to them two corresponding higher-order interests in developing and exercising these powers. To say that these interests are "higher-order" interests means that, as the fundamental

idea of the person is specified, these interests are viewed as basic and hence as normally regulative and effective. Someone who has not developed and cannot exercise the moral powers to the minimum requisite degree cannot be a normal and fully cooperating member of society over a complete life. From this it follows that as citizens' representatives the parties [in the original position] adopt principles that guarantee conditions securing for those powers their adequate development and full exercise.

In addition, we suppose that the parties represent citizens regarded as having at any given time a determinate conception of the good, that is, a conception specified by certain definite final ends, attachments, and loyalties to particular persons and institutions, and interpreted in the light of some comprehensive religious, philosophical, or moral doctrine. To be sure, the parties do not know the content of these determinate conceptions, or the doctrines used to interpret them. But they still have a third higher-order interest to guide them, for they must try to adopt principles of justice that enable the persons represented to protect and advance some determinate (but unspecified) conceptions of the good over a complete life, allowing for possible changes of mind and conversions from one comprehensive conception to another. (at 74)

[T]he restrictions on information imposed by [the veil of ignorance] mean that the parties have only the three higher-order interests to guide their deliberations. These interests are purely formal: for example, the sense of justice is the highest-order interest in developing and exercising the capacity to understand, to apply, and to act from whatever principles of justice are rationally adopted by the parties. This capacity assures the parties that once their undertaking is made, it can be complied with and hence is not in vain; but that assurance does not by itself favor any particular principles of justice. Similar considerations hold for the other two higher-order interests. How, then, can the parties make a rational agreement on specific principles that are better designed than the other available alternatives to protect the determinate interests (conceptions of the good) of those they represent?

Here we introduce the idea of the primary goods. We stipulate that the parties evaluate the available principles by estimating how well they secure the primary goods essential to realize the higher-order interests of the person for whom each acts as a trustee. In this way we endow the parties with sufficiently specific aims so that their rational deliberations reach a definite result. To identify the primary goods we look to social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents. (at 75)

61. Rawls, *Political Liberalism*, note 1, at 307

In other words, although Rawls's account of the primary goods still presupposes "various general facts about human wants and abilities, their characteristic phases and requirements of nurture, relations of social interdependence and much else" (*Political Liberalism*, at 307-308), as it did in *A Theory of Justice* (note 1, at e.g. 253), and for which he was criticized, his argument now depends for

its justification upon his political conception of the person.

62. *Political Liberalism*, note 1, at 188.

As Baynes notes, once the principles of justice are selected, the list of primary goods also provides a basis for

> "interpersonal comparison so that the relative well-being of representative members of a society can be determined. An indexing of the primary goods, for example, enables the least-advantaged representative group to be identified ... . [T]he notion of primary social goods provides a tool that can be used by the social critic in assessing social institutions. (*The Normative Grounds of Social Criticism*, note 29, at 146; See also *Political Liberalism*, at 186)

63. According to Rawls,

> [a] basic feature of a well-ordered political society is that there is a public understanding not only about the kinds of claims it is appropriate for citizens to make when questions of political justice arise, but also a public understanding about how such claims are to be supported. ... An effective political conception of justice includes ... a political understanding of what is to be publicly recognized as citizens' needs and hence as advantageous for all.
>
> In political liberalism the problem of interpersonal comparisons arises as follows: given the conflicting comprehensive conceptions of the good, how is it possible to reach such a political understanding of what are to count as appropriate claims? ... To find a shared idea of citizens' good appropriate for political purposes, political liberalism looks for an idea of rational advantage within a political conception that is independent of any particular comprehensive doctrine and hence may be the focus [sic] an overlapping consensus.
>
> ... The conception of primary goods addresses this practical political problem. The answer proposed rests on identifying a partial similarity in the structure of citizens' permissible conceptions of the good. Here permissible conceptions are comprehensive doctrines the pursuit of which is not excluded by the principles of political justice. Even though citizens do not affirm the same (permissible) conception, complete with all its final ends and loyalties, two things suffice for a shared idea of rational advantage: first, that citizens affirm the same political conception of themselves as free and equal persons; and second, that their (permissible) conceptions of the good, however distinct their content and their related religious and philosophical doctrines, require for their advancement roughly the same primary goods, that is, the same basic rights, liberties, and opportunities, and the same all-purpose means such as income and wealth, with all of these supported by the same social bases of self-respect. These goods, we say, are things citizens need as free and equal persons, and claims to these goods are counted as appropriate claims. (*Political Liberalism*, note 1, at 179)

64. *Political Liberalism*, note 1, at 181-182, 296

65. Rawls notes that the

> role of this liberty is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers. Two wider conceptions of the right of property as a basic liberty are to be avoided. One conception extends this right to include certain rights of acquisition and bequest, as well as the right to own means of production and natural resources. On the other conception, the right of property includes the equal right to participate in the control of means of production and natural resources, which are to be socially owned. These wider conceptions are not used because they cannot, I think, be accounted for as necessary for the development and exercise of the moral powers. The merits of these and other conceptions of the right of property are decided at later stages when much more information about a society's circumstances and historical tradition is available. (*Political Liberalism*, note 1, at 298)

66. Rawls, *A Theory of Justice*, note 1, at 61

67. Rawls, *Political Liberalism*, note 1, at 308, 181

68. Rawls, *Political Liberalism*, note 1, at 188

69. Rawls notes, in his response to Hart in "The Basic Liberties and their Priority", note 1, at 4 (reproduced in *Political Liberalism*, note 1, at 289), that

> the basic liberties and the grounds for their priority can be founded on the conception of citizens as free and equal persons ... . These revisions bring out that the basic liberties and their priority rest on a conception of the person that would be recognized as liberal and not, as Hart thought, on considerations of rational interests alone. (*Political Liberalism*, at 290)

70. *Political Liberalism*, note 1, at 11

71. "John Rawls' New Methodology: An Interpretive Account", (1990) 35 McGill Law Journal 572, at 583

72. *Political Liberalism*, note 1, at 8

73. *Political Liberalism*, note 1, at 8; see also at 13-14

74. *Political Liberalism*, note 1, at 8

75. *Political Liberalism*, note 1, at 8; *A Theory of Justice*, note 1, at 20-21, 48-51, 120-121

76. Rawls, "Justice as Fairness", note 1, at 229

77. Nielsen, "Rawls' New Methodology", note 71, at 585, quoting Rawls, "Justice as Fairness", note 1, at 231

78. Nielsen, "Rawls's New Methodology", note 71, at 581

79. "Justice as Fairness", note 1, at 224, note 2

80. See e.g. Rawls, *Political Liberalism*, note 1, at 9

81. "Justice as Fairness", note 1, at 223. Rawls has explicitly disavowed reliance upon metaphysical assumptions and 'moral truths' in his recent work:

> The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine, an order apart and distinct from how we conceive of ourselves. ("Kantian Constructivism", note 1, at 519)

In *Political Liberalism*, note 1, Rawls states that

> we do not say that the procedure of construction makes, or produces, the order of moral values. ... [T]he intuitionist says this order is independent and constitutes itself, as it were. Political constructivism neither denies nor asserts this. Rather it claims only that its procedure represents an order of political values proceeding from the values expressed by the principles of practical reason, in union with conceptions of society and person, to the values expressed by certain principles of political justice.
>
> Political liberalism adds: this represented order is the most appropriate one for a democratic society marked by the fact of reasonable pluralism. This is because it provides the most reasonable conception of justice as the focus of an overlapping consensus. (at 95; see also at xvi-xx, xxvii-xxviii, 27, 29)

82. Nielsen, "Rawls' New Methodology", note 71, at 578 (emphasis in original)

83. Rawls states that

> [a] Kantian doctrine interprets the notion of objectivity in terms of a suitably constructed social point of view that is authoritative with respect to all individual and associational points of view. This rendering of objectivity implies that, rather than to think of the principles of justice as true, it is better to say that they are the principles most reasonable for us, given our conception of persons as free and equal, and fully cooperating members of a democratic society. ("Kantian Constructivism", note 1, at 554)

In *Political Liberalism*, note 1, Rawls elaborates on the relationship between reasonableness and truth by reference to reasonable comprehensive doctrines and the elements necessary to reach an overlapping consensus:

> [Political constructivism] does not ... use (or deny) the concept of truth; nor does it question that concept, nor could it say that the concept of truth and its idea of the reasonable are the same. Rather, within itself the political conception does without the concept of truth. ... One thought is that the idea of the reasonable makes an overlapping consensus of reasonable doctrines possible in ways the concept of truth may not. Yet, in any case, it is up to each comprehensive doctrine to say how its idea of the reasonable connects with its concept of truth, should it have one. (at 94; see also at xx, 127-128)

84. "Kantian Constructivism", note 1, at 519

85. That is, the society of which we who are faced with the task of settling questions of justice are members.

86. *Political Liberalism*, note 1, at 20. So, for example, Rawls assumes, for the purposes of argument, that persons as citizens have all the capacities that enable them to be cooperating members of society. He thus puts "aside for the time being [certain] temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense. Thus, while we begin with an idea of the person implicit in the public political culture, we idealize and simplify this idea in various ways in order to focus first on the main question". (at 20) In Rawls's procedure, once the main question is resolved, the principles of justice will be extended to health care.

87. Rawls's society in *Political Liberalism*, note 1, is a) a modern constitutional democracy, b) a closed society, c) whose many competing reasonable comprehensive doctrines are the result of the exercise of free practical reason within the framework of free institutions.

> ... I assume that the basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies. Its members enter it only by birth and leave it only by death. This allows us to speak of them as born into a society where they will lead a complete life. That a society is closed is a considerable abstraction, justified only because it enables us to focus on certain main questions free from distracting details. (at 12)
>
> ... [S]ociety is viewed not only as closed ... but as a more or less complete and self-sufficient scheme of cooperation, making room within itself for all the necessities and activities of life, from birth until death. A society is also conceived as existing in perpetuity: it produces and reproduces itself and its institutions and culture over generations and there is no time at which it is expected to wind up its affairs. (at 18)
>
> ... [W]e have assumed that a democratic society, like any political society, is to be viewed as a complete and closed social system. It is complete in that it is self-

> sufficient and has a place for all the main purposes of human life. It is also closed ..., in that entry into it is only by birth and exit from it is only by death. We have no prior identity before being in society: it is not as if we came from somewhere but rather we find ourselves growing up in this society in this social position, with its attendant advantages and disadvantages, as our good or ill fortune would have it. For the moment we leave aside entirely relations with other societies and postpone all questions of justice between peoples until a conception of justice for a well-ordered society is on hand. Thus, we are not seen as joining society at the age of reason, as we might join an association, but as being born into society where we will lead a complete life. (at 40; see also Rawls, "*Kantian Constructivism*", note 1, at 536)

Rawls is working, for the sake of simplicity, from the model of a society from which liberalism originated. When he speaks of comprehensive doctrines, he describes them as being generated by free practical reason within a framework of free institutions or, in other words, internally generated. He specifically does not deal with forms of diversity which exist in an open society containing different ethnic and cultural groups. Nor does he deal, in *Political Liberalism*, with the question of just relations between peoples.

88. Rawls states that the concerns of political liberalism are rooted in its historical origins, in particular, religious conflict within Christianity since the Reformation.

> ... [T]he historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth and seventeenth centuries. Something like the modern understanding of liberty of conscience and freedom of thought began then. ... Of course, other controversies are also of crucial importance, such as those over limiting the powers of absolute monarchs by appropriating principles of constitutional design protecting basic rights and liberties.
>
> Yet despite the significance of other controversies and of principles addressed to settling them, the fact of religious division remains. For this reason, political liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines, including both religious and nonreligious doctrines. (*Political Liberalism*, note 1, at xxiv)
>
> ... [T]he problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines? ... This is not a problem of justice as it arose in the ancient world. What the ancient world did not know was the clash between salvationist, creedal, and expansionist religions. This is a phenomenon new to historical experience, a possibility realized by the Reformation. Of course, Christianity already made possible the conquest of people, not simply for their land and wealth, and to exercise power and dominion over them, but to save their souls. The Reformation turned this possibility inward upon itself.
>
> What is new about this clash is that it introduces into people's conceptions of their good a transcendent element not admitting of compromise. This element forces

> either mortal conflict moderated only by circumstance and exhaustion, or equal liberty of conscience and freedom of thought. Except on the basis of these last, firmly founded and publicly recognized, no reasonable political conception of justice is possible. Political liberalism starts by taking to heart the absolute depth of that irreconcilable latent conflict. (at xxv)
>
> It may seem that my emphasis on the Reformation and the long controversy about toleration as the origin of liberalism is dated in terms of the problems of contemporary political life. Among our most basic problems are those of race, ethnicity, and gender. These may seem of an altogether different character calling for different principles of justice, which *Theory* does not discuss.
>
> ... [T]hat work set out to offer an account of political and social justice that is more satisfactory than the leading familiar traditional conceptions. To this end it limited itself ... to a family of classical problems that had been at the center of the historical debates concerning the moral and political structure of the modern democratic state. Hence it treats the grounds of the basic religious and political liberties, and of the basic rights of citizens in civil society, including here freedom of movement and fair equality of opportunity, the right of personal property, and the protections of the rule of law. It also takes up the justice of economic and social inequalities in a society in which citizens are viewed as free and equal. But *Theory* leaves aside for the most part the question of the claims of democracy in the firm and workplace, as well as that of justice between states (or peoples as I prefer to say); it barely mentions retributive justice and the protection of the environment or the preservation of wildlife. Other major matters are omitted, for example, the justice of and in the family, though I do assume that in some form the family is just. The underlying assumption is that a conception of justice worked up by focusing on a few long-standing classical problems should be correct, or at least provide guidelines for addressing further questions. Such is the rationale of focusing on a few main and enduring classical problems. (at xxviii)

This would respond in part to Sibyl A. Schwarzenbach's criticism of Rawls for underinclusiveness in "Rawls, Hegel, and Communitarianism", (1991) 19 Political Theory 539. She is critical of Rawls's exclusion of "important, shared moral ends we in fact hold in common, namely, economic and ... "reproductive" ones" (i.e. family, child and home care)" from the public sphere (at 561).

89. Note 1

90. Gerald Doppelt, in "Rawls' Kantian Ideal and the Viability of Modern Liberalism", (1988) 31 Inquiry 413 argues that the "plausibility of Rawlsian liberalism [has been] considerably enhanced" (at 414) by Rawls's recent articulation of a Kantian ideal of personhood "presupposed by the living tradition of liberal-democratic judgment and practice, which reason can recover through a critical reflection upon this tradition". (at 413) In Doppelt's opinion, "some of the most serious criticisms of *A Theory of Justice* (including Sandel's)" can now be met. (at 414)

However, Doppelt is also critical of Rawls's political conception of the person as

underinclusive. Although it captures "a 'democratic' conception of persons underlying one major part of our tradition" (at 438), it excludes rival social ideals, other "dimensions of personhood which are equally central to the rationality of modern social life and conflict with the Kantian conception" (at 415). These would include, for example, a 'bourgeois' or competitive individualist conception of the person (at 438) and Judeo-Christian and patriarchal ideals of human agency, personhood and social justice (at 442, 447). According to Doppelt,

> the resources of the original position for determining social justice depends on the recognition of one ideal of personhood supremely regulative in this standpoint. It lacks the resources for choosing between or otherwise mediating rival ideals of personhood in the standpoint of moral justice. Under these conditions, entering the original position loses its normative force and rationale - as a device for representing our moral identity or as a framework for resolving the basic conflicts concerning social justice. The ongoing debate or disagreement in our society concerning the relative merits and urgency of these rival ideals of personhood and social justice in contexts where they come into conflict will simply be duplicated in the original position. (at 443)

So, for example,

> [a] stress on the bourgeois ideal may lead the deliberators [in the original position] to favor a principle of equal liberty in which various capitalist market freedoms and property rights are prior to, or at least on an equal footing with, the democratic civil and political liberties central to Rawls' first principle. Similarly, a stress on the bourgeois ideal of economic self-support may lead to an outright rejection of his principle of redistributive economic justice ... . (at 441)

Doppelt proposes that

> [t]he knowledge that such conflicts are *built into* our shared traditions of judgment requires that we *go beyond* a reflection upon tradition itself in order to understand the *whole way of life* informed by and reflected in traditions of thought. Our interest is to determine whether our traditions express a way of life involving widespread aspirations and ideals which are bound to be thwarted in large measure by the conditions of life which they justify. Our interest is also to determine whether this pattern of frustrated ideals is avoidable through alternative normative and institutional possibilities. Finally we need to know whether the reinterpretation of our traditions and ideals which might alter these patterns of frustrated aspirations involves an intolerable abandonment of the core of these ideals or a more rational embodiment of their central claims. (at 446 (emphasis in original))

If Rawls's political conception of the person is not a complete representation of the ideals implicit in our public culture (on this point, see the discussion at note 29), and if other equally important ideals conflict with the political conception of the person, Rawls's argument may be vulnerable to this type of criticism.

However, I should emphasize that, in this paper, I do not attempt to respond to criticisms of

Rawls's theory, but only to explore the implications of his methodology for the recognition of group rights and the treatment of rights and freedoms in conflict. In other words, I am content to take Rawls's argument as a given and to explore its boundaries. I should also note that my concern is to argue that the 'equal basic liberty to participate in, produce and enjoy one's own culture' is a liberty under Rawls's first principle. Provided it has the same priority as the other equal basic liberties (whatever they may be), I am not particularly concerned, for the sake of the argument in this paper, what that priority might amount to in relation to the primary goods protected by the second principle. This being said, it does strike me that my argument for 'equal liberty to participate in, produce and enjoy one's own culture' as an extension of the social primary goods contemplated by Rawls's first principle benefits from Doppelt's defence of Rawls's recent methodology while circumventing in large part the ramifications of his critique, which would seem mainly (although, admittedly, not exclusively) to affect the second principle of justice.

91. "The Priority of Abstract Right", note 4, at 289 (emphasis in original)

92. "The Priority of Abstract Right", note 4, at 290

93. On this point, Benson states that

> [i]t is the public conception of justice, framed in terms that are categorially distinct from individuals' conceptions of the good, that provides the context within which ends may be (permissibly) chosen. But, of course, this public conception of justice rests on the priority of the basic liberties. ("The Priority of Abstract Right", note 4, at 290)

94. *Liberalism, Community and Culture*, note 1, at 192

95. Rawls defines equal liberty of conscience as including "the freedom and integrity of the internal life of religious associations and the liberty of persons to determine their religious affiliations in social conditions that are free". (*Political Liberalism*, note 1, at 341)

96. *Political Liberalism*, note 1, at 312

97. ... [W]hile the parties [in the original position] know that the persons they represent have determinate conceptions of the good, they do not know the content of those conceptions; that is, they do not know the particular final ends and aims these persons pursue, nor the objects of their attachments and loyalties, nor their view of their relation to the world - religious, philosophical, or moral - by reference to which these ends and loyalties are understood. However, the parties do know the general structure of rational persons' plans of life (given the general facts about human psychology and the workings of social institutions) and hence the main elements in a conception of the good just enumerated. Knowledge of these matters goes with their understanding and use of primary goods as previously explained. (*Political Liberalism*, note 1, at 310)

98. Rawls, *Political Liberalism*, note 1, at 311

99. Let us now turn to considerations relating to the capacity for a conception of the good. This capacity was earlier defined as a capacity to form, to revise, and rationally to pursue a determinate conception of the good. Here there are two closely related grounds, since this capacity can be viewed in two ways. In the first way, the adequate development and exercise of this capacity, as circumstances require, is regarded as a means to a person's good; and as a means it is not (by definition) part of this person's determinate conception of the good. Persons exercise this power in rationally pursuing their final ends and in articulating their notions of a complete life. At any given moment this power serves the determinate conception of the good then affirmed; but the role of this power in forming other and more rational conceptions of the good and in revising existing ones must not be overlooked. There is no guarantee that all aspects of our present way of life are the most rational for us and not in need of at least minor if not major revision. For these reasons the adequate and full exercise of the capacity for a conception of the good is a means to a person's good. Thus, on the assumption that liberty of conscience, and therefore the liberty to fall into error and to make mistakes, is among the social conditions necessary for the development and exercise of this power, the parties have another ground for adopting principles that guarantee this basic liberty. (*Political Liberalism*, note 1, at 312)

100. *Political Liberalism*, note 1, at 314

101. *Political Liberalism*, note 1, at 313.

The second way of regarding the capacity for a conception of the good leads to a further ground for liberty of conscience. This ground rests on the broad scope and the regulative nature of this capacity and the inherent principles that guide its operations (the principles of rational deliberation). These features of this capacity enable us to think of ourselves as affirming our way of life in accordance with the full, deliberate, and reasoned exercise of our intellectual and moral powers. And this rationally affirmed relation between our deliberative reason and our way of life itself becomes part of our determinate conception of the good. This possibility is contained in the conception of the person. Thus, in addition to our beliefs being true, our actions right, and our ends good, we may also strive to appreciate *why* our beliefs are true, our actions right, and our ends good and suitable for us. As Mill would say, we may seek to make our conception of the good "our own"; we are not content to accept it ready-made from our society or social peers. Of course, the conception we affirm need not be peculiar to us, or a conception we have, as it were, fashioned for ourselves; rather we may affirm a religious, philosophical, or moral tradition in which we have been raised and educated, and which we find, at the age of reason, to be a center of our attachments and loyalties. In this case what we affirm is a tradition that incorporates ideals and virtues which meet the tests of our reason and which answer to our deepest desires and affections. Of course, many persons may not examine their acquired beliefs and ends but take them on faith, or be satisfied that they are matters of custom and tradition. They are not to be criticized for this, for in the liberal view there is no political or social evaluation of the good within the limits permitted by justice.

In this way of regarding the capacity for a conception of the good, this

> capacity is not a means to but is an essential part of a determinate conception of the good. The distinctive place in justice as fairness of this conception is that it enables us to view our final aims and loyalties in a way that realizes to the full extent one of the moral powers in terms of which persons are characterized in this political conception of justice. For this conception of the good to be possible we must be allowed, even more plainly than in the case of the preceding ground, to fall into error and to make mistakes within the limits established by the basic liberties. In order to guarantee the possibility of this conception of the good, the parties, as our representatives, adopt principles which protect liberty of conscience. (at 313 (emphasis in original))

102. *Political Liberalism*, note 1, at 314

103. *The Morality of Freedom*, note 16, at 307-313

104. I think it is fair to say that social forms constitute culture. However, it is not necessary to the argument I am making in this chapter that social forms be shown to constitute culture. It is sufficient that specific social forms be associated with each culture.

105. An obvious corollary of this position, but one which may merit emphasis, is that there is no legitimate basis for obliging a group claiming a right related to culture to justify a departure from the types of goods or duties associated with rights or freedoms related to religion.

Rather, as I explain in chapter 2, the process of specification and adjustment of the basic liberties is driven by reference to the unique and particular role of each liberty vis-a-vis one or both of the two moral powers in one or both of the two fundamental cases. The achievement of a fully adequate scheme of equal basic liberties is judged by reference to the criterion of significance.

106. According to Michael Asch, there is consensus among anthropologists that

> 1. Culture is an attribute of *all* human societies.
>
> 2. Culture includes rules and/or behaviour regarding virtually all aspects of human social life.
>
> 3. Culture is passed from one generation to another by learning rather than by instinct.
>
> 4. Virtually all human social behaviour is based on patterns that are cultural and learned rather than inherited genetically through biological processes.

("Errors in *Delgamuukw*: An Anthropological Perspective", *Aboriginal Title in British Columbia: Delgamuukw v. the Queen*, Frank Cassidy, ed., (Lantzville, B.C.: Oolichan Books, and Montreal: The Institute for Research on Public Policy, 1992) 221, at 224 (emphasis in original). Asch cites the following authors for these propositions: D. Bates and F. Plog, *Cultural Anthropology*, 3rd ed. (New York: McGraw-Hill Publishing Co., 1990), at 7, 18; Keith Otterbein, *Comparative Cultural Analysis: An Introduction to Anthropology* (New York: Holt, Rinehart and Winston, 1972), at 1; Abraham

Rosman and P. Rubel, *The Tapestry of Culture: An Introduction to Cultural Anthropology*, 3rd ed. (New York: Random House, 1989), at 7; Ernest Schusky, *The Study of Cultural Anthropology* (New York: Holt, Rinehart and Winston, 1975), at 15; Marvin Harris, *Culture, People, Nature: An Introduction to General Anthropology*, 5th ed. (New York: Harper and Row Publishers, 1988), at 123.)

Michel Leiris has stated that

> [a]s culture ... comprehends all that is inherited or transmitted through society, it follows that its individual elements are proportionately diverse. They include not only beliefs, knowledge, sentiments and literature [which includes oral literature] ..., but the language or other systems of symbols which are their vehicles. Other elements are the rules of kinship, methods of education, forms of government and all the fashions followed in social relations. Gestures, bodily attitudes and even facial expressions are also included, since they are in large measure acquired by the community through education or imitation; and so, among the material elements, are fashions in housing and clothing and ranges of tools, manufactures and artistic production, all of which are to some extent traditional. Far from being restricted to or identical with what is commonly implied in describing a person as 'cultured' or otherwise (i.e. having a greater or lesser sum of knowledge of a greater or lesser variety of the principal branches of arts, letters and science in their Western forms), that is, the ornamental culture which is mainly an outcrop of the vaster mass which conditions it and of which it is only a partial expression, culture in the true [broader] sense should be regarded as comprising the whole more or less coherent structure of concepts, sentiments, mechanisms, institutions, and objects which explicitly or implicitly condition the conduct of members of a group.
>
> In this context, a group's future is as truly the product of its culture as its culture is of its past, for its culture both epitomises its past experience (what has been retained of the responses of its members in earlier generations to the situations and problems which confronted them) and also - and as a consequence - provides each new generation with a starting point (a system of rules and models of behaviour, values, concepts, techniques, instruments, etc.) round which it will plan its way of life and on which the individual will draw to some extent, and which he will apply in his own way and according to his own means in the specific situation confronting him. Thus it is something which can never be regarded as fixed for ever, but is constantly undergoing changes, sometimes small enough or slow enough to be almost imperceptible or to remain long unnoticed, sometimes of such scope or speed as to appear revolutionary. ("Race and Culture", Leo Kuper, ed., *Race, Science and Society* (Paris: The Unesco Press and London: George Allen and Unwin Ltd., 1975) 135, at 149)
>
> To judge of the importance of his culture as a factor in the formation of the individual's personality, we need only remember that it is not merely in the form of the heritage handed down to him through education that his group's culture affects him: it conditions his whole experience. ...
>
> In general, the individual is so thoroughly conditioned by his culture that

> even in the satisfaction of his most elementary needs - those which may be classified as biological ... - he only breaks free of the bonds of custom in the most exceptional circumstances ... . (at 152)
>
> ... [T]he cultural environment is a factor of primary importance not merely because it determines what the individual learns and how he learns it, but because it is in the strict sense the 'environment' within which and in terms of which he reacts. (at 153)

Recent cultural studies have shifted away from seeing cultures as isolated societies, internally homogeneous and externally distinctive and bounded: "Cultural change or cultural evolution does not operate on isolated societies but always on interconnected systems in which societies are variously linked within wider "social fields"". (Michael Carrithers, *Why Humans Have Cultures, Explaining Anthropology and Social Diversity* (Oxford: Oxford University Press, 1992), at 25, quoting E. Wolf, *Europe and the People without History* (London: University of California Press, 1982), at 76) The result is that cultures are increasingly seen as having a mutable and metamorphic quality. (See e.g. Carrithers, at 12-33)

The change of focus is "from the centres of cultures and their societies to their peripheries and the relations between them; and from a more or less static description of their characteristics to the dynamic one of processes in which they are involved." (Carrithers, at 27) Another way of describing this shift is from "static wholes" to "animated in-betweens". (Carrithers, at 28)

My purpose in this paper is not to identify what constitutes culture, other than to the minimal extent necessary to show the importance of cultures to their members. So I do not intend to enter the debate about theoretical and methodological issues in the study of culture (described for example, in Rosamund Billington, Sheelagh Strawbridge, Lenore Greensides, Annette Fitzsimons, *Culture and Society: A Sociology of Culture* (London: MacMillan Education Ltd., 1991)). My concern is not with the 'centres' of cultures, but with the interaction at their peripheries. In particular, I am concerned, not with any conceivable interactions between cultures which include, for example, extinction or assimilation by force of arms or numbers, but only with the interactions justifiable within a Rawlsian analysis. There is no doubt that cultures *can* be extinguished or assimilated. History - Canadian history - is proof of that. The question is whether extinction or assimilation may be justified in a liberal democracy, and if not, what limitations and obligations are placed on patterns of interaction between cultures.

107. I should note, for purposes of clarification, that my reliance upon Raz's analysis of the relationship of social forms to conceptions of the good should not be taken as an endorsement of other positions taken in *The Morality of Freedom*. I do not adopt Raz's position on perfectionism. Nor, in my view, does the aspect of his argument relating to social forms depend upon acceptance of his perfectionist thesis. Also, as I will discuss in chapter 3, I prefer Denise Réaume's and Jeremy Waldron's critique and elaboration of Raz's theory with respect to communal (or public participatory) goods.

108. *The Morality of Freedom*, note 16, at 309

109. *The Morality of Freedom*, note 16, at 311

110. Raz states that the concept of individual well-being "captures one crucial evaluation of a person's life: how good or successful is it from his point of view?" (*The Morality of Freedom*, note 16, at 289) In this context, Raz states that

> [i]t is best understood by excluding what does not belong to it. It is not an evaluation of his contribution to the well-being of others, or to culture, or to the ecosystem, etc. The distinction should not be confused with the distinction between personal or 'prudential' reasons on the one hand, and moral or impersonal reasons of some other kind. Nor do we assume that a person's well-being is secured by pursuing 'prudential' reasons, or reasons of self-interest. When judging a person's well-being one is judging the success or failure of his life, not the means of that success or failure. (at 289)

111. *The Morality of Freedom*, note 16, at 321

According to Raz, "it is generally the case that the value of various situations for a particular person depends to a large extent on his actual goals, as they are or will be throughout his life." (at 290) The main exceptions to this rule are biologically determined needs and desires. Yet, "while there is no denying the importance of the biologically determined wants for the well-being of a person, it is clear that they are not the only determinants of that well-being. Much depends on his other goals ...". (at 290). "I use the term [goals] broadly to cover [a person's] projects, plans, relationships, ambitions, commitments, and the like." (at 291)

Raz's definition of 'goals' therefore appears to coincide with Rawls's description of 'conceptions of the good, aims and attachments'. It should be emphasized that it is not limited to goals that are self-serving.

The function of a person's goals in determining well-being is important because, according to Raz, "improving the well-being of a person can normally only be done through his goals". (at 291)

112. *The Morality of Freedom*, note 16, at 321

According to Raz, "important goals form nested structures. They are comprehensive goals in which are embedded as constituent parts more limited goals" (at 321).

> A person's important immediate goals are nested in larger projects. Moreover, the importance of the immediate goal depends primarily on the importance of the larger goal, and on the degree to which realization of the immediate goal is essential to the success of the larger one. The relevance of nestedness to the evaluation of the importance of goals means that to a large extent ... one does not measure the importance of an action by the number of goals it enables one to reach, but by its contribution to the highest goals it serves. (at 292)
>
> Other things being equal, if a goal permeates all aspects of one's life it, and actions serving it, are more important than if it affects only a short span of one's life or only a few aspects of it. ... [R]elative to each person, other things being equal, his more pervasive goals are more important to his well-being than his less pervasive ones. (at 293)

113. *The Morality of Freedom*, note 16, at 309

114. *The Morality of Freedom*, note 16, at 308

As a result, "a person's well-being depends to a large extent on success in socially defined and determined pursuits and activities". (at 309)

Raz presents two reasons for the argument that comprehensive goals are based on social forms.

> The first shows that individual behaviour would not have the significance it has but for the existence of social forms. The second is to the effect that, even if the first were not the case, individuals would not have been able to acquire and maintain their goals except through continuous familiarity with the social forms.
>
> First and most obviously, some comprehensive goals require social institutions for their very possibility. One cannot pursue a legal career except in a society governed by law ... . (at 310)
>
> [T]he reasons we are considering are far-reaching indeed. ... [E]ngaging in the same activities will play a different role, have a different significance in the life of the individual depending on social practices and attitudes to such activities. (at 311)
>
> The second group of reasons for the thesis that one can only have comprehensive goals which are based on social forms does not depend on the fact that the significance of the goals is conditioned by the existence of an appropriate social form. Rather, taking that for granted, they point to the fact that an individual cannot acquire the goal by explicit deliberation. It can be acquired only by habituation. (at 311)

Raz offers as examples relations between spouses, or parental behaviour and continues:

> Such relations are dense, in the sense that they involve more than individuals, even those experienced in them, can adequately describe. They involve for example ways of treating a tired and distressed friend. Each one of us reacts somewhat differently to different friends in the same situation. This is in part a response to the personality of the friends. But it is in part a reflection of conventions of appropriate behaviour. Those distinguish between business friends, personal friends, golfing friends, etc. They include clues by which one judges the intensity or intimacy the relationship has reached, and these in turn determine what reaction will be appropriate. All these we describe inadequately. ... [T]hey are too dense to allow explicit description or learning, they can be learnt only by experience, direct or derived ... .
>
> It is of course not only the learning which is not explicit. Even once the patterns of behaviour have been learnt much, indeed most, of our behaviour remains based on learnt semi-automatic responses (i.e. ones which we can, usually with some effort, suppress, but which we normally do not deliberate on and which we are not explicitly aware of). Often even where such responses can be deliberate they should

not be. They acquire their significance from the fact that they are not. We value their spontaneity, their instinctive, non-reflective immediacy.

> Furthermore, often when the goal concerns interaction between people, its very possibility depends on the partners having correct expectations concerning the meaning of other people's behaviour. The significance of a thousand tiny clues of what is known as body language contribute, indeed are often essential, to the success of the developing relationship. All these are derived from the common culture, from the shared social forms, and though they receive the individual stamp of each person, their foundation in shared social forms is continuing and lasting. Just as the eye continues to guide the hand all the way to its target, and is not limited to determining its original trajectory, so our continued awareness of the common culture continuously nourishes and directs our behaviour in pursuit of our goals. (at 311)

115. *The Morality of Freedom*, note 16, at 348

116. *The Morality of Freedom*, note 16, at 309

117. *The Morality of Freedom*, note 16, at 309

That 'oppositional cultures' and 'countercultures' may also ultimately be incorporated into dominant cultural social forms is exemplified by the recent description of Allen Ginsberg's once "subversive" poem *Howl* as "classic", "the great American poem of the postwar era". (The Ottawa Citizen, March 13, 1994)

118. *The Morality of Freedom*, note 16, at 291.

119. "The Idea of an Overlapping Consensus", note 1, at 4

120. *Political Liberalism*, note 1, at 13

121. Note 1, at 542

122. For example, Rawls states,

> [t]he ... three grounds for liberty of conscience are related as follows. In the first, conceptions of the good are regarded as given and firmly rooted; and since there is a plurality of such conceptions, each, as it were, non-negotiable, the parties recognize that behind the veil of ignorance the principles of justice which guarantee equal liberty of conscience are the only principles which they can adopt. In the next two grounds, conceptions of the good are seen as subject to revision in accordance with deliberative reason, which is part of the capacity for a conception of the good. But since the full and informed exercise of this capacity requires the social conditions secured by liberty of conscience, these grounds support the same conclusion as the first. (*Political Liberalism*, note 1, at 314)

123. It is undeniable that there are significant similarities in their nature: Philosophical, moral and religious doctrines and culture encompass both questions of belief and conduct. None are exclusively individualistic. (For example, in *Political Liberalism*, note 1, at 341, in the context of religious doctrines, Rawls would protect the "freedom and integrity of the internal life of religious associations" as well as "the liberty of persons to determine their religious affiliations in social conditions that are free".) All are, to some degree, the outcome of theoretical and practical reasoning. Most significantly, they all constitute, to a greater or lesser extent, the horizons within which individuals form, pursue and revise their conceptions of the good.

However, my purpose in identifying the relevant point of comparison as role-related is to clarify that any differences that might be identified in the *nature* of religious, philosophical and moral doctrines and of culture are irrelevant to a Rawlsian analysis unless they contribute to a significant difference in their *roles* vis-a-vis Rawls's political conception of the person and conceptions of the good, informed by Rawls's ideals of reciprocity and mutual respect, and the requirements of overlapping consensus and the concept of free public reason.

124. As Rawls notes in *A Theory of Justice*, note 1,

> justice is the virtue of practices where there are competing interests and where persons feel entitled to press their rights on each other. In an association of saints agreeing on a common ideal, if such a community could exist, disputes about justice would not occur. Each would work selflessly for one end as determined by their common religion, and reference to this end (assuming it to be clearly defined) would settle every question of right. But a human society is characterized by the circumstances of justice. The account of these conditions involves no particular theory of human motivation. Rather, its aim is to include in the description of the original position the relations of individuals to one another which set the stage for questions of justice. (at 129)

125. Although this is not necessary to my argument, I would contend that philosophical, religious, and moral beliefs and forms of conduct are simply a category of social forms.

126. I should emphasize that, as in open societies, in a closed society where one culture is shared by all, the capacity to form, revise and pursue conceptions of the good is linked to the social forms that constitute that culture. The difference between a closed society and an open one is that, in a closed society as defined by Rawls, questions of justice are not raised by culture because culture is shared and homogeneous.

127. Note 1, at 546

128. That is, the same priority as the equal basic liberties contained in Rawls's first principle of justice. Note that this paper does not address the controversial question of the lexical priority of the basic liberties contained in Rawls's first principle of justice over the social primary goods contemplated in the second. It simply contends that 'equal liberty to participate in, produce and enjoy one's own culture' should have the same priority as the other basic liberties, whatever that might be.

129. I should emphasize that it does not follow from the secondary argument that the 'equal liberty to participate in, produce and enjoy one's own culture' is justified as a social primary good on the same grounds as 'equal liberty of conscience' that the same goods would be necessary to effect it.

Let me clarify with an example: Rawls justifies the status of the political liberties on the same grounds as freedom of thought by reference to their identical role vis-a-vis the first moral power of citizens and the first fundamental case. He justifies liberty of conscience on the same grounds as freedom of association by reference to their identical role vis-a-vis the second moral power and the second fundamental case.(*Political Liberalism*, note 1, at 334, "The Basic Liberties", note 1, at 49). In neither case are the specifications of a particular liberty and the identification of duties associated with them limited by, or even similar to, the specifications of the other liberty which is justified on the same grounds.(For a discussion of the two fundamental cases, see Chapter 2, A. 3. (c) "The basis for identifying the best, or a fully adequate scheme".)

The relationship between the basic liberties and goods necessary to effect them will be discussed further in chapters 2 and 3. I do not attempt in the paper to identify actual specifications of the equal basic liberties but only the process by which they are specified and adjusted. However, at this point, I would suggest that specifications of the 'equal liberty to participate in, produce and enjoy one's own culture' would relate, first, to the particular *role* that cultures play vis-a-vis Rawls's political conception of the person, and second, to what is required to guarantee *'equal'* liberty, given the specific dynamics and interactions of cultures.

It is also worth mentioning, for purposes of clarification, that nothing in the concept of a liberty precludes positive duties being associated with the rights, freedoms and institutional rules which specify it. (See e.g. Rawls, *Political Liberalism*, note 1, at 359-363; see also Jeremy Waldron, "Rights in Conflict", *Liberal Rights, Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993) 203.)

130. I would also like to briefly discuss two aspects of autonomy in Rawls's recent work which may be compared to Kymlicka's. This discussion is not necessary to my argument in the text, but may be useful to situate it.

One of the criticisms Michael McDonald has made of Kymlicka's argument is that his analysis might inherently set limits to the rights of groups which do not meet the demands of a liberal individualist paradigm or, worse, might encourage interference in their affairs. ("Should Communities Have Rights? Reflections of Liberal Individualism", (1991) 4 Canadian Journal of Law and Jurisprudence 217, at 235; see also Will Kymlicka, "The Rights of Minority Cultures: Reply to Kukathas", (1992) 20 Political Theory 140)

In *Political Liberalism*, note 1, Rawls recognizes that the nature of autonomy espoused in traditional liberalism may not be similarly valued by other comprehensive doctrines. He contrasts the account of the 'full autonomy of citizens in a well-ordered society' contemplated by his political liberalism with the autonomy required by the liberalisms of Kant and Mill, which he describes as comprehensive doctrines.

> ... [T]he point of view of you and me - the point of view of the full justification of justice as fairness in its own terms - ... we model by our description of the thought

> and judgment of fully autonomous citizens in the well-ordered society of justice as fairness. For they can do anything we can do, for they are an ideal description of what a democratic society would be like should we fully honour our political conception. (at 70)
>
> [It is] citizens of a well-ordered society in their public life who are fully autonomous. This means that in their conduct citizens not only comply with the principles of justice, but they also act from these principles as just. Moreover, they recognize these principles as those that would be adopted in the original position. It is in their public recognition and informed application of the principles of justice in their political life, and as their effective sense of justice directs, that citizens achieve full autonomy. Thus, full autonomy is realized by citizens when they act from principles of justice that specify the fair terms of cooperation they would give to themselves when fairly represented as free and equal persons.
>
> ... [F]ull autonomy is achieved by citizens: it is a political and not an ethical value. By that I mean that it is realized in public life by affirming the political principles of justice and enjoying the protections of the basic rights and liberties; it is also realized by participating in society's public affairs and sharing in its collective self-determination over time. This full autonomy of political life must be distinguished from the ethical values of autonomy and individuality, which may apply to the whole of life, both social and individual, as expressed by the comprehensive liberalisms of Kant and Mill. Justice as fairness emphasizes this contrast: it affirms political autonomy for all but leaves the weight of ethical autonomy to be decided by citizens severally in light of their comprehensive doctrines. (at 77)
>
> ... Kant's doctrine is a comprehensive moral view in which the ideal of autonomy has a regulative role for all of life. This makes it incompatible with the political liberalism of justice as fairness. A comprehensive liberalism based on the ideal of autonomy may, of course, belong to a reasonable overlapping consensus that endorses a political conception, justice as fairness among them; but as such it is not suitable to provide a public basis of justification. (at 99)

In other words, comprehensive liberalisms, with their associated values and definitions of autonomy and individuality, play no different role vis-a-vis political liberalism and the political principles of justice than any other of the reasonable comprehensive doctrines in a modern democratic society. They simply belong to a reasonable overlapping consensus which endorses a political conception of justice.

Among the other reasonable comprehensive doctrines in a modern democratic society, the perception and exercise of autonomy may vary greatly from that endorsed by the comprehensive liberalisms. But according to Rawls, *if within the limits permitted by justice*, this is effectively a matter with which political liberalism should not interfere. (See e.g. at 313) Rawls deals specifically with the question of the limits permitted by justice in his discussion of the education of children and the requirements the state can impose on the content of education consistently with political liberalism. It is clear that the 'limits permitted by justice' are those required to ensure the 'full autonomy of citizens'.

> [V]arious religious sects oppose the culture of the modern world and wish to lead their common life apart from its unwanted influences. A problem now arises about their children's education and the requirements the state can impose. The liberalisms of Kant and Mill may lead to requirements designed to foster the values of autonomy and individuality as ideals to govern much if not all of life. But political liberalism has a different aim and requires far less. It will ask that children's education include such things as knowledge of their constitutional and civic rights so that, for example, they know that liberty of conscience exists in their society and that apostasy is not a legal crime, all this to insure that their continued membership when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that do not exist. Moreover, their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honor the fair terms of social cooperation in their relations with the rest of society. (at 199)
>
> Beyond the requirements already described, justice as fairness does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy and individuality, or indeed of any other comprehensive doctrine. For in that case it ceases to be a form of political liberalism. Justice as fairness honors, as far as it can, the claims of those who wish to withdraw from the modern world in accordance with the injunctions of their religion, provided only that they acknowledge the principles of the political conception of justice and appreciate its political ideals of person and society.
>
> Observe here that we try to answer the question of children's education entirely within the political conception. Society's concern with their education lies in their role as future citizens, and so in such essential things as their acquiring the capacity to understand the public culture and to participate in its institutions, in their being economically independent and self-supporting members of society over a complete life, and in their developing the political virtues, all this from within a political point of view. (at 200)

Rawls, therefore, argues that the state may require a type of education which is sufficient to produce fully autonomous citizens within the meaning of his definition. How (and whether) fully autonomous citizens exercise autonomy, in the sense of the autonomy advocated by the comprehensive liberalisms, is another question altogether, and not one with which the state should interfere.

To respond to McDonald's concern, then, whatever the nature of autonomy endorsed by the comprehensive doctrines, the only autonomy for the purposes of Rawls's political liberalism is what he describes as the 'full autonomy of citizens'. Any attempt to impose a broader form of autonomy and individuality endorsed by the comprehensive liberalisms on members of other communities would contravene the concept of political liberalism. This may not, of course, satisfy McDonald, to the extent that Rawls's theory does rely on a commitment to a form of autonomy, that is, the 'full autonomy of citizens in a well-ordered society'. (See e.g. W.J. Norman, "The Revisionist Challenge: Can the liberal do without "liberty"?", (1990) 3 Canadian Journal of Law and Jurisprudence 29, at 45, note 63)

On a related point, Rawls's recent work has been criticized by Kymlicka as abandoning a commitment to revisability in favour of plurality and mutual respect. (*Liberalism, Community and*

Culture, note 1, at 58-61) Kymlicka sees Rawls as retreating from an account of revisability in his earlier work to one which attempts to accommodate individuals with "constitutive attachments", people who "(in their deepest self-understandings) view themselves as finding a conception of the good which is set for them, rather than forming and revising their own conception" (at 58), and challenges the ability of Rawls's political liberalism to achieve this goal. By contrast, Rawls denies that modifications to his earlier work are a function of criticisms raised by communitarians, and ascribes the changes to problems internal to justice as fairness and, in particular, to the problem of stability given the fact of reasonable pluralism. (*Political Liberalism*, at xv-xvii)

In Kymlicka's opinion, plurality and mutual respect are not sufficient to justify political liberalism or to defend the full range of liberal freedoms. They must be accompanied by a commitment to the conditions for revisability of one's ends.

I would suggest that Rawls's recent work is not at odds with this view, and that the point of disagreement seems to lie in Kymlicka's description of Rawls as attempting to accommodate persons whose constitutive attachments preclude a commitment to revisability, or more significantly for the purposes of Kymlicka's argument, even the *capacity* to form or revise conceptions of the good. (See Will Kymlicka, "Two Models of Pluralism and Tolerance", (1992) 13 Analyse & Kritik 33, at 44,45) Rawls must have divorced plurality from revisability in his recent work, as Kymlicka claims, for Kymlicka's argument to work. Rawls's individuals must be incapable of (as opposed to simply being unwilling or disinterested in) revising their commitments. If not, at most, Kymlicka's argument would go to whether Rawls's scheme could achieve his goal of stability.

Yet, Rawls's political conception of the person, along with his accounts of non-institutional or moral identity (at 30-31) and the 'full autonomy of citizens', are clearly committed to a view of persons as having the moral capacity to form and revise both their public and non-public goals. Rawls's account of reasonable comprehensive doctrines and their endorsement of liberty of conscience and freedom of thought would also be unnecessary if he viewed persons as constituted by their ends in the way Kymlicka describes, and if he had abandoned a commitment to revisability. (See e.g. Rawls's discussion of the role of revisability in the context of 'equal liberty of conscience' at notes 99-102)

131. See Hart, "Rawls on Liberty and its Priority", note 1, at 233

132. This articulation of the equation is from Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press, 1982), at 2

Notes to Chapter 2

1. The delineation in this chapter of the four-stage process, as it relates to the equal basic liberties, reflects Rawls's analysis but, for purposes of clarity and consistency, where appropriate, I have framed it in terms of the language of goods used in the paper.

2. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 291; John Rawls, "The Basic Liberties and their Priority", S. McMurrin, ed., *The Tanner Lectures on Human Values*, vol. 3 (Salt Lake City: University of Utah Press, 1982) at 5

3. Rawls, *Political Liberalism*, note 2, at 290; "The Basic Liberties", note 2, at 4. No priority is assigned to liberty as such (*Political Liberalism*, at 291; "The Basic Liberties", at 5), or to any particular liberty (*Political Liberalism*, at 292; "The Basic Liberties", at 6). Rawls says in *Political Liberalism*, at 292, note 7; "The Basic Liberties", at 6, note 6 that, on this point, he agrees on the whole with H.L.A. Hart's criticism in "Rawls on Liberty and its Priority", Norman Daniels, ed., *Reading Rawls, Critical Studies on Rawls' A Theory of Justice* (New York: Basic Books Inc., 1974) 230.

4. Rawls, *Political Liberalism*, note 2, at 295; "The Basic Liberties", note 2, at 9. According to Rawls, "[t]his restriction holds even when those who benefit from the greater efficiency, or together share the greater sum of advantages, are the same persons whose liberties are limited or denied". (*Political Liberalism*, at 295; "The Basic Liberties", at 9)

5. Rawls, *Political Liberalism*, note 2, at 365; "The Basic Liberties", note 2, at 81

6. *Political Liberalism*, note 2, at 366-367; "The Basic Liberties", note 2, at 82-83. According to Rawls, the essential point of this distinction

> is that the conception of citizens as free and equal persons is not required in a well-ordered society as a personal or associational or moral ideal ... . Rather it is a political conception affirmed for the sake of establishing an effective public conception of justice. (*Political Liberalism*, at 367; "The Basic Liberties", at 83)
>
> A commonsense explanation of why the basic liberties are inalienable might say, following an idea of Montesquieu, that the basic liberties of each citizen are a part of public liberty, and therefore in a democratic state a part of sovereignty. The Constitution specifies a just political procedure in accordance with which this sovereignty is exercised subject to limits which guarantee the integrity of the basic liberties of each citizen. Thus agreements which alienate these liberties cannot be enforced by law, which consists only of enactments of sovereignty. Montesquieu believed that to sell one's status as a citizen (and, let us add, any part of it) is an act

so extravagant that we cannot attribute it to anyone. He thought that its value to the seller must be beyond all price. In justice as fairness, the sense in which this is so can be explained as follows. We use the original position to model the conception of free and equal persons as both reasonable and rational, and then the parties as rationally autonomous representatives of such persons select the two principles of justice which guarantee the basic liberties and their priority. The grounds upon which the parties are moved to guarantee these liberties, together with the constraints of the reasonable, explain why the basic liberties are, so to speak, beyond all price to persons so conceived. For these liberties are beyond all price to the representatives of citizens as free and equal persons when these representatives adopt principles of justice for the basic structure in the original position. The aims and conduct of citizens in society are therefore subordinate to the priority of these liberties, and thus in effect subordinate to the conception of citizens as free and equal persons. (*Political Liberalism*, at 366; "The Basic Liberties", at 81-82)

7. *Political Liberalism*, note 2, at 76

8. *Political Liberalism*, note 2, at 76

9. Rawls states that

> the constitution specifies a just political procedure and incorporates restrictions which both protect the basic liberties and secure their priority. The rest is left to the legislative stage. Such a constitution conforms to the traditional idea of democratic government while at the same time it allows a place for the institution of judicial review. This conception of the constitution does not found it, in the first instance, on principles of justice, or on basic (or natural) rights. Rather, its foundation is in the conceptions of the person and of social cooperation most likely to be congenial to the public culture of a modern democratic society. I should add that the same idea is used each time in the stages I discuss. That is, at each stage the reasonable frames and subordinates the rational; what varies is the task of the rational agents of deliberation and the constraints to which they are subject. Thus the parties in the original position are rationally autonomous representatives constrained by the reasonable conditions incorporated into the original position; and their task is to adopt principles of justice for the basic structure. Whereas delegates to a constitutional convention have far less leeway, since they are to apply the principles of justice adopted in the original position in selecting a constitution. Legislators in a parliamentary body have less leeway still, because any laws they enact must accord both with the constitution and the two principles of justice. As the stages follow one another and as the task changes and becomes less general and more specific, the constraints of the reasonable become stronger and the veil of ignorance becomes thinner. At each stage, then, the rational is framed by the reasonable in a different way. While the constraints of the reasonable are weakest and the veil of ignorance thickest in the original position, at the judicial stage these constraints are strongest and the veil of ignorance thinnest. The whole sequence is a schema for working out a conception of justice and guiding the application of its principles to the right subject in the right order. (*Political Liberalism*, note 2, at 339; "The Basic Liberties", note 2, at 54)

10. Here [at the stage of the constitutional convention, the parties] are to decide upon the justice of political forms and choose a constitution: they are delegates, so to speak, to such a convention. Subject to the constraints of the principles of justice already chosen, they are to design a system for the constitutional powers of government and the basic rights of citizens. It is at this stage that they weigh the justice of procedures for coping with diverse political views. (John Rawls, *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1971) at 196)

> [T]he first principle of justice [which encompasses the basic liberties] is to be applied at the stage of the constitutional convention. (Rawls, *Political Liberalism*, note 2, at 336; "The Basic Liberties", note 2, at 51)

The initial emphasis of the constitutional convention is the establishment of a just political procedure. According to Rawls,

> [t]his means that the political liberties and freedom of thought enter essentially into the specification of a just political procedure. Delegates to such a convention (still regarded as representatives of citizens as free and equal persons but now assigned a different task) are to adopt, from among the just constitutions that are both just and workable the one that seems most likely to lead to just and effective legislation. (Which constitutions and legislation are just is settled by the principles of justice already agreed to in the original position.) This adoption of a constitution is guided by the general knowledge of how political and social institutions work, together with the general facts about existing social circumstances. In the first instance, then, the constitution is seen as a just political procedure which incorporates the equal political liberties and seeks to assure their fair value so that the processes of political decision are open to all on a roughly equal basis. The constitution must also guarantee freedom of thought if the exercise of these liberties is to be free and informed. The emphasis is first on the constitution as specifying a just and workable political procedure so far without any explicit constitutional restrictions on what the legislative outcome may be. (*Political Liberalism*, at 336; "The Basic Liberties", at 51)

> The basic liberties associated with the capacity for a conception of the good must also be respected and this requires additional constitutional restrictions against infringing equal liberty of conscience and freedom of association (as well as the remaining and supporting basic liberties). Of course, these restrictions are simply the result of applying the first principle of justice at the stage of the constitutional convention. But if we return to the idea of starting from the conception of persons as capable of being normal and fully cooperating members of society and of respecting its fair terms of cooperation over a complete life, then these restrictions can be viewed in another light. If the equal basic liberties of some are restricted or denied, social cooperation on the basis of mutual respect is impossible. For we saw that fair terms of social cooperation are terms upon which as equal persons we are willing to cooperate with all members of society over a complete life. When fair terms are not honored, those mistreated will feel resentment or humiliation, and those who benefit must either recognize their fault and be troubled by it, or else regard those mistreated as deserving their loss. On both sides, the conditions of mutual respect are undermined.

> Thus, the basic liberties of liberty of conscience and freedom of association are properly protected by explicit constitutional restrictions. These restrictions publicly express on the constitution's face, as it were, the conception of social cooperation held by equal citizens in a well-ordered society. (*Political Liberalism*, at 337; "The Basic Liberties", at 52)

The 'central range of application of the basic liberties' will be described later in this chapter under the heading 3. a) The steps in specifying and adjusting the equal basic liberties.

11. The first principle of equal liberty is the primary standard for the constitutional convention. Its main requirements are that the fundamental liberties of the person and liberty of conscience and freedom of thought be protected and that the political process as a whole be a just procedure. Thus the constitution establishes a secure common status of equal citizenship and realizes political justice. (Rawls, *A Theory of Justice*, note 10, at 199)

12. Rawls, *A Theory of Justice*, note 10, at 197

> Given their theoretical knowledge and the appropriate general facts about their society, they are to choose the most effective just constitution, the constitution that satisfies the principles of justice and is best calculated to lead to just and effective legislation.
>
> At this point we need to distinguish two problems. Ideally a just constitution would be a just procedure arranged to insure a just outcome. The procedure would be a political process governed by the constitution, the outcome the body of enacted legislation, while the principles of justice would define an independent criterion for both procedure and outcome. In pursuit of this ideal of perfect procedural justice ..., the first problem is to design a just procedure. To do this the liberties of equal citizenship must be incorporated into and protected by the constitution. These liberties include those of liberty of conscience and freedom of thought, liberty of the person, and equal political rights. The political system, which I assume to be some form of constitutional democracy, would not be a just procedure if it did not embody these liberties.
>
> Clearly any feasible political procedure may yield an unjust outcome. In fact, there is no scheme of procedural political rules which guarantees that unjust legislation will not be enacted. In the case of a constitutional regime, or indeed of any political form, the ideal of perfect procedural justice cannot be realized. The best attainable scheme is one of imperfect procedural justice. Nevertheless some schemes have a greater tendency than others to result in unjust laws. The second problem, then, is to select from among the procedural arrangements that are both just and feasible those which are most likely to lead to a just and effective legal order [which accords with the principles of justice]. ... To solve this problem intelligently requires a knowledge of the beliefs and interests that men in the system are liable to have and of the political tactics that they will find it rational to use given their circumstances. The delegates are assumed, then, to know these things. Provided they have no information

about particular individuals including themselves, the idea of the original position is not affected.

> In framing a just constitution I assume that the two principles of justice already chosen define an independent standard of the desired outcome. (at 197)

13. Although I am not dealing with the second principle of justice in this paper, for the sake of completeness, I should note here that the second principle comes into play at the legislative stage. Rawls states that

> [a]lthough delegates [to the constitutional convention] have a notion of just and effective legislation, the second principle of justice, which is part of the content of this notion, is not incorporated into the constitution itself. Indeed, the history of successful constitutions suggests that principles to regulate economic and social inequalities, and other distributive principles, are generally not suitable as constitutional restrictions. Rather, just legislation seems to be best achieved by assuring fairness in representation and by other constitutional devices. (*Political Liberalism*, note 2, at 337; "The Basic Liberties", note 2, at 52)

> [The second principle of justice] dictates that social and economic policies be aimed at maximizing the long-term expectations of the least advantaged under conditions of fair equality of opportunity, subject to the equal liberties being maintained. At this point the full range of general economic and social facts is brought to bear. The second part of the basic structure contains the distinctions and hierarchies of political, economic, and social forms which are necessary for efficient and mutually beneficial social cooperation. Thus the priority of the first principle of justice to the second is reflected in the priority of the constitutional convention to the legislative stage. (*A Theory of Justice*, note 10, at 199)

> [T]he question of whether legislation is just or unjust, especially in connection with economic and social policies, is commonly subject to reasonable differences of opinion. In these cases judgment frequently depends upon speculative political and economic doctrines and upon social theory generally. Often the best that we can say of a law or policy is that it is at least not clearly unjust. The application of the difference principle in a precise way normally requires more information than we can expect to have [at the constitutional stage] and, in any case, more than the application of the first principle. It is often perfectly plain and evident when the equal liberties are violated. These violations are not only unjust but can be clearly seen to be unjust: the injustice is manifest in the public structure of institutions. But this state of affairs is comparatively rare with social and economic policies regulated by the difference principle. (*A Theory of Justice*, at 198)

Moreover, all non-basic legal rights and liberties (i.e. other than the basic liberties) are "specified at the legislative stage in the light of the two principles of justice and other relevant principles". (Rawls, *Political Liberalism*, at 338; "The Basic Liberties", at 53)

14. Rawls, *A Theory of Justice*, note 10, at 198

15. Rawls, *A Theory of Justice*, note 10, at 199

Rawls makes the following general comments about the availability of knowledge in the four stage sequence:

> Let us distinguish between three kinds of facts: the first principles of social theory (and other theories when relevant) and their consequences; general facts about society, such as its size and level of economic advance, its institutional structure and natural environment, and so on; and finally, particular facts about individuals such as their social position, natural attributes and peculiar interests. In the original position the only particular facts known to the parties are those that can be inferred from the circumstances of justice. While they know the first principles of social theory, the course of history is closed to them; they have no information about how often society has taken this or that form, or which kinds of societies presently exist. In the next stages, however, the general facts about their society are made available to them but not the particularities of their own condition. Limitations on knowledge can be relaxed since the principles of justice are already chosen. *The flow of information is determined at each stage by what is required in order to apply these principles intelligently to the kind of question of justice at hand, while at the same time any knowledge that is likely to give rise to bias and distortion and to set men against one another is ruled out.* The notion of the rational and impartial application of principles defines the kind of knowledge that is admissible. At the last stage, clearly, there are no reasons for the veil of ignorance in any form, and all restrictions are lifted. (at 200, emphasis added)

16. Note 3

17. *Political Liberalism*, note 2, at 290; "The Basic Liberties", note 2, at 4

18. Rawls describes the entire process as "instituting the basic liberties". (*Political Liberalism*, note 2, at 296; "The Basic Liberties", note 2, at 10) This occurs at the constitutional and legislative stages and is specified further at the judicial stage. Elsewhere, he describes the basic liberties as "specified by institutional rights and duties". (*Political Liberalism*, at 325; "The Basic Liberties, at 40)

19. For example, according to Rawls, conceptions of the right to property which would include certain rights of acquisition and bequest as well as the right to own means of production and natural resources, or the equal right to participate in the control of means of production and natural resources which are socially owned, cannot be characterized as a basic liberty because they cannot be accounted for as necessary for the development and exercise of the moral powers. (*Political Liberalism*, note 2, at 298; "The Basic Liberties", note 2, at 12)

20. According to Rawls,

> under reasonably favorable conditions, there is a practicable scheme of liberties that can be instituted in which the central range of each liberty is protected. But that such a scheme exists cannot be derived solely from the conception of the person as having

> the two moral powers, nor solely from the fact that certain liberties, and other primary goods as all-purpose means, are necessary for the development and exercise of these powers. Both of these elements must fit into a workable constitutional arrangement. The historical experience of democratic institutions and reflection on the principles of constitutional design suggest that a practicable scheme of liberties can indeed be found. (*Political Liberalism*, note 2, at 297; "The Basic Liberties", note 2, at 11)

I do not think that Rawls is arguing here that historical experience has produced fully adequate practicable schemes (If he were, his book would be superfluous), but rather that both the historical experience of democratic institutions and reflection on principles of constitutional design suggest that such schemes are possible. The remainder of this section of the chapter addresses Rawls's approach to their construction.

21. *Political Liberalism*, note 2, at 331; "The Basic Liberties", note 2, at 46

22. Rawls, *Political Liberalism*, note 2, at 331; "The Basic Liberties", note 2, at 46

23. Rawls, *Political Liberalism*, note 2, at 295; "The Basic Liberties", note 2, at 9

24. Rawls, *Political Liberalism*, note 2, at 291; "The Basic Liberties", note 2, at 5

25. *Political Liberalism*, note 2, at 332; "The Basic Liberties", note 2, at 47. Rawls notes that there are two reasons why the idea of a maximum does not apply to specifying and adjusting the scheme of basic liberties.

> First, a coherent notion of what is to be maximized is lacking. We cannot maximize the development and exercise of two moral powers at once. And how could we maximize the development and exercise of either power by itself? Do we maximize, other things equal, the number of deliberate affirmations of a conception of the good? That would be absurd. Moreover, we have no notion of a maximum development of these powers. What we do have is a conception of a well-ordered society with certain general features and certain basic institutions. Given this conception, we form the notion of the development and exercise of these powers which is adequate and full relative to the two fundamental cases.
>
> The other reason why the idea of a maximum does not apply is that the two moral powers do not exhaust the person, for persons also have a determinate conception of the good. Recall that such a conception includes an ordering of certain final ends and interests, attachments and loyalties to persons and associations, as well as a view of the world in the light of which these ends and attachments are understood. If citizens had no determinate conceptions of the good which they sought to realize, the just social institutions of a well-ordered society would have no point. Of course, grounds for developing and exercising the moral powers strongly incline the parties in the original position to adopt the basic liberties and their priority. But the great weight of these grounds from the standpoint of the parties does not imply

> that the exercise of the moral powers on the part of the citizens in society is either the supreme or the sole form of good. Rather, the role and exercise of these powers (in the appropriate instances) is a condition of good. (*Political Liberalism*, at 333; "The Basic Liberties", at 48)

26. *Political Liberalism*, note 2, at 332; "The Basic Liberties", note 2, at 47 (emphasis added)

According to Rawls,

> [t]he upshot will be that the criterion at later stages is to specify and adjust the basic liberties so as to allow the adequate development and the full and informed exercise of both moral powers in the social circumstances under which the two fundamental cases arise in the well-ordered society in question. Such a scheme of liberties I shall call "a fully adequate scheme". This criterion coheres with that of adjusting the scheme of liberties in accordance with the rational interests of the representative equal citizen, the second criterion ... . For it is clear from the grounds on which the parties in the original position adopt the two principles of justice that these interests, as seen from the appropriate stage, are best served by a fully adequate scheme. (*Political Liberalism*, at 333; "The Basic Liberties", at 48)

27. *Political Liberalism*, note 2, at 332; "The Basic Liberties", note 2, at 47

28. Rawls, *Political Liberalism*, note 2, at 334; "The Basic Liberties", note 2, at 49

29. Note that in *Political Liberalism*, note 2, at 341, note 49, "The Basic Liberties", note 2, at 56, note 48, Rawls agrees with Hart that a strictly quantitative criterion for the specification and adjustment of the basic liberties is insufficient. He agrees that some qualitative criterion is necessary and that the notion of significance serves this role.

30. *Political Liberalism*, note 2, at 335; "The Basic Liberties", note 2, at 50

31. Rawls, *Political Liberalism*, note 2, at 336; "The Basic Liberties", note 2, at 51

32. *Political Liberalism*, note 2, at 356; "The Basic Liberties", note 2, at 71

33. *Political Liberalism*, note 2, at 295; "The Basic Liberties", note 2, at 9

34. Rawls, *Political Liberalism*, note 2, at 358; "The Basic Liberties", note 2, at 74

Rawls notes that, because of their special status, the basic liberties should be limited to those that are truly essential. (See *Political Liberalism*, at 296; "The Basic Liberties", at 10)

35. See Rawls, *Political Liberalism*, note 2, at 359; "The Basic Liberties", note 2, at 74

36. *Political Liberalism*, note 2, at 341; "The Basic Liberties", note 2, at 56

37. *Political Liberalism*, note 2, at 341; "The Basic Liberties", note 2, at 56

Rawls uses the example of freedom of political speech, which is one of the freedoms which specifies the basic liberty of freedom of thought. (See *Political Liberalism*, at 340 and 358; "The Basic Liberties", at 56 and 74) Freedom of political speech relates to the first fundamental case of the application of the principles of justice to the basic structure of society and its social policies. "We think of these principles as applied by free and equal citizens of a democratic regime by the exercise of their sense of justice." (*Political Liberalism*, at 342; "The Basic Liberties", at 57)

Rawls identifies the central range of political speech as "the free [and informed (*Political Liberalism*, at 346; "The Basic Liberties", at 62)] public use of our reason in all matters that concern the justice of the basic structure and its social policies" (*Political Liberalism*, at 348; "The Basic Liberties", at 63) and relies upon the history of constitutional doctrine to draw out the more particular content of this central range of political speech.

> Among these fixed points are the following: there is no such thing as the crime of seditious libel; there are no prior restraints on freedom of the press, except for special cases; and the advocacy of revolutionary and subversive doctrines is fully protected. The three fixed points mark out and cover by analogy much of the central range of freedom of political speech. (*Political Liberalism*, at 342; "The Basic Liberties", at 57)

He also acknowledges that there must be some point at which political speech becomes so closely connected with the use of force that it may be properly restricted. The question of the restriction of rights and liberties will be discussed below under the heading 3. d) ii) Restriction.

Rawls provides the following example of considerations which enter into the self-limitation of the freedom of political speech.

> [W]hile we might want to include in our freedom of (political) speech rights to the unimpeded access to public places and to the free use of social resources to express our political views, these extensions of our liberty, when granted to all, are so unworkable and socially divisive that they would actually greatly reduce the effective scope of freedom of speech. ... Thus, [delegates to the constitutional convention] accept reasonable regulations relating to time and place, and the access to public facilities, always on a footing of equality. For the sake of the most significant liberties, they abandon any special claims to the free use of social resources. This enables them to establish the rules required to secure an effective scope for free political speech in the fundamental case. (*Political Liberalism*, at 341; "The Basic Liberties", at 56)

He also notes that

> [m]uch the same reasoning shows why the basic liberty of liberty of conscience is also self-limiting. Here too reasonable regulations would be accepted to secure intact the central range of this liberty, which includes the freedom and integrity of the internal life of religious associations and the liberty of persons to determine their religious

affiliations in social conditions that are free. (*Political Liberalism*, at 341; "The Basic Liberties", at 56)

38. *Political Liberalism*, note 2, at 356; "The Basic Liberties", note 2, at 72

39. *Political Liberalism*, note 2, at 357; "The Basic Liberties", note 2, at 72

40. *Political Liberalism*, note 2, at 362; "The Basic Liberties", note 2, at 78

41. See *Political Liberalism*, note 2, at 357-358; "The Basic Liberties", note 2, at 73-74

Rawls uses as an example political speech (which specifies the basic liberty of freedom of thought) and the fair value of the political liberties.

> Let us assume ... that [regulation of political speech, e.g] public financing of political campaigns and election expenditures, various limits on contributions and other regulations are essential to maintain the fair value of the political liberties. These arrangements are compatible with the central role of free political speech and press as a basic liberty provided that the following three conditions hold. First, there are no restrictions on the content of speech; the arrangements in question are, therefore, regulations which favor no political doctrine over any other. They are, so to speak, rules of order for elections and are required to establish a just political procedure in which the fair value of the equal political liberties is maintained.
>
> A second condition is that the instituted arrangements must not impose any undue burdens on the various political groups in society and must affect them all in an equitable manner. Plainly, what counts as an undue burden is itself a question, and in any particular case is to be answered by reference to the purpose of achieving the fair value of the political liberties. For example, the prohibition of large contributions from private persons or corporations to political candidates is not an undue burden (in the requisite sense) on wealthy persons and groups. Such a prohibition may be necessary so that citizens similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class. It is precisely this equality which defines the fair value of the political liberties. On the other hand, regulations that restrict the use of certain public places for political speech might impose an undue burden on relatively poor groups accustomed to this way of conveying their views since they lack the funds for other kinds of political expression.
>
> Finally, the various regulations of political speech must be rationally designed to achieve the fair value of the political liberties. While it would be too strong to say that they must be the least restrictive regulations required to achieve this end - for who knows what the least restrictive among the equally effective regulations might be - nevertheless, these regulations become unreasonable once considerably less restrictive and equally effective alternatives are both known and available. (*Political Liberalism*, at 357; "The Basic Liberties", at 73)

42. *Political Liberalism*, note 2, at 356; "The Basic Liberties", note 2, at 71

43. *Political Liberalism*, note 2, at 354; "The Basic Liberties", note 2, at 69

Rawls again uses the example of political speech and standards governing its permissible restriction.

> [T]he substantive evils which the legislature seeks to prevent must be of a highly special kind, namely the loss of freedom of thought itself, or of other basic liberties, including ... the fair value of the political liberties; and second, ... there must be no alternative way to prevent these evils than the restriction of free speech. This formulation of the rule goes with the requirement that a constitutional crisis of the requisite kind is one in which free political institutions cannot operate or take the steps required to preserve themselves. (*Political Liberalism*, at 356; "The Basic Liberties", at 72)

> It is not enough for those in authority to say that a grave danger exists and that they are taking effective steps to prevent it. A well-designed constitution includes democratic procedures for dealing with emergencies. Thus as a matter of constitutional doctrine the priority of liberty implies that free political speech cannot be restricted unless it can be reasonably argued from the specific nature of the present situation that there exists a constitutional crisis in which democratic institutions cannot work effectively and their procedures for dealing with emergencies cannot operate. (*Political Liberalism*, at 354; "The Basic Liberties", at 70)

> [F]or free political speech to be restricted, a constitutional crisis must exist requiring the more or less temporary suspension of democratic political institutions, solely for the sake of preserving these institutions and other basic liberties. (*Political Liberalism*, at 355; "The Basic Liberties", at 70)

> [I]n a country with a vigorous tradition of democratic institutions, a constitutional crisis need never arise unless its people and institutions are simply overwhelmed from the outside. For practical purposes, then in a well-governed democratic society under reasonably favorable conditions, the free public use of our reason in questions of political and social justice would seem to be absolute. (*Political Liberalism*, at 355; "The Basic Liberties", at 71)

44. For example, this problem has been raised in reference to section 25 of the *Charter* by Mary Ellen Turpel in her draft report to the Working Group on Aboriginal and Treaty Rights and the Charter, Court Challenges Program, entitled "Aboriginal and Treaty Rights and Section 15 of the Canadian Charter of Rights and Freedoms", March 1991.

45. 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

46. 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration is made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

47. *Political Liberalism*, note 2, at 368; "The Basic Liberties", note 2, at 84

48. *Political Liberalism*, note 2, at 23

49. Rawls, *Political Liberalism*, note 2, at 25

50. Rawls, *Political Liberalism*, note 2, at 368; "The Basic Liberties", note 2, at 84

51. See e.g. *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 813-815

52. See e.g. Hogg, *Constitutional Law of Canada*, note 51, at 818-819, 978-979; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452.

The result is that the focus of the litigation before the court dictates the way in which rights are defined. Although the Supreme Court of Canada, in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 rejected an approach to the definition of rights that balances societal interests at the rights-defining stage of a case (with its rejection of the "fair and reasonable" qualifying test which McLachlin J. had applied at the rights-definition phase of section 15 at the Court of Appeal level) and considers these interests in the context of section 1, it may be argued that it jeopardizes this distinction made between the content of a given guaranteed right or freedom and societal interests when a right or freedom is asserted *in support* of challenged legislation.

Moreover, where a right or freedom is raised in support of challenged legislation, if the legislation for some reason does not meet the section 1 test, then the claim to that right or freedom, by virtue of its necessary association with the legislation in the justificatory process under section 1, fails along with the legislation. Because there is no alternative process for balancing conflicting rights, the protection afforded that right or freedom is entirely dependent upon balancing criteria applicable to

societal interests.

Conflicting rights, to the extent they are being taken into account at all by the courts, are often balanced in accordance with values, priorities and a hierarchical ranking of rights and freedoms that are not made explicit. Unfortunately, the onus and methodology of section 1 allow the status and priority of rights and freedoms that are invoked in defence of challenged legislation to be overlooked and, as a result, reduce the sense of having to account for the terms of their definition, or what often effectively amounts to their limitation or restriction. Whatever else Rawls's approach to principles and criteria governing the specification, limitation and restriction of the equal basic liberties offers, it would encourage careful consideration and identification of the grounds for the definition, limitation and restriction of rights and freedoms.

53. *R. v. Oakes*, [1986] 1 S.C.R. 103

54. Nor, I might add, does anything in the wording of section 1 require that conflicting rights be considered at the section 1 phase of a case.

55. A distinction would have to be made from situations where legislation is attempting to fix a balance between the interests of competing groups in society, but where those interests are unrelated to rights and freedoms.

56. Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1991) at 197

57. *Liberalism, Community and Culture*, note 56, at 198

Kymlicka uses the following examples of cases where the survival of a society in circumstances of cultural vulnerability may require some temporary restrictions on the freedom of choice of its members:

> One occasionally hears of cases like that of an isolated tribe in Indonesia where a large number of children jumped off a cliff to their death in an attempt to emulate a Superman feat that they had just seen on (recently introduced) television. The unregulated introduction of liquor to a society can have an analogous effect on the adults. Our ability as individuals to make our way in the modern world of seemingly unlimited possibilities depends, in fact, on the existence of a structure of social understandings which point out the dangers and limits of the resources at our disposal. Where that structure is absent, the unregulated introduction, and free use, of such resources can have literally fatal consequences. If we refuse to let a cultural community have such temporary special restrictions on individual behaviour, knowing full well that without them the vast majority of its members will end up dead, or in jail, or on skid row, then that refusal isn't so much a victory for liberalism as a deliberate act of genocide. (at 170)

58. See *Liberalism, Community and Culture*, note 56, at 170-171, 198-199

Kymlicka states that there are a number of possible principles where restrictions on some

rights of members are required in order to secure others, which he describes as "non-ideal, or partial compliance, situations...."

> The principle behind partial compliance measures can be to minimize violations of legitimate claims (what Nozick calls a 'utilitarianism of rights'), or to respect certain legitimate claims as inviolable even if the result is that overall claim-violations are increased (what Nozick calls 'side-constraints'). In between these, we might say that even if no individual claim is inviolable, one type of claim has absolute priority over other types: we might say that cultural membership has priority over the rights of individual members, since cultural membership provides the context of individual choice; or conversely that individual rights always have priority over cultural membership, since the value of cultural membership is in enabling individual choice. Or we could say that cultural membership sometimes takes priority over individual rights and sometimes not - depending not only on what would minimize claim-violations overall, but also on how severe, long-lasting, and equitably distributed the rights-violations would be, and what avenues exist for individual members to choose to assimilate to another culture.
>
> ... It seems unlikely in this case that any claim or set of claims has absolute priority over others, since the conflicting values really are interdependent. Assuming that there can be some legitimate restrictions on the internal activities of minority members, where those activities would literally threaten the existence of the community, to find the precise limits would be enormously difficult, and I doubt anything useful could be achieved without reasonably detailed knowledge of particular instances. These are complex issues in which our intuitions are pulled in different directions, and I don't see how any simple formula could cover all relevant cases.
>
> But while the view of minority rights I am advancing leaves this question open, that should not be taken as a reason to reject cultural membership as a liberal value. On the contrary, these questions would not pose such a conflict for liberals if cultural membership were not a primary value; for there would then be nothing of moral value to oppose the legitimate demands for individual rights. But there is a real problem here, and we need a theory which recognizes the genuine conflicts. Any theory which denies that there is a conflict has missed something of great importance.
>
> In any event, it seems that some measures of cultural protection are justified, even if their precise application is subject to variation and their outermost boundaries are undefined. (at 198)

59. *Liberalism, Community and Culture*, note 56, at 170

60. Rawls, *Political Liberalism*, note 2, at 356; "The Basic Liberties", note 2, at 71

Notes to Chapter 3

1. i.e. claims to goods that may be enjoyed by separate individuals. This should be distinguished from the question of whether the moral desirability of communal goods must ultimately be referable to benefits secured to, for, or from the point of view of individuals. For the purposes of argument in the paper, I take the position that it must.

2. "Individuals, Groups, and Rights to Public Goods", (1988) 38 University of Toronto Law Journal 1

3. "Can Communal Goods Be Human Rights?", *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993)

4. "Right-Based Moralities", Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984) 182, at 187

5. Réaume, in "Individuals, Groups and Rights to Public Goods", note 2, at 4, notes that "the notion of excludability takes for granted a background framework of rights and duties. Given that one has certain basic rights which prohibit some means of exclusion, a public good is one from which one cannot otherwise be excluded."

6. "Individuals, Groups, and Rights to Public Goods", note 2, at 19

7. Réaume, "Individuals, Groups and Rights to Public Goods", note 2, at 19

8. "Individuals, Groups and Rights to Public Goods", note 2, at 20.

Where groups are rule-defined, the criteria for definition are subject to moral scrutiny.

9. Réaume, "Individuals, Groups and Rights to Public Goods", note 2, at 21 (emphasis added). "The examples of contingent public goods usually offered involve some sort of technical or economic constraint - for example, the city water supply system from which everyone benefits only because engineers have not yet invented a way to control the water supply to each individual house, or because any such method is too expensive." (at 21)

10. For example,

> [a] rule which says that wage rates must be uniform for each job category within a company turns the negotiating abilities of each of the workers into a public good. This is not naturally public, because in the absence of the rule each employee would theoretically be able to negotiate a pay raise for herself alone. The existence of the rule, however, means that if any worker does negotiate a raise, all the other

employees will benefit as well. ...

> Similarly, the good of being able to attend a minority language school is made public by the existence of section 23 of the Charter. (Réaume, "Individuals, Groups and Rights to Public Goods", note 2, at 21)

11. "Individuals, Groups and Rights to Public Goods", note 2, at 3, note 10

12. "Individuals, Groups and Rights to Public Goods", note 2, at 12. Réaume observes that,

> [a]lthough an important feature of public goods, this characteristic does not affect the argument about whether there can be rights to such goods ... . If anything this feature may even make it easier on substantive grounds to make out a claim to a right to a public good because one source of competing consideration - the enjoyment of the good by others - is eliminated. (at 3, note 10)

13. Réaume, "Individuals, Groups and Rights to Public Goods", note 2, at 12

14. "Individuals, Groups and Rights to Public Goods", note 2, at 9

15. "Individuals, Groups and Rights to Public Goods", note 2, at 8 (emphasis added)

16. Réaume uses the examples of clean air and freedom from contagion as public goods that can be enjoyed individually.

17. "Individuals, Groups and Rights to Public Goods", note 2, at 10 (emphasis in original). Réaume describes communal goods as uniting production and consumption:

> A cultured society is not a set of artefacts - plays, paintings, films. The good does not consist in some end product, such as clean streets, which, once in existence, is only externally related to its enjoyment as means to ends; it consists in participating in the production of those artefacts which constitute a cultured society. But there is no end product because, in a sense, these artefacts are never completed but are continuously reinterpreted and re-created by each generation. This process is the essence of a cultured society and can only take place *through*, not simply *because* of, the involvement of many. Unlike clean air, its enjoyment cannot be separated from its production. (at 10 (emphasis in original))

Jeremy Waldron gives the following examples of communal goods, among others: shared traditions, culture and language, the value of a cultured society, a tolerant society, and a society where there is a general sense of respect for persons. ("Can Communal Goods be Human Rights?", note 3, at 358)

18. "Individuals, Groups and Rights to Public Goods", note 2, at 23

19. "Can Communal Goods Be Human Rights?", note 3, at 345

20. This approach is consistent with my intention in the thesis to ensure that the concepts I use are relatively uncontroversial in liberal theory.

Furthermore, in my view, there is additional merit to locating the value of collectivities and collective claims in their significance to individuals: the characterization and justification of group rights and the relative 'significance' (in Rawls's terms) of conflicting group and individual rights would be ultimately capable of measurement by reference to a single entity (i.e. the individual).

21. It is important to emphasize at this point that the fact that goods are of value to members of a group does not mean that they necessarily qualify as goods to which a right may be claimed. This involves an independent substantive assessment, the process of which was discussed in chapter 2.

22. In other words, under this approach, only groups (as opposed to other entities, such as aggregates and associations) are theoretically capable of being rights-claimants.

It may be useful at this point to define some of the terms used in this chapter. First, I use the terms "groups" and "collectivities" interchangeably. Some authors, such as Douglas Sanders, in "Collective Rights", (1991) 13 Human Rights Quarterly 368, distinguish between them for the purposes of defining which is a rights-claimant and which is not. Second, the term "group" will be used to reflect the understanding of the term in ordinary discourse unrelated to rights. Where I refer to groups in the context of whether or not they are capable of being rights-claimants, I will say so explicitly. Note, however, that the use of these terms in excerpts from writers to which I refer in the paper is not necessarily consistent with this approach.

23. *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 45

24. Johnston links the need to identify which groups are right-holders and what she describes as the "argument from anarchy":

> [t]he first conceptual issue to be addressed in the articulation of a theory of group rights is the definition of the right-holder. Much of the animosity against group rights stems from a scepticism that satisfactory criteria can be developed for locating entities entitled to such rights. The sceptics want some assurance of quality control. Otherwise they fear that collective rights will become a Pandora's box, "from which all sorts of groupings might spring, demanding rights."

("Native Rights as Collective Rights: A Question of Group Self-Preservation", (1989) 2 Canadian Journal of Law and Jurisprudence 19, at 22, quoting Vernon Van Dyke, "Collective Entities and Moral Rights: Problems in Liberal-Democratic Thought", (1982) 44 Journal of Politics 21, at 32)

25. *Justice and the Politics of Difference*, note 23, at 44

26. "Groups and the Equal Protection Clause", (1976) 5 Philosophy and Public Affairs 107, at 148

27. "Collective Rights and Tyranny", (1986) 56 University of Ottawa Quarterly 115, at 120

28. Young, *Justice and the Politics of Difference*, note 23, at 43

29. George Sher, "Groups and Justice", Gertrude Ezorsky, ed., *Moral Rights in the Workplace* (Albany: State University of New York Press, 1987) 253, at 256

30. "Should Communities Have Rights? Reflections on Liberal Individualism", (1991) 4 Canadian Journal of Law and Jurisprudence 217, at 218

31. *Justice and the Politics of Difference*, note 23, at 44

32. According to Young, "[m]oral theorists and political philosophers tend to elide social groups more often with associations than with aggregates". (*Justice and the Politics of Difference*, note 23, at 44)

33. For example, Pierre Elliott Trudeau, in his discussion of the collective aspects of the Charlottetown Accord, makes no distinction between groups and associations. He states that "[m]y family is a collectivity, we at Cité libre [the magazine with which he is associated] are a collectivity with majorities and minorities." (*A mess that deserves a big No*, Speech given at the 11th Cité Libre dinner (Toronto: Robert Davies Publishing, 1992) at 57)

34. "Should Communities Have Rights?", note 30, at 218 (emphasis in original)

35. In contrast to aggregates, collectivities are "self-collecting" in the sense that the members engage in rule-following activity of a sort that constitutes the collectivity. The notion of "self-collection" is intended as an analogue to "self-reflection." If self-reflection is basic to individual identity, self-collection is also basic to collective identity. Sometimes the manner of self-collection is formal, as in the rules of incorporation or a nation's constitution. In other cases, it is relatively informal, as in the kind of self-constitutional understanding that unites a discussion group or a tribe. ("Collective Rights and Tyranny", note 27, at 120)

36. "Indian Status: Colonialism or Sexism?", (1986) 9 Canadian Community Law Journal 23, at 41.

Johnston notes that "McDonald considers the Fissian notion of interdependence to be "much more a matter of recognition than of choice." The suggestion is that the identity and well-being of R-based collectivities is more intimately connected to that of its members than is the case with W-based collectivities". ("Native Rights as Collective Rights", note 24, at 23)

37. "Questions About Collective Rights", David Schneiderman, ed., *Language and the State: The Law and Politics of Identity* (Cowansville, Québec: Les Editions Yvon Blais Inc., 1991) 3, at 17 (emphasis in original)

38. "Questions", note 37, at 17-18. Moreover, assuming a claim of right is made by a group for a purpose (e.g. to protect cultural integrity), a criterion of "purposelessness" to identify a group risks undercutting the legitimacy of a claim of right made by the "purposeless" group.

39. It is curious, and somewhat problematic, that even writers who profess to reject an individualistic social ontology, such as Iris Young (see e.g. *Justice and the Politics of Difference*, note 23, at 45), continue to rely upon the concept when attempting to distinguish groups from associations.

Michael McDonald states that

> [c]ommunities present, what I would call, *formation questions*. These are questions about the interaction of individual and group identities: how individuals form and are formed by their communities. On social contract models of justice, formation is standardly pictured as a one-way process in which asocial individuals have only instrumental interests in establishing a common normative order. Without denying the interest and ingenuity of contractarian theories presented by philosophers like John Rawls and David Gauthier, I believe that we should be sceptical about using the state of nature as a universal departure point or *point d'appui* for addressing formation questions. ("Questions", note 37, at 17 (emphasis in original))

Yet, like Young, McDonald implicitly relies upon an individualistic social ontology to distinguish groups which are capable of being rights-holders from associations which are not.

40. "Liberal Democracy and Group Rights: The Legacy of Individualism and its Impact on American Indian Tribes", (1979) 27 Political Studies 421, at 434

41. "Liberal Democracy and Group Rights", note 40, at 434 (emphasis in original)

42. "Liberal Democracy and Group Rights", note 40, at 435

43. For example, Svensson distinguishes multidimensional groups from "groups based on a single bond", which have

> two critical limitations as candidates for special political status: (1) they are organized around single purposes (that is, preservation of language, freedom of religion) and therefore resemble the interest groups which are already recognized in American practice; (2) their members are also likely to be members of innumerable other purpose or interest groups, so that there would be a crazy quilt of overlapping group and individual statuses and right-claims and no way to mediate these claims other than by going back to the principle of overriding individual rights. ("Liberal Democracy and Group Rights", note 40, at 434)

44. "Should Communities Have Rights?", note 30, at 219 (emphasis in original)

45. *Justice and the Politics of Difference*, note 23, at 44

46. *Justice and the Politics of Difference*, note 23, at 44

47. Proponents of collective rights appear to draw a direct relationship between the moral importance of a group and factors such as dimensional complexity, non-voluntary membership and

purposelessness which are positively correlated with group constitution of individual identity. However, these writers do not succeed in drawing a clear line between the types of groups that can be rights-holders and those that can not based upon these attributes. Rather, at most, these attributes can be treated only as indicators of stronger or weaker claims to the status of rights-holders. (See e.g. Van Dyke, "Collective Entities and Moral Rights", note 24, at 32.)

48. Note that, recently, McDonald has identified some of the problems with his own theoretical approach to collective rights:

> [F]rom social scientists, I would ask help in modelling what I assume to be a continuum from purposeful associations to identifying communities. I would then ask for help in understanding communities from within, from the minority community's perspectives, and from without, from the larger community's perspective. Understanding another community from within raises acute problems in the translatability of perspectives - in particular in the philosophy of the social sciences. But perhaps social scientists can provide at least approximate notions of how the potential subjects of collective rights - "communities" or "peoples" - see themselves. They can also help by providing ways of conceptualizing and imaginatively reconstructing differences in a minority's understanding of itself and the majority's understanding of the minority.
>
> From legal scholars, I would ask for help in thinking through the notions of legal agency and patiency (my term for the capacity for being a patient or object of others' actions) to see how well they can apply to diverse kinds of groups. I have tried to do this in terms of the notion of self-collection based on a shared understanding. But I must confess that notion has its origins in two, perhaps culturally bound sources: one is the notion of legal personhood found in the law of associations and corporations and the other is what might be described as a philosophical reconstruction of a proto-legal community along Hartian lines. The first has the advantage of linking the notion of communities to familiar classes of rights-bearers; the second has the advantage of tying it to a paradigmatic notion of a rule-creator. My worry with both approaches is that they may result in trying to force a variety of different shaped pegs into two extremely narrow holes: that of the legal person as the bearer of legal rights and the self-governing community as the source of law. ("Questions", note 37, at 18)
>
> The result may be unfortunate in both theoretical and practical terms. In terms of theory, the use of an all purpose metaphor like that of the legal person may lead us into misdescribing important legal issues ... . [I]n terms of practice, the manner and mode in which we recognize communities as bearers (or deny that they can be bearers) of collective rights may distort those communities and deny them the autonomy they need to survive and flourish. (at 19, note 42)

I would suggest the theoretical problems described by McDonald can be resolved only by shifting the boundaries of the analysis. Also, I must express reservations about the virtue of any approach that relies upon external specialists to interpret and conceptualize the self-understanding of minorities. I think that McDonald's particular concern with "double understanding" in this article, which he sees as requiring specialist interpretation of majority and minority understandings, is in part created by his methodology.

49. in ways that have resonances, for example, in critiques of gender and race essentialism

50. "Individuals, Groups, and Rights to Public Goods", note 2, at 26

51. I have not considered this issue in detail for the purposes of this paper, but it strikes me that this is most likely to arise in two situations:

a) where persons are members of a naturally defined grouping but are excluded from the group by means of superimposed rules. In such a case, the dispute would likely address the legitimacy of the rules governing exclusion.

b) where the group is rule-defined. In such a case, the dispute would likely address either or both the legitimacy of the group definition and exclusion from the group.

These situations raise the following possible questions (which I do not attempt to resolve here):

i) whether the exclusionary criteria are set by the community or from outside the community; and
ii) whether who sets the criteria makes any difference to the considerations by which the moral legitimacy of the criteria is assessed.
iii) whether the purpose (or need) for exclusion is legitimate;
iv) if so, whether the exclusionary criteria are necessary to meet, and do not overshoot, the legitimate purpose for exclusion;
v) whether the purpose for exclusion is consistent with and required by the claim to the communal good at issue in any given case. (As Réaume notes, cases involving rule-defined groups may present the issue of the justifiability of the criteria for inclusion in the group. For any given communal good, depending upon the nature of the good, it might be argued that the definition of the group should be expanded or contracted. ("Individuals, Groups, and Rights to Public Goods", note 2, at 20))
vi) whether the group's criteria for inclusion and exclusion are applied consistently.

52. This is a practical problem that relates to the adequacy of decision-making structures within the group to ensure that all members participate equally in the definition of communal goods which are the object of the group's rights-claims and decisions about representation, and to adherence to decision-making procedures. It should be distinguished from situations where persons who are excluded from membership in a group dispute their exclusion and the resulting inadequate representation of their interests by representatives of the group.

53. Réaume, "Individuals, Groups, and Rights to Public Goods", note 2, at 16

Non-members, by definition, are not required to participate in the production and enjoyment of a communal good. Some non-members, by virtue of their particular relationship or proximity to a group may be uniquely affected by the burdens of a group rights-claim in a way that other non-members are not, but they are not in the position of being compelled to participate in the production and enjoyment of the communal good to which the claim is made in the way that members may be.

54. In addition, both members and non-members may, where appropriate, assert independent competing rights or liberties which must be taken into account in Rawls's specification and adjustment process discussed in chapter 2.

It should be noted, however, that issues related to membership raise very different questions from situations which are often, inappropriately, identified as raising concerns about the legitimacy of group rights-claims, and are invested with greater validity than they warrant by virtue of their being confused with questions of membership. These are situations where non-members dispute their exclusion from communal benefits enjoyed pursuant to a group right by a group of which they are not members (often ostensibly on the basis of claims to the universality of rights and anti-discrimination concepts), or challenge the burdens placed upon them by the duties required to promote or protect the group right to a communal good.

The former objection exhibits a misunderstanding of the concepts of 'groups' and communal goods, and a distortion of the meaning of universality, upon which the claim of discrimination is then founded. The latter challenge may be legitimate on the same principles that would apply to any challenge to rights and freedoms, that is, that they interfere with other independent competing rights and freedoms and therefore that some form of mutual adjustment is required. But it should be emphasized that, given the primacy of the basic liberties over societal interests and over the whims or will of the majority (and assuming, as I do in this paper, that some of the basic liberties, and some of the rights and freedoms which specify the basic liberties, relate to goods of a communal nature), mere unwillingness on the part of non-members to perform the duties required to effect group rights does not justify the denial or violation of group rights any more than it would the denial or violation of individual rights.

55. This is a question of fact in the context of any given claim. This is true of the relationship of any right-claim to the right upon which it is based, whether that claim relates to an individualizable good or a communal good. For example, a claim to a particular good asserted pursuant to the constitutional right to 'freedom of religion' (which represents the entrenchment of one aspect of the basic liberty of 'equal liberty of conscience' in the constitution) must, in fact, be necessary to effect that right in order to be a valid claim.

Although it is tangential to the argument in this paper, I should emphasize that I see distinctions between groups capable of asserting cultural rights-claims as manifesting, not at the stage of the articulation of the liberty, but at the stage of specifying rights and freedoms in legislation, assessing rights-claims to goods, and identifying the duties associated with each. For example, on my argument, theoretically, any cultural group would be capable of founding a rights-claim on the 'equal liberty to participate in, produce and enjoy one's own culture'.

However, I would differentiate between groups in the goods necessary to effect the basic liberty and in the relationship between the group and those persons or entities who would have duties correlative to the right. The nature of relationships between rights-claimants and persons or entities who would have the duties correlative to the right claimed will impact upon the nature of the goods which may be necessary to effect the basic liberty and the nature and the onerousness of duties which it may be appropriate to impose. Let me clarify with an example: The active and prolonged attempt by the Canadian government to eradicate Aboriginal languages and cultures and to assimilate Aboriginal peoples, of which the residential school system is just one illustration, would militate in favour of the

government being identified as a duty-bearer, and would affect the nature of the goods claimed, and the nature and the degree of onerousness of the duties which the Canadian government should bear towards Aboriginal peoples. Other groups in Canada, which have not had the same relationship with the government or similar experiences of enforced cultural assimilation would not be in a position to claim the same particular goods, or that the same duties should be imposed, in pursuance of their equal basic liberty to culture.

In this sense, the argument in this paper differs from Kymlicka's in that proof of disadvantage would not be a precondition to establishment of the equal basic liberty, but would be one important factor relevant to the specifications of the basic liberty in legislation and the assessment of rights-claims, and the duties associated with them.

56. In the final analysis, however, the argument in the remainder of the paper does not require acceptance of this proposed methodology. Even if some of my readers are not persuaded to accept the methodology proposed and remain committed to the proposition that groups must have independent moral value to be rights-claimants, and that this moral value is derived from their constituting the identities of their individual members (assuming they can justify the imposition of this additional threshold), the validity of the remaining argument in the paper should be unaffected, provided the readers are prepared to recognize that *some* groups have moral value, whatever the threshold requirement of proof.

This being said, as noted in the text, groups that are in a position to claim communal goods at all, and in particular to claim rights to communal goods, will generally, *by that relationship of group, members and goods alone*, be groups that constitute the identities of their individual members.

I would also argue that the theoretical problems and arbitrariness of the existing methodological approach to the discussion of groups as rights-claimants described in the text should, at least, persuade these readers to consider adopting the following proposition:

> If a group must have some degree of independent moral importance or status to qualify as a rights-claimant and that importance exists by virtue of the group constituting or shaping the identities of its individual members, the threshold question would be whether a group has been shown to be of some importance to its members by virtue of its being identity-constituting *to some degree*. If so, it should not theoretically be precluded from making a rights-claim. This should be a fairly low threshold.

57. On this point, in an analogous context, in *Feminist Theory, From Margin to Center* (Boston: South End Press, 1984), bell hooks has noted that

> [white feminists] make [black women] the "objects" of their privileged discourse on race. As "objects", we remain unequals, inferiors. Even though they may be sincerely concerned about racism, their methodology suggests they are not yet free of the type of paternalism endemic to white supremacist ideology. Some of these women place themselves in the position of "authorities" who must mediate communication between racist white women (naturally they see themselves as having come to terms with their racism) and angry black women whom they believe are incapable of rational

> discourse. Of course, the system of racism, classism, and educational elitism remain intact if they are to maintain their authoritative positions. (at 12)

In *Yearning: Race, Gender and Cultural Politics* (Toronto: Between the Lines, 1990), hooks has identified some of the ways in which the involvement of white academics in cultural studies perpetuates racism. Many of the same risks apply to the area of collective rights theory.

> Cultural studies can serve as an intervention, making a space for forms of intellectual discourse to emerge that have not been traditionally welcomed in the academy. It cannot achieve this end if it remains solely a privileged "chic" domain where, as Cornel West writes in his essay "Black Culture and Postmodernism," scholars engage in debates which "highlight notions of difference, marginality, and otherness in such a way that it further marginalizes actual people of difference and otherness". When this happens, cultural studies re-inscribes patterns of colonial domination, where the "Other" is always made object, appropriated, interpreted, taken over by those in power, by those who dominate.
>
> Participants in contemporary discussions of culture highlighting difference and otherness who have not interrogated their perspectives, the location from which they write in a culture of domination, can easily make of this potentially radical discipline a new ethnographic terrain, a field of study where old practices are simultaneously critiqued, re-enacted and sustained. (at 125)
>
> Many of us are suspicious of explanations that justify exclusions [of missing perspectives and voices from work in the area of cultural studies], especially as this seems to be "the" historical moment when shifting certain paradigms is possible. If white male scholars support, encourage, and even initiate theoretical interventions without opening the space of interrogation so that it is inclusive, their gestures of change appear to be ways of holding onto positions of power and authority in a manner that maintains structures of domination based on race, gender and class. (at 130)
>
> If we do not interrogate our motives, the direction of our work, continually, we risk furthering a discourse on difference and otherness that not only marginalizes people of color but actively eliminates the need for our presence. (at 132)

58. Michael McDonald describes this as "double understanding":

> With minority rights, the picture is of minority groups that exercise and benefit from rights in a given society's legal system. As a claimant or beneficiary, the minority group has standing in a more encompassing normative order - "the social order". However, a space or gap is left or created in society's shared understanding for the minority to occupy. In that shared social understanding, the group is represented as having such characteristics of a community-constituting understanding as are necessary to the exercise or enjoyment of the right in question. But the group with its shared understanding also presents a normative order or set of rules concerning its own and its members activities. So, with minority rights, there is the minority group's

> understanding of itself and society's recognition of the minority as a rights-holder and beneficiary. There is then, with minority rights, a ***double understanding***; two normative orders are involved. ("Questions", note 37, at 15 (emphasis in original))
>
> There may well be conceptual or practical conflicts between the [social understanding and the minority understanding]. Society's norms may be inconsistent with the minority's shared understanding. Perhaps the recognition of minority rights will in this case initiate a process that leads to the dissolution of that society. Or the minority may well see that it will destroy itself if it tries to exercise the collective rights afforded in that social order. So, from the central law-giver's perspective, the question is whether and in what ways to recognize a minority consistent with the encompassing shared understanding; while from the minority perspective, it is whether and in what ways to seek recognition from the central legal order consistent with the minority's understanding of itself. (at 16)

59. As bell hooks notes, representation and the process by which groups are defined and represented are important:

> Edward Said reminds readers that "representations are put to use in the domestic economy of an imperial society." Speaking of his schooling in classrooms where he was taught English history and culture but "nothing about my own history, Arab history," he states: "I couldn't help but come to understand representation as a discursive system involving political choices and political forces, authority in one form or another." Attention to the politics of representation has been crucial for colonized groups globally in the struggle for self-determination. (*Yearning*, note 57, at 72)

Angela Harris uses Zora Neale Hurston's work as an illustration of the notion of representation. Hurston argues that her colour is not an inherent part of her being, but a response to her surroundings:

> "[H]ow it feels to be colored Zora" depends on the answer to these questions: "Compared to what? As of when? Who is asking? In what context? For what purpose? With what interests and presuppositions?" What Hurston rigorously shows is that questions of difference and identity are always functions of a specific interlocutionary situation - and the answers, matters of strategy rather than truth." ("Race and Essentialism in Feminist Legal Theory", (1990) 42 Stanford Law Review 581, at 611)

60. In this context, I have been influenced in the development of this methodology by Linda Alcoff's discussion of the positionality of subjectivity and identity politics:

> If we combine the concept of identity politics with a conception of the subject as positionality, we can conceive of the subject as nonessentialized and emergent from a historical experience and yet retain our political ability to take gender as an important point of departure. ("Cultural Feminism versus Poststructuralism: The Identity Crisis in Feminist Theory" (1988) 13 Signs 405, at 433)

Alcoff states that Teresa de Lauretis, in "Feminist Studies/Critical Studies: Issues, Terms, and

Contexts", Teresa de Lauretis, ed., *Feminist Studies/Critical Studies* (Bloomington: Indiana University Press, 1986) 1, has further developed the valuable conception of subject and subjectivity which she had originally formulated in *Alice Doesn't: Feminism, Semiotics, Cinema* (Bloomington: Indiana University Press, 1984):

> [She] claims that an individual's identity is constituted with a historical process of consciousness, a process in which one's history "is interpreted or reconstructed by each of us within the horizon of meanings and knowledges available in the culture at given historical moments, a horizon that also includes modes of political commitment and struggle. ... Consciousness, therefore, is never fixed, never attained once and for all, because discursive boundaries change with historical conditions."... The agency of the subject is made possible through this process of political interpretation. And what emerges is multiple and shifting, neither "prefigured ... in an unchangeable symbolic order" nor merely "fragmented, or intermittent." (at 425)
>
> ... The importance of this focus on practices is, in part, Lauretis's shift away from the belief in the totalization of language or textuality to which most antiessentialist analyses become wedded. Lauretis wants to argue that language is not the sole source and locus of meaning, that habits and practices are crucial in the construction of meaning, and that through self-analyzing practices we can rearticulate female subjectivity. Gender is not a point to start from in the sense of being a given thing but is, instead, a posit or construct, formalizable in a nonarbitrary way through a matrix of habits, practices, and discourses. Further, it is an interpretation of our history within a particular discursive constellation, a history in which we are both subjects of and subjected to social construction. (at 431)
>
> ... [W]e must continually emphasize within any account of subjectivity the historical dimension. This will waylay the tendency to produce general, universal, or essential accounts by making all our conclusions contingent and revisable. Thus, through a conception of human subjectivity as an emergent property of a historicized experience, we can say "feminine subjectivity is construed here and now in such and such a way" without this ever entailing a universalizable maxim about the "feminine".
>
> It seems to me equally important to add to this approach an "identity politics" ... . The idea here is that one's identity is taken (and defined) as a political point of departure, as a motivation for action, and as a delineation of one's politics. Lauretis and the authors of *Yours in Struggle* [Elly Bulkin, Minnie Bruce Pratt and Barbara Smith, *Yours in Struggle: Three Feminist Perspectives on Anti-Semitism and Racism* (Brooklyn, New York: Long Haul Press, 1984)] are clear about the problematic nature of one's identity, one's subject-ness, and yet argue that the concept of identity politics is useful because identity is a posit that is politically paramount. Their suggestion is to recognize one's identity as always a construction yet also a necessary point of departure. (at 431)
>
> When the concept "woman" is defined not by a particular set of attributes but by a particular position, the internal characteristics of the person thus identified are not denoted so much as the external context within which that person is situated. The

> external situation determines the person's relative position, just as the position of a pawn on a chessboard is considered safe or dangerous, powerful or weak, according to its relation to the other chess pieces. The essentialist definition of women makes her identity independent of her external situation: since her nurturing and peaceful traits are innate they are ontologically autonomous of her position with respect to others or to the external historical and social conditions generally. The positional definition, on the other hand, makes her identity relative to a constantly shifting context, to a situation that includes a network of elements involving others, the objective economic conditions, cultural and political institutions and ideologies, and so on. If it is possible to identify women by their position within this network of relations, then it becomes possible to ground a feminist argument for women, not on a claim that their innate capacities are being stunted, but that their position within the network lacks power and mobility and requires radical change. (at 433)

In my view, Linda Alcoff's and Teresa de Lauretis's approach to the positionality of subjectivity has the virtue of being sensitive to the issue of specificity, and the need, emphasized by bell hooks, to recognize the "authority of experience" of oppressed and exploited groups (*Yearning*, note 57, at 29), while circumventing the potential risks identified by Diana Fuss of perpetuating essentialist logic by simply fragmenting one essential subject into a multiplicity of essential subjects (*Essentially Speaking: Feminism, Nature and Difference* (New York: Routledge, Chapman and Hall, Inc., 1989) at 19-20; on the issue of positionality, see Katharine T. Bartlett, "Feminist Legal Methods", (1990) 103 Harvard Law Review 829.)

Notes to Conclusion

1. Stephen Shute and Susan Hurley, eds., *On Human Rights, The Oxford Amnesty Lectures, 1993* (New York: Basic Books, 1993) 41

2. I should not be taken to suggest that Aboriginal communities (or governments) would have unlimited internal sovereignty in the sense of being exempt from obligations relating to the human rights of their members or citizens. Rawls's analysis of well-ordered liberal and non-liberal societies in the context of the law of peoples would preclude such a view. I am suggesting, however, that on a Rawlsian analysis the application of the *Charter* could not legitimately be considered a *sine qua non* of negotiations (presumably on the assumption that the outcome of negotiations must guarantee the application of values protected in a liberal democracy, despite the fact that the negotiations address Aboriginal rights related to self-determination and sovereignty, derived from prior occupation).

By contrast, for example, Rawls's analysis provides that a non-liberal society that is non-expansionist and has a legal order guided by a common good conception of justice which ensure that it honours basic human rights qualifies as a well-ordered society. ("The Law of Peoples", note 1, at 67) These basic human rights include "the right to life and security, to personal property, and the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration". (at 68) But these standards are not identical to those of a liberal democracy. Nor may the liberal democratic parties to the agreement concerning a just political society of peoples impose their own standards and values upon well-ordered societies which do not share them. (at 67)

3. Rawls defines peoples as "persons and their dependents seen as a corporate body and as organized by their political institutions, which establish the powers of government. In democratic societies persons will be citizens, while in hierarchical and other societies they will be members. ("The Law of Peoples", note 1, at 220, note 5)

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