

CONSTITUTIONAL RECOGNITION OF DIVERSITY IN CANADA

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INTRODUCTION

Constitutionalism is deeply relational. It mediates relations between individuals and the state, between governments, between government actors, between economic and social institutions and the state, and between diverse communities. One of the enduring challenges of Canadian constitutional law has been how to forge a sense of national unity and a Canadian identity in the face of strongly diverse communities. Although debates about accommodating diversity in pluralistic democracies have become more prevalent over the past thirty years, the debate in Canada goes back to the early era of nation building. At that time, however, the constitutional accommodation of diversity only reached the two dominant communities—English-speaking Protestants and French Catholics. Other significant sources of diversity in Canada were not recognized. Most strikingly, aboriginal peoples did not participate in the constitutional dialogues about the Canadian constitution. Constitutional law, through its omissions, also allowed for other discriminatory exclusions based on race, national or ethnic origin, sex, civil status, and disability.

It is only in the post–World War II era that we begin to see a shift in public policy and constitutional law. With an emerging international consensus about the importance of securing universal human rights and ending discrimination, judges began interpreting the Canadian Constitution as containing implicit protection for fundamental freedoms.¹ Protection against the arbitrary mistreatment of minority groups was also secured through the unwritten principle of the rule of law.² During this postwar era, Canadian law also witnessed the passage of human rights legislation, particularly throughout the 1960s and 1970s.³ It was not until the 1980s however, that legal protection for diverse collectivities and minority groups

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1. On the implied bill of rights, see Andr  e Lajoie, *The Implied Bill of Rights, the Charter and the Role of the Judiciary*, 44 U.N.B.L.J. 337 (1995).

2. See *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 183–84 (Abbott, J., concurring).

3. See generally WALTER SURMA TARNOPOLSKY, *DISCRIMINATION AND THE LAW IN CANADA* 25–37 (1982) (noting significant developments in the history of antidiscrimination legislation).

was given formal constitutional recognition.⁴ The constitutional entrenchment of minority and group-based entitlements was premised on an understanding of pluralistic democracy that contemplated and required legal recognition of distinctive group-based identities and rights.

Such constitutional recognition in the texts of the law, however, does not ensure the effective enjoyment or protection of pluralistic identities in Canadian society. The interaction between constitutional rights and social reality tells a much more complex and less linear story and raises a number of theoretical challenges to protecting group-based rights in constitutional law. These include conceptual problems associated with defining the boundaries of group membership, the risks of congealing essentialist conceptions of group-based identity or overlooking intersectional and multiple identities in legal categories and definitions, legal resistance to abandoning legal formalism and classical legalism, and the problem of mediating conflict within and between social groups.

In the face of these social, political, economic, and theoretical challenges, one response is to reject group-based constitutional rights and entitlements and advocate a return to the individual-rights approach of classical liberal constitutional theory. Such a return resonates with neoliberal and neoconservative political agendas and reflects a backlash against what are perceived as special, group-based rights. Another possibility is to imagine alternatives to identity-based rights claims.⁵ A third option is to theorize and address the conceptual complexities of group-based rights without abandoning their importance.⁶ Innovative strategies for overcoming some of the challenges of group-based constitutional rights include challenging and revising dominant norms and enhancing participatory, democratic processes to facilitate constitutional dialogue across group differences. At this historical juncture, the creation of a constitutional law that recognizes an inclusive, pluralistic, and diverse conception of citizenship within nation-states is essential not only in Canada but also in countries around the world.

4. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

5. For a discussion of this alternative approach, see Roderick A. Macdonald, *The Legal Mediation of Social Diversity*, in *THE CONDITIONS OF DIVERSITY IN MULTINATIONAL DEMOCRACIES* 85, 98–108 (Alain-G. Gagnon et al. eds., 2003). See generally Lise Gotell, *Queering Law: Not by Vriend*, 17 *CANADIAN J.L. & SOC'Y.* 89, 103–12 (2002) (discussing alternatives to identity-based rights claims to challenge heterosexual privilege).

6. SHERENE H. RAZACK, *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* 157–70 (1998).

I. DISCRIMINATING CITIZENSHIP: AN ERA OF ASSIMILATION AND
EXCLUSION

Prior to Canadian Confederation in 1867, politicians grappled with how to respect group-based differences while generating national unity. According to Samuel LaSelva, “Questions of identity and nationhood were prominent in discussions of Confederation. . . . Not only was nationality the single most divisive issue of Confederation, but almost all the important questions of Confederation were somehow connected to it.”⁷ LaSelva goes on to explore how George-Étienne Cartier, one of the founding fathers of confederation from Quebec, understood the necessity of a conception of Canadian identity that was not premised on homogeneity.⁸ Cartier articulated the idea of “political nationality”—a fundamentally important concept in today’s multicultural contexts.⁹

[W]hen we [are] united . . . we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, will interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian — it [is] impossible. Distinction of this kind [will] always exist. . . . In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and success [will] increase the prosperity and glory of the new Confederacy. . . . [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.¹⁰

For Cartier, “Canada was to be a nation in which multiple loyalties and multiple identities flourished.”¹¹ While federalism was one structural mechanism for ensuring the vitality of local communities and regional diversity, particularly the specificity of the French language and civil law in Quebec, decentralized local democracy was not the only constitutional mechanism for protecting diverse identities and communities.¹² Cartier

7. SAMUEL V. LASELVA, *THE MORAL FOUNDATIONS OF CANADIAN FEDERALISM* 38 (1996).

8. *Id.* at 38–39.

9. *Id.* at 39.

10. *In re Secession of Québec*, [1998] 2 S.C.R. 217, para. 43 (first, third, and eighth alterations added) (quoting *PARLIAMENTARY DEBATES ON THE SUBJECT OF THE CONFEDERATION* 60 (1865)).

11. LASELVA, *supra* note 7, at 41.

12. For a range of perspectives on federalism and diversity issues, see generally *THE STATES AND MOODS OF FEDERALISM: GOVERNANCE, IDENTITY AND METHODOLOGY* pt. II (Jean-François Gaudreault-DesBiens & Fabien Gélinas eds., 2005).

strongly endorsed checks on democratic majoritarianism to ensure minority rights, framed constitutionally in terms of express minority-language protections, in the federal and Quebec governments.¹³ Special protections for denominational schools were another vehicle for the continued protection of not only religion but also the language and cultural diversity of minority communities.¹⁴

Despite Cartier's articulation of the idea of political nationality, however, constitutional recognition of diversity in the early constitutional texts was limited to the two dominant linguistic-religious communities.¹⁵ And even in this respect, the protections were predominantly structural—embedded in the jurisdictional divisions of Canadian federalism.¹⁶ More direct and comprehensive constitutional protection for diverse communities in Canada did not emerge until the latter part of the twentieth century. Prior to this time, as revealed in the histories of the aboriginal peoples, the francophone minority communities outside of Quebec, and other racialized and historically disadvantaged groups, Canadian public law overwhelmingly reinforced assimilation or exclusion. Indeed, the first one hundred years of Canadian constitutionalism may be most accurately characterized as an era of nonrecognition of diversity—an era of assimilation, where the dominant citizenship norm was an anglophone, white, male, propertied, able-bodied, British subject.

A. Aboriginal Communities and Assimilationist Policies

Although the early colonial history involved treaty negotiations and the establishment of nation-to-nation relationships between the British Crown and aboriginal peoples,¹⁷ around the time of Confederation, Canadian public policy shifted to one premised upon assimilation.¹⁸ Aboriginal peoples did

13. LASELVA, *supra* note 7, at 41; *see, e.g.*, Constitution Act, 1867, 30 & 31 Vict. Ch. 3 § 133 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985), available at <http://digbig.com/4rdba> (allowing both the use of English and French in the Houses of Parliament and in the Legislature of Quebec).

14. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 §§ 93, 133. For a general discussion, *see* Roderick Macdonald, *The Design of Constitutions to Accommodate Linguistic, Cultural and Ethnic Diversity: The Canadian Experiment*, in DUAL IMAGES: MULTICULTURALISM ON TWO SIDES OF THE ATLANTIC 52, 76–79 (Kálmán Kulcsár & Denis Szabo eds., 1996).

15. *See, e.g.*, Constitution Act, 1867, 30 & 31 Vict. Ch. 3 § 133 (allowing both the use of English and French in the Houses of Parliament).

16. *See In re Secession of Québec*, [1998] 2 S.C.R. 217, paras. 49–54 (elaborating on federalism as a structural mechanism for protecting minority rights). For a comprehensive historical overview of Canadian political and constitutional culture, *see* Roderick Macdonald, *The New Zealand Bill of Rights Act: How Far Does It or Should It Stretch?*, in THE LAW AND POLITICS: PROCEEDINGS OF THE 1993 NEW ZEALAND LAW CONFERENCE 94 (1993).

17. John Borrows, *Creating an Indigenous Legal Community*, 50 MCGILL L.J. 153, 161 (2005).

18. 1 ROYAL COMMISSION ON ABORIGINAL PEOPLES, REPORT OF THE ROYAL COMMISSION ON

not participate as founding members of Canada. Instead, they were included as an enumerated head of power of the federal government: “Indians, and Lands reserved for the Indians.”¹⁹ They were treated in constitutional law and in federal legislation as wards or dependents of the federal government. Early statutes, such as the Gradual Civilization Act²⁰ and the Gradual Enfranchisement Act,²¹ were designed to promote the assimilation of First Nations into nonaboriginal society and to eliminate distinctive aboriginal cultures and languages. Such laws were buttressed by an ideology of cultural superiority articulated through a discourse of “civilized” versus “uncivilized” peoples.²² The Indian Act of 1876 established an elaborate scheme of regulating Indians who had not been assimilated into nonaboriginal society.²³ It regulated Indian status and membership, regulated federal reserves, and created a band-council-governance structure for regulating registered First Nations’ communities.²⁴ Imbued with contradiction, born of its simultaneous protection and colonization of First Nations, the Indian Act continues to engender controversy.²⁵ It extends special treatment to status Indians, while subjecting First Nations to exclusionary membership rules, gender-based discrimination, and constraints on aboriginal self-government.²⁶ Explicit policies of assimilation also included the criminal prohibition of traditional aboriginal ceremonies and customs as well as the devastating residential schools policy.²⁷ The latter involved the removal of aboriginal youth from their communities, prohibitions on their continued use of their native languages, and systemic physical and sexual abuse.²⁸ This residential school policy deeply eroded the intergenerational transmission of culture. As noted in the *Report of the Royal Commission on Aboriginal Peoples*,

ABORIGINAL PEOPLES: LOOKING FORWARD LOOKING BACK 2 (1996), available at <http://digbig.com/4rdbd> [hereinafter RCAP].

19. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 § 91(24).

20. An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians, 1857 S.C., ch. 26 (Can.).

21. An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act 31st Victoria Chapter 42, 1869 S.C., ch. 6 (Can.).

22. For judicial commentary on this type of racist discourse, see *Simon v. The Queen*, [1985] 2 S.C.R. 387, 398–99.

23. An Act to Amend and Consolidate the Laws Respecting Indians, 1876 S.C., ch. 18 (Can.).

24. *Id.* §§ 3, 11–22, 61–63; RCAP, *supra* note 18, at 285, 303–04.

25. Indian Act, R.S.C., ch. I–5 (1985); John Borrows, *Stewardship and the First Nations Governance Act*, 29 QUEEN’S L.J. 103, 117–18 (2003) [hereinafter Borrows, *Stewardship*].

26. Borrows, *Stewardship*, *supra* note 25, at 117–18.

27. RCAP, *supra* note 18, at 183, 337; see also DOUGLAS COLE & IRA CHAIKIN, AN IRON HAND UPON THE PEOPLE 1–3 (1990) (discussing the importance of the potlatch to indigenous Canadian culture, and why it was made illegal).

28. RCAP, *supra* note 18, at 337, 365–67.

Successive governments have tried—sometimes intentionally, sometimes in ignorance—“to absorb Aboriginal people into” Canadian society, thus eliminating them as distinct peoples.²⁹ Until relatively recently, therefore, Canadian government policy was designed to promote assimilation and the erasure of aboriginal identity.³⁰

B. Francophone, Minority Communities Outside of Quebec

Francophone, minority communities outside of Quebec also experienced the social and legal pressures of assimilation, the latter being funnelled predominantly through language-education policy. Constitutional provisions safeguard Catholic and Protestant denominational schools indirectly secured protection for minority-linguistic rights since language and religion were aligned (i.e., French Catholics and English Protestants).³¹ Nevertheless, at the end of the nineteenth and beginning of the twentieth centuries, some provinces began adopting laws prohibiting or restricting the use of French in schools.³² As in the case of aboriginal communities, legal regulations explicitly advanced assimilationist objectives and undermined the survival of linguistic minority communities outside of Quebec.³³ In legal challenges before the courts, it was argued that the constitutional provisions protecting denominational schools should extend to the language of instruction. The Privy Council disagreed holding that section 93(1) was limited to the protection of rights and privileges associated with denominational teaching.³⁴ The economic vulnerability of many

29. *Id.* at 2.

30. *Id.*; see also ALAN C. CAIRNS, *CITIZENS PLUS: ABORIGINAL PEOPLES AND THE CANADIAN STATE* 5 (2000) (elaborating on how the policy of assimilation enjoyed a long hegemony because aboriginal peoples were silenced by official policy); HAROLD CARDINAL, *THE UNJUST SOCIETY: THE TRAGEDY OF CANADA'S INDIANS* 1 (1969) (critiquing the 1969 Federal White Paper as an attempt to assimilate Canada's aboriginal peoples).

31. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 § 93 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985), available at <http://digbig.com/4rdba>.

32. See, e.g., Gordon Bale, *Law, Politics and the Manitoba School Question: Supreme Court and Privy Council*, 63 CANADIAN B. REV. 461, 466–73 (1985) (discussing the religious and demographical changes that led to the Official Language Act, which made English the official language of public schools in Manitoba); Gaétan Gervais, *Le Règlement XVII (1912-1927)*, 18 REVUE DU NOUVEL ONT. 123, 123 (1996); see also THOMAS R. BERGER, *FRAGILE FREEDOMS: HUMAN RIGHTS AND DISSENT IN CANADA* 58–92 (1982) (providing a history of French language restrictions in Canadian schools).

33. For a poignant description of the plight of Franco-Manitobans, see GABRIELLE ROY, *LA DÉTRESSE ET L'ENCHANTEMENT* 11 (1984). “Quand donc ai-je pris conscience pour la première fois que j'étais, dans mon pays, d'une espèce destinée à être traitée en inférieure?” (“When did I first realize that, within my own country, I was destined to be treated as inferior?”). *Id.*

34. *Ottawa Separate Sch. Trs. v. Mackell*, [1917] A.C. 62, 74–75, 32 D.L.R. 1, 3–4, 6 (P.C.). In the early Manitoba cases, the Judicial Committee of the Privy Council provided uneven protection for

francophone communities outside of Quebec further fueled the trend towards assimilation into a dominant English norm—the language of wealth and capital.

C. Overt Exclusions and Discrimination

A third example of the failure to recognize diversity in Canada is the overt and discriminatory denial of rights to social groups such as racial, religious and ethnic communities, women, and persons with disabilities. Racist exclusions and differential treatment were explicitly enacted in legislative provisions.³⁵ For example, in 1885, the federal government passed An Act to Restrict and Regulate Chinese Immigration into Canada, imposing a C\$50 head tax on Chinese immigrants.³⁶ The purpose of the head tax was to deter Chinese immigrants from entering Canada. In 1903, the head tax was raised to C\$500.³⁷ In the early twentieth century, a quota was placed on Japanese immigration to Canada and provincial governments enacted voting and employment restrictions on individuals of Japanese and Chinese origin.³⁸ In 1923, the federal government passed the Chinese

religious minority education rights. *See* Brophy v. Att’y Gen., [1895] 1 Olms. 316, [1895] A.C. 202, 228–29 (P.C.) (finding that the rights and privileges of the Roman Catholic minority community in Manitoba were infringed); City of Winnipeg v. Barrett [1892] 1 Olms. 272, [1892] A.C. 445, 456–59 (P.C.) (holding that the Act of 1890 was not a violation of minority religious rights). In the later Ontario decisions, the courts expressly concluded that only religious educational rights, not minority language rights, were covered by the constitutional protections. *Mackell*, [1917] A.C. at 74–75, 32 D.L.R. at 3–4, 6; *see also* FRANCOPHONIES MINORITAIRES AU CANADA (Joseph Yvon Thériault ed., 1999); Troy Q. Riddell, *The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones Outside Quebec*, 38 LAW & SOC’Y REV. 583, 587 (2004) (stating that a ban on teaching French did not violate any laws because the Canadian Constitution only protects the right to religious education).

35. CONSTANCE BACKHOUSE, COLOUR-CODED: A LEGAL HISTORY OF RACISM IN CANADA 1900–1950, at 15 (1999) (documenting “the central role of the Canadian legal system in the establishment and enforcement of racial inequality”); Peter S. Li, *Race and Ethnicity*, in RACE AND ETHNIC RELATIONS IN CANADA 3, 3 (Peter S. Li ed., 2d ed. 1999); *see* Christina Sampogna et al., *Historical Overview and Introduction*, in RACIAL DISCRIMINATION: LAW AND PRACTICE 1-1, 1-1 (Errol Mendes ed., 1995) (mentioning how Canada’s “many ethnic and racial groups . . . have been victims of direct and explicit discrimination in the past”); Vic Satzewich, *Introduction to DECONSTRUCTING A NATION: IMMIGRATION, MULTICULTURALISM AND RACISM IN 90’S CANADA* 13, 13 (Vic Satzewich ed., 1992) (discussing the implementation of legislation intended to “curb non-European migration”).

36. An Act to Restrict and Regulate Chinese Immigration into Canada, 1885 S.C., ch. 71, § 4 (Can.); Aprodicio A. Laquian & Eleanor R. Laquian, *Asian Immigration and Racism in Canada—A Search for Policy Options*, in THE SILENT DEBATE: ASIAN IMMIGRATION AND RACISM IN CANADA 3, 12 (Eleanor Laquian et al. eds., 1998) (citing K.W. Taylor, *Racism in Canadian Immigration Policy*, 23 CANADIAN ETHNIC STUD. 1, 2, 5 (1991)).

37. Chinese Immigration Act, 1903 S.C., ch. 8, § 6 (Can.); Laquian & Laquian, *supra* note 36, at 12 (citing Taylor, *supra* note 36, at 5).

38. Laquian & Laquian, *supra* note 36, at 8; Bruce Ryder, *Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909*, 29 OSGOODE

Immigration Act,³⁹ which effectively prevented the immigration of all Chinese people to Canada until the ban was removed in 1947.⁴⁰ During World War II, over twenty thousand people of Japanese descent were jailed or placed in internment camps, and their personal property was confiscated.⁴¹ In 1988, Canada offered an official apology and compensation to the Japanese community for the World War II internment.⁴² This was also an era of overt discrimination against the Jewish community, with the refusal of entry to Jewish immigrants fleeing Nazi Germany and religious-based exclusions from educational and professional opportunities.⁴³

Explicitly discriminatory gender-based exclusions were also promulgated in the late nineteenth century and well into the twentieth century; women were excluded from professions, from voting entitlements, and from participation in government.⁴⁴ Persons with disabilities were also subjected to group-based exclusions, forced sterilization, and segregation from mainstream society.⁴⁵ As Justice La Forest noted in *Eldridge v.*

HALL L.J. 619, 656, 669–72 (1991).

39. Chinese Immigration Act, 1923 S.C., ch. 38, §§ 5–9 (Can.).

40. An Act to Amend the Immigration Act and to Repeal the Chinese Immigration Act, 1947 S.C., ch. 19 (Can.); PETER S. LI, *THE CHINESE IN CANADA* 35 (2d ed. 1998) (citing An Act to Amend the Immigration Act and to Repeal the Chinese Immigration Act, 1947 S.C., ch. 19); Beverley Baines, *When Is Past Discrimination Un/Constitutional? The Chinese Canadian Redress Case*, 65 SASK. L. REV. 573, 574 (2002) (citing Constance Backhouse, *Gretta Wong Grant: Canada's First Chinese-Canadian Female Lawyer*, 15 WINDSOR Y.B. ACCESS TO JUST. 3, 5–9, 13–14 (1996)); Laquian & Laquian, *supra* note 36, at 12 (citing Taylor, *supra* note 36 at 2, 5).

41. KEN ADACHI, *THE ENEMY THAT NEVER WAS: A HISTORY OF JAPANESE CANADIANS* iv, 251–54 (1977); Elliot Tenofsky, *The War Measures and Emergencies Acts: Implications for Canadian Civil Rights and Liberties*, 19 AM. REV. CAN. STUD. 293, 293 (1989); *see also* Co-operative Comm. on Japanese Canadians v. Att'y-Gen., [1947] A.C. 87, 106–09, [1947] 1 D.L.R. 577, 590–93 (P.C.) (unsuccessfully challenging Japanese internment orders in the courts). A much smaller number of individuals of Italian or German descent were also subject to internment orders during WWII. Mary Halloran, *Ethnicity, the State and War: Canada and Its Ethnic Minorities, 1939-1945*, 21 INT'L MIGRATION REV. 159, 160–61 (1987). Ukrainians had been interned during WWI. Peter Melnycky, *The Internment of Ukrainians in Canada*, in *LOYALTIES IN CONFLICT: UKRAINIANS IN CANADA DURING THE GREAT WAR* 1, 23–24 (Frances Swyripa & John Herd Thompson eds., 1983).

42. Historica, *The Internment of the Japanese During World War II*, <http://digbig.com/4rdbe> (last visited Jan. 31, 2007). *See generally* BERGER, *supra* note 32, at 93–126 (discussing the history of Japanese-Canadians during World War II).

43. IRVING ABELLA & HAROLD TROPER, *NONE IS TOO MANY: CANADA AND THE JEWS OF EUROPE 1933-1948*, at vi, 280–81 (1983); *see, e.g.*, IRVING ABELLA, *A COAT OF MANY COLOURS: TWO CENTURIES OF JEWISH LIFE IN CANADA* 179 (2d ed. 1999) (providing as an example a protest by many interns at a hospital when a Jewish intern was offered an internship).

44. CONSTANCE BACKHOUSE, *PETTICOATS AND PREJUDICE: WOMEN AND LAW IN NINETEENTH-CENTURY CANADA* 4–5, 293 (1991); ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA, *REPORT OF THE ROYAL COMMISSION ON THE STATUS OF WOMEN IN CANADA* 7, 337 (1970).

45. SANDRA A. GOUNDRY & YVONNE PETERS, *LITIGATING FOR DISABILITY EQUALITY RIGHTS: THE PROMISES AND THE PITFALLS* 5–6 (1994); GERALD B. ROBERTSON, *MENTAL DISABILITY AND THE LAW IN CANADA* 159–63, 301–16 (2d ed. 1994); M. David Lepofsky, *A Report Card on the*

British Columbia, a leading Supreme Court of Canada case on disability discrimination:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. . . . [Disabled persons] have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.⁴⁶

Indeed, histories of overt exclusion and marginalization are shared by a number of social groups in Canada.⁴⁷

While a standard story in Canadian human rights law is the emergence of human rights laws to respond to discrimination in the private sphere, it is important to acknowledge the deep continuity between the acceptance of exclusion and discrimination both in private relations and in public law, as illustrated in the examples highlighted above. Moreover, while there were some efforts by judges and legislators to affirm equality rights and fundamental freedoms, the emergence of more robust legal protections for human rights did not emerge until the post-World War II era.⁴⁸

II. CONSTITUTIONAL RECOGNITION: INDIVIDUAL AND COLLECTIVE RIGHTS

It is with this brief historical background that we can begin to understand the momentous changes of the past thirty years. We have shifted from an era where the constitution was virtually silent on rights

Charter's Guarantee of Equality to Persons with Disabilities after 10 Years – What Progress? What Prospects?, 7 NAT'L J. CONST. L. 263, 268–70 (1997).

46. *Eldridge v. Att'y Gen.*, [1997] 3 S.C.R. 624, para. 56 (citations omitted) (citing GOUNDRY & PETERS, *supra* note 45, at 5–6; Lepofsky, *supra* note 45, at 268–70).

47. Scholarship on the inequalities faced by gay and lesbian individuals reveals similar patterns of overt discrimination against gay male sexuality and the invisibility of lesbianism. See, e.g., Mary Eaton, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality*, 20 QUEEN'S L.J. 628 (1995) (book review) (reviewing Didi Herman's scholarship discussing jurisprudence concerning gays and lesbians). For a review of the overt discrimination against the Jewish community in Canada, see ABELLA, *supra* note 43.

48. *Switzman v. Elbling*, [1957] S.C.R. 285, 304–07 (Rand, J., concurring); *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, 321–25 (Kerwin, J., concurring); *id.* at 368–76 (Locke, J., concurring).

issues to an era where the constitutional recognition of diversity is explicitly engaged by a number of provisions in the constitution and endorsed as a fundamental, unwritten principle of Canadian constitutionalism.⁴⁹ What is the scope and tenor of the modern recognition of cultural and group-based pluralism in Canadian constitutional law? In the discussion that follows, I focus on the constitutional reforms of 1982 and most specifically the express provisions affirming equality rights and securing protection for minority-linguistic communities and aboriginal peoples. These reforms were articulated in the Canadian Charter of Rights and Freedoms⁵⁰ and in the Rights of the Aboriginal Peoples of Canada section of the Constitution Act, 1982, Part II.⁵¹

A. *The Rights of Aboriginal Peoples*

Turning first to the aboriginal rights provisions, section 35(1) of the Constitution Act, 1982, provides that “existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁵² Section 35(2) defines aboriginal peoples of Canada to include “Indian, Inuit and Métis peoples of Canada.”⁵³ The collective tenor of these constitutionally entrenched rights is reflected in the reference to “peoples.” An interpretive proviso in the Charter of Rights and Freedoms was also added to ensure that it would “not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.”⁵⁴ Faced with the task of interpreting

49. See *In re Secession of Québec*, [1998] 2 S.C.R. 217, paras. 49–51 (discussing four fundamental, unwritten constitutional principles including federalism, democracy, protection of minority rights, and the rule of law).

50. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

51. Rights of the Aboriginal Peoples of Canada, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.).

52. *Id.* § 35(1). As expressly acknowledged, aboriginal rights predate 1982. Although I focus on the constitutional dimensions of the emergence of group-based rights, the definition of aboriginal rights was not exclusive to constitutional law. Aboriginal title, for example, emerged outside of the constitutional law context. See, e.g., *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 376–77 (discussing how the aboriginal title was derived from occupation and possession (citing *Calder v. Att’y-Gen.*, [1973] S.C.R. 313, 322–23)); *Calder*, [1973] S.C.R. at 322–23 (discussing the origins of aboriginal title in the Proclamation of 1763); *St. Catherine’s Milling & Lumber Co. v. The Queen*, 14 App. Cas. 46, 55–60 (P.C. 1888) (explaining how the provinces did not have title to the land as this power was held by the Dominion). Nevertheless, these cases have significant constitutional ramifications.

53. Rights of the Aboriginal Peoples of Canada, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 35(2) (U.K.).

54. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 25 (U.K.); see also Royal Proclamation of 1763, 3 Geo. III, as reprinted in R.S.C., No. 1 (Appendix II 1985) (Gr. Brit.) (reserving certain lands to Indians and

these constitutional protections, judges drew on their earlier experience in interpreting treaty rights and the common law concept of aboriginal title. But they went further, clarifying that the use of the term “existing” was not meant to freeze the constitutional protection of aboriginal rights to those existing prior to 1982.⁵⁵ They also delineated the constitutional concept of “aboriginal rights,” linking it to those “practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.”⁵⁶ This judicial test for defining “aboriginal rights” was developed primarily in cases involving allegations of violations of hunting and fishing regulations and prompted judges to assess the extent to which hunting and fishing, for subsistence or exchange, were part of the precontact, aboriginal tradition. Basing modern-day constitutional entitlements on historical traditions raises fundamental questions about how to recognize group-based rights. To what extent have the courts constructed a legal test for aboriginal rights that obscures or discounts the legacy and the effects of colonization?⁵⁷

B. Language Rights

In the domain of language rights, the reforms of 1982 are also deeply significant. They reaffirmed the official status of French and English at the federal level. Reflecting the revival of the Acadian francophone community in New Brunswick, French and English were affirmed as the official languages in New Brunswick.⁵⁸ In an effort to redress the undermining of minority languages in provincial education policy, the Charter enumerated a series of minority-language educational rights.⁵⁹ Though the wording of these provisions is somewhat complicated, they are designed to ensure that minority-linguistic communities have access to primary and secondary school instruction in the minority language.⁶⁰ The entitlement to minority-language education is subject to the continued presence of a minority-language community with a sufficient number of

proscribing private purchase of such lands).

55. *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, 1091–93; see also Brian Slattery, Note, *Understanding Aboriginal Rights*, 66 CANADIAN B. REV. 727, 782 (1987).

56. *Van der Peet v. The Queen*, [1996] 2 S.C.R. 507, para. 44.

57. John Borrows, *Frozen Rights in Canada: Constitutional Interpretation and the Trickster*, 22 AM. INDIAN L. REV. 37, 38 (1997) [hereinafter Borrows, *Frozen Rights*].

58. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 16(2) (U.K.).

59. See *id.* § 23 (allowing citizens the right to have their children receive primary and secondary school instruction in English or French if English or French was their first language and the citizen received their education in that language).

60. *Id.*

children seeking minority-language instruction to justify their provision using public funds.⁶¹ These constitutional provisions therefore contain a strong collective tenor; they are community-based rights. They contain nonetheless the contradiction that assimilation risks undermining the continued availability of constitutional remedies.

Interpreting these rights has been challenging for the courts, engaging them in assessments of what level of constitutional protection is required in particular community contexts and necessitating the adjudication of constitutional rights having explicit positive rights dimensions.⁶² Of particular significance is the strongly remedial interpretation that courts have accorded to language rights, recognizing that their constitutionalization is designed to reverse assimilation of linguistic minorities. They have been understood as endorsing a form of substantive equality that “requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority.”⁶³ The courts have also recognized that the effective enjoyment of linguistic minority education rights requires constitutional protection, not only for the provision of minority-language education, but also for control and participation in the governance of educational institutions, a development that I discuss further below.⁶⁴ In this regard, the Canadian Supreme Court has acknowledged that “[e]mpowerment is essential to correct past injustices and to guarantee that the specific needs of the minority language community are the first consideration in any given decision affecting language and cultural concerns.”⁶⁵

61. *Id.* § 23(3).

62. *Mahe v. The Queen*, [1990] 1 S.C.R. 342, 362; *Arsenault-Cameron v. Government of Prince Edward Island*, [2000] 1 S.C.R. 3, para. 31. The specific programs or facilities that the government is required to provide, and the requisite degree of parental involvement, will vary depending on the number of potential students. *Arsenault-Cameron*, [2000] 1 S.C.R. para. 57; *see also* *Doucet-Boudreau v. Att’y Gen.*, [2003] 3 S.C.R. 3, para. 29 (suggesting that the “numbers warrant” standard requires governments to act in a timely fashion to provide minority language programs and/or facilities, and may require the judiciary to order affirmative remedies to secure these rights).

63. *Arsenault-Cameron*, [2000] 1 S.C.R. para. 31.

64. *Id.* paras. 42, 45–46 (citing *Mahe*, [1990] 1 S.C.R. 342, 372–75).

65. *Id.* para. 45.

C. Equality Rights

Finally, it is important to highlight the constitutional entrenchment of equality rights in the Charter.⁶⁶ Though the earlier Canadian Bill of Rights had contained an equal protection clause, it did not enjoy formal constitutional status and was interpreted in a very narrow and formalistic way by the Supreme Court of Canada throughout the 1960s and into the 1970s.⁶⁷ The equality guarantees of the Charter were drafted to preclude the restrictive interpretations of the Canadian Bill of Rights.⁶⁸ Furthermore, in addition to the equality protections set out in section 15(1), section 15(2) provides that “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”⁶⁹ This clause was added in an effort to secure the constitutionality of affirmative action initiatives and to avoid the divisive litigation that had occurred in the United States.⁷⁰ Although equality-rights litigants in Canada have not always succeeded in their claims, and recent jurisprudence suggests a tendency to limit the scope of constitutional protection, the courts have nevertheless articulated a broad definition of constitutional equality. It asks whether there is direct differential treatment or disparate effects, on the basis of an enumerated or analogous ground of discrimination, and whether, given the contextual realities of the claim, the differential treatment or effects undermines the

66. Section 15(1) provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 15(1) (U.K.). The entrenchment of freedom of religion in section 2(a) of the Charter is also significant in terms of the constitutional recognition of diversity but is not examined further in this Essay. *Id.* § 2(a).

67. See *Bliss v. Att’y Gen.*, [1979] 1 S.C.R. 183, 189–91, 194 (concluding that difference of treatment on the basis of pregnancy did not constitute sex discrimination); *Att’y Gen. v. Lavell*, [1974] S.C.R. 1349, 1352–56, 1372–73 (finding no discrimination against Indian women deprived of their Indian status upon marriage to a non-Indian). *Contra* *The Queen v. Drybones*, [1970] S.C.R. 282, 289–90, 297–98 (invalidating a law that only punished intoxicated Indians in public and no other ethnic origin).

68. Bruce Porter, *Twenty Years of Equality Rights: Reclaiming Expectations*, 23 WINDSOR Y.B. ACCESS JUST. 145, 150 (2005).

69. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 15(2) (U.K.).

70. COLLEEN SHEPPARD, ONT. LAW REFORM COMM’N, STUDY PAPER ON LITIGATING THE RELATIONSHIP BETWEEN EQUITY AND EQUALITY 39–42 (1993); see, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (affirming the use of race in a medical school admission policy).

fundamental purposes of the equality guarantees.⁷¹ Some key contextual factors, outlined by the court include:

- (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. The effects of a law as they relate to the important purpose of s. 15(1) in protecting individuals or groups who are vulnerable, disadvantaged, or members of “discrete and insular minorities” should always be a central consideration. . . .
- (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. . . .
- (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. . . .
- (D) The nature and scope of the interest affected by the impugned law. . . .⁷²

In the early Charter cases, one fundamental purpose articulated by the courts was the redressing of the historical and continuing discrimination against socially disadvantaged groups in society.⁷³ More recent jurisprudence has focused on the additional objective of protecting fundamental human dignity, a concern that highlights the individual rather than collective dimensions of equality rights.⁷⁴ As described by the court:

It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.⁷⁵

71. *Law v. Minister of Human Res. Dev.*, [1999] 1 S.C.R. 497, para. 88.

72. *Id.* para. 88.

73. See generally *Eldridge v. Att’y Gen.*, [1997] 3 S.C.R. 624, paras. 78–79; *Law Soc’y of B.C. v. Andrews*, [1989] 1 S.C.R. 143, 152; *Turpin v. The Queen*, [1989] 1 S.C.R. 1296, 1332–33 (1989).

74. *Law*, [1999] 1 S.C.R. para. 51. For commentary on the *Law* case, see generally Beverley Baines, *Law v. Canada: Formatting Equality*, 11 CONST. F. 65 (2000); Emily Grabham, *Law v. Canada: New Directions for Equality Under the Canadian Charter?*, 22 OXFORD J. LEGAL STUD. 641 (2002); Donna Greschner, Comment, *Does Law Advance the Cause of Equality?*, 27 QUEEN’S L.J. 299 (2001); Daniel Proulx, *Les droits à l’égalité revus et corrigés par la Cour suprême du Canada dans l’arrêt Law: un pas en avant ou un pas en arrière*, 61 REVUE DU BARREAU [R. DU B.] 187 (2001).

75. *Law*, 1 S.C.R. para. 51. For a discussion of the purposes of equality rights, see Greschner, *supra* note 74, at 300; Donna Greschner, *The Purpose of Canadian Equality Rights*, 6 REV. CONST. STUD. 291, 292 (2002).

Though this purposive and contextual inquiry has not always been easy to apply, the courts have endorsed the idea that a substantive conception of equality is designed to recognize that in some circumstances equality requires the accommodation of group-based differences.

III. CURRENT COMPLEXITIES

This overview of constitutional and legal change in Canada appears to convey progress—from assimilation, denial of rights, and exclusion to formal constitutional recognition and a willingness on the part of the judiciary to give a fairly expansive interpretation to modern constitutional rights and freedoms.⁷⁶ But the story is not yet over and indeed once we probe beneath the surface of formal constitutional law, a number of complexities emerge.⁷⁷ In the final section of this Essay, some of the complexities confronting a constitutionalism committed to recognizing diverse social groups are enumerated.

A. Formal Constitutional Law Versus Social Norms and Contexts

Constitutional recognition of diversity occurs against a backdrop of changing social, economic, and political conditions, which affect the interpretation and application of legal rights and state obligations. It is impossible to promote assimilation and exclusion of diverse communities for over one hundred years and then expect to reverse the effects of such policies and practices through formal constitutional law reform. The current obstacles to revitalizing group-based identity in aboriginal and linguistic minority communities reflect the limits of formal constitutional law reform. Legal recognition of the remedial role of constitutional law responds in part to this dilemma. Imposing positive rights obligations on the state entails an acknowledgment that the societal status quo is not neutral in terms of the possibility of exercising constitutional rights and freedoms. Nonintervention by the state does not equal freedom in a world of systemic and institutionalized inequalities and historic patterns of

76. While the jurisprudence reflects a willingness on the part of the judiciary to give a large and liberal interpretation to constitutional rights in some significant and leading cases, the case law is not uniformly positive. For a critical review of the first twenty years of equality rights law pursuant to the Canadian Charter of Rights and Freedoms, see *DIMINISHING RETURNS: INEQUALITY AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* (Sheila McIntyre & Sanda Rodgers eds., 2006). For a critique of judicial approaches to aboriginal rights, see Borrows, *Frozen Rights*, *supra* note 57, at 44–52.

77. See Martha Minow, “*Forming Underneath Everything that Grows: Toward a History of Family Law*,” 1985 WIS. L. REV. 819, 896–97 (1985) (evaluating family law to illustrate the complexities that underlie formal law).

assimilation and domination. Thus, while it is important to provide constitutional recognition to social groups and communities whose rights have been violated in the past, it is critical to go beyond formal recognition. It is also necessary to assess what social, political, and economic changes are needed to make possible the effective enjoyment of constitutional rights and freedoms.

Despite the importance of recognizing state responsibility for remedying historical human rights abuses, the nature of state regulation is also in a period of transition. A considerable amount of legal regulation continues to be premised on an instrumentalist approach. Positive law sets out legal prohibitions, which are subject to retroactive enforcement by state actors (courts, administrative tribunals, etc.). At the same time, however, legal regulation has evolved to embrace a range of more complex regulatory strategies. Constitutionalism increasingly operates, therefore, in a domain where state regulation embraces regulatory approaches such as the delegation of law enforcement to private actors and public-private partnership models of regulation.⁷⁸ These regulatory strategies reflect a shift away from a simple command-and-control approach and have emerged to deal with the complex, institutionalized, and systemic nature of many social problems.⁷⁹

The insights of scholars of legal pluralism have further brought to light the importance of informal legal regimes, operating in conjunction with formal law.⁸⁰ On a more macro level, globalization has impeded the ability of nation-states to affirm human rights and to protect the effective enjoyment of constitutional rights and freedoms.⁸¹ The complexity of legal

78. For an expanded discussion of these ideas, see Colleen Sheppard, *Inclusive Equality and New Forms of Social Governance*, 24 SUP. CT. L. REV. (2d) 45, 46 (2004).

79. On the limits of a retroactive complaint-based model, see Colleen Sheppard, *The Promise and Practice of Protecting Human Rights: Reflections on the Quebec Charter of Human Rights and Freedoms*, in MÉLANGES 641 (1997). In the criminal law domain, see DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 124–27 (2001).

80. See Jean-Guy Belley, *Law as Terra Incognita: Constructing Legal Pluralism*, 12 CANADIAN J. L. & SOC'Y. 17, 19 (1997) (finding that “[t]he new theoretical framework of legal pluralism urges us to observe the social diversity of law at more in-depth, less formalized levels . . . and to leave behind the more easily observed levels of organizations, explicit rules and institutional practices of regulation or conflict resolution”); Martha-Marie Kleinhans & Roderick A. Macdonald, *What Is a Critical Legal Pluralism?*, 12 CAN. J. L. & SOC'Y. 25, 30–31 (1997) (“Legal pluralists do not simply proclaim a normative competition between official State law and unofficial . . . law. . . . They signal a pervasive pluralism in law.”); Sally Engle Merry, *Legal Pluralism*, 22 LAW. & SOC'Y. REV. 869, 879–81 (1988) (analyzing the relationship between normative orders). On the intersection between human rights and legal pluralism, see generally Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CANADIAN J. L. & SOC'Y. 247, 250, 252 (1997); Colleen Sheppard, *Equality Rights and Institutional Change: Insights from Canada and the United States*, 15 ARIZ. J. INT'L & COMP. L. 143, 147–148 (1998).

81. DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 16 (1995); Frank I. Michelman,

regulation has critical implications for how the state effectively ensures constitutional recognition of diverse social groups. Thus, the affirmation and protection of constitutional rights must be assessed in a dynamic regulatory context, characterized by changing social, political, economic, and community realities.

B. Accommodation Versus Transformation: Separation Versus Mainstreaming

An important issue regarding the recognition of equality and diversity concerns the extent to which constitutional recognition of difference should result in a fundamental rethinking of the societal status quo. When should legal recognition of group-based identities entail an accommodation of difference, and when should societal norms and practices be transformed to take into account group-based realities and differences? Both strategies are important and the one that is endorsed depends on the particular social contexts. Transformative strategies are not premised on special or differential rights or entitlements being accorded to a particular group. Instead, they alter the dominant status quo to eradicate its inequitable effects.⁸² Arguably, such strategies are simultaneously both more radical and less controversial.⁸³ For example, feminist critiques of the ways in which the workplace is modeled on a male norm have prompted recommendations for the transformation of the workplace (e.g., hours of work) to make it more conducive to the equitable inclusion of women.⁸⁴ Transformative approaches represent one pathway out of what has been described as the “difference dilemma,” whereby social disadvantage can ensue both by acknowledging or denying difference.⁸⁵ To acknowledge difference risks creating occasions for social stereotyping and exclusion.⁸⁶

W(h)ither the Constitution?, 21 CARDOZO L. REV. 1063, 1063–64 (2000); Fiona Sampson, *Globalization and the Inequality of Women with Disabilities*, 2 J. L. & EQUALITY 16, 17 (2003); Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 IND. J. GLOBAL LEGAL STUD. 5, 27–28 (2003).

82. MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 85–87 (1997).

83. For more information on this idea in the context of affirmative action initiatives, see generally Sheppard, *supra* note 79.

84. Colleen Sheppard, *Individual Accommodation Versus Institutional Transformation: Two Paradigms for Reconciling Paid Work and Family Responsibilities*, in LA CHARTE DES DROITS ET LIBERTÉS DE LA PERSONNE: POUR QUI ET JUSQU’OÙ? 379–404 (Tribunal des droits de la personne & Barreau du Québec eds., 2005); see also Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1185 (1989).

85. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 49 (1990).

86. *Id.* at 50.

To deny difference risks having one's needs overlooked or ignored in a society constructed to meet the needs of dominant groups.⁸⁷ Understanding an alternative to these dichotomous choices is a significant challenge for social and public policy developments.

Nevertheless, in some circumstances, what is required is accommodation of difference to allow inclusion or participation despite nonconformity to dominant social norms. For example, in the case of religious accommodation, minority religious practices may require accommodation as much as possible combined with secure safeguards for dissenting or vulnerable members of a religious community.⁸⁸ Furthermore, in some cases, vulnerable communities seek to sustain or revitalize separate social institutions or activities. Linguistic minorities, for example, demand separate minority-language schools as a critical dimension of their struggle to maintain their minority language and culture. Aboriginal communities seek self-government. These claims must be analyzed in their historical context—and issues of inclusion, participation, and membership addressed.

Thus, the interplay between transformation and accommodation is fluid and constantly changing, depending on the specific context and circumstances. Both accommodation and transformation often exist simultaneously. For example, despite the importance of linguistic-minority educational institutions, the French language in Canada is arguably reinforced by the interest and commitment of the anglophone community in Canada to learn French as a second language.⁸⁹ Similarly, it has been suggested that beyond separate aboriginal institutions and communities, aboriginal leaders and traditions should inform nonaboriginal institutions and social and political practices.⁹⁰

87. *Id.*

88. *See, e.g.,* Syndicat de l'enseignement de Champlain v. Comm'n scolaire régionale de Chambly, [1994] 2 S.C.R. 525, 544 (stating that employers are required to take measures "to accommodate those employees that are adversely affected by the employment rules"); Alta. Human Rights Comm'n v. Cent. Alta. Dairy Pool, [1990] 2 S.C.R. 489, 520–21 (finding a duty for an employer to accommodate religious practices as long as no undue hardship existed).

89. For example, extensive French language immersion programs have been set up in public schools in the anglophone provinces across Canada. *French Immersion: Stalling Enrolment, Looming Challenges*, CBC News, Sept. 15, 2004, <http://digbig.com/4rdbg>.

90. John Borrows, "Landed" Citizenship: Narratives of Aboriginal Political Participation, in CITIZENSHIP, DIVERSITY, AND PLURALISM 72, 74 (Alan C. Cairns et al. eds., 1999); *see* Roderick A. Macdonald, *Recognizing and Legitimizing Aboriginal Justice: Implications for a Reconstruction of Non-Aboriginal Legal Systems in Canada*, in ABORIGINAL PEOPLES AND THE JUSTICE SYSTEM 232, 232–33 (1992) (arguing that aboriginal systems of law and conceptions of justice can be incorporated into the Canadian legal system).

C. The Asymmetry of Substantive Equality and the Symmetry of the Rule of Law

The recognition of group-based differences in Canadian constitutional law, through aboriginal-rights provisions, minority-language protections, and equality-rights provisions that expressly contemplate affirmative action, does not insulate Canadian law from debates about the legitimacy and fairness of according differential treatment to diverse social groups.⁹¹ It is conceptually more difficult to articulate legal principles to govern asymmetrical and group-based rights and entitlements. The individual-rights, equal-treatment model appears more readily justifiable according to the exigencies of the formal rule of law. Such is the challenge of the current era of constitutional law, where multiple justifications for group-based legal entitlements are evident. One justification is the need to remedy past wrongs, historical unfairness, assimilation, and legacies of colonialism. This is particularly relevant to aboriginal and minority-language communities. Another is the need to remedy continuing harms in the present—the continuing racism, sexism, able-bodyism, and heterosexism at the interstices of institutional and social life. This justification is reinforced by social science research revealing, for example, unconscious racism and sexism, and continued systemic inequities in educational institutions and workplaces.⁹² A third justification is the critical importance of celebrating and accommodating differences that are to be sustained in the future.⁹³ Understanding these justifications and elaborating their limits remains a critical task for constitutional scholars and jurists.

91. See SHEPPARD, *supra* note 70, at 35–48 (exploring the history of challenges brought against affirmative action measures).

92. See CAROLINE AGOCS & HARISH C. JAIN, SYSTEMIC RACISM IN EMPLOYMENT IN CANADA 3 (2001) (explaining that systemic racism “is deeply embedded within the culture of organizations, and remains invisible and untouched by equity change efforts”); JEAN LOCK KUNZ ET AL., CANADIAN COUNCIL ON SOC. DEV., UNEQUAL ACCESS: A CANADIAN PROFILE OF RACIAL DIFFERENCES IN EDUCATION, EMPLOYMENT AND INCOME 3–4, 22 (2000) (discussing disparate treatment of Canada’s minorities and noting that in 1996 twenty-three percent of individuals from racialized communities born outside of Canada were in the bottom income quintile in contrast to fifteen percent of white people born abroad).

93. See, e.g., AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 114, 114–123 (1984); see also Amy Gutmann, *Preface* to CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION ix, x (Amy Gutmann ed., 1994).

D. Complex, Dynamic and Multiple Identities: From Essentialist to Aspectival Identity

If we are to accord legal rights and entitlements to groups, it appears necessary to define group membership in some way. Yet, there is a growing recognition that identity defies such easy characterization. James Tully suggests that we have witnessed a shift from essentialist conceptions of identity to aspectival identity.

[C]ultures are not internally homogeneous. They are continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others. The identity, and so the meaning, of any culture is thus aspectival rather than essential: like many complex human phenomena, such as language and games, cultural identity changes as it is approached from different paths and a variety of aspects come into view.⁹⁴

How can the law recognize group identities as aspectival rather than essentialist? While the rule of law requires categories and principles, all of which reinforce law's essentializing tendencies, many scholars insist that categories can be used, provided they remain expressly historicized and contingent.⁹⁵

Beyond the interactive and dynamic character of groups, many individuals also have identities that embrace more than one community, rendering inadequate any legal understanding premised on a single group affiliation. Rather than dismissing as exceptional those individuals or groups whose identities are intersecting, theorists are seeking insights from the multiple consciousness such complexities can provide.⁹⁶ Similarly

94. JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 11 (1995).

95. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584–85 (1990) (arguing that a “multiple consciousness” should be used to explain the women’s experience rather than just an “‘essential’ women’s experience”); Nitya Iyer, *Categorical Denials: Equality Rights and the Shaping of Social Identity*, 19 QUEEN’S L.J. 179, 191–92 (1993) (explaining how in order for one to succeed in an antidiscrimination claim, the claimant “must present a caricature of the individual or group’s social identity, distorting the individual and communal experience of a social characteristic (one that is historically specific and contingent, and which interacts in complex ways with other characteristics), into a static and oversimplified image of the claimant’s ‘difference’”).

96. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 139–140 (1989) (critiquing the treatment of “race and gender as mutually exclusive categories” by antidiscrimination law); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–43 (1991) (discussing the failure of identity politics to recognize intragroup differences—particularly race and

overlapping identities, in some contexts, result in the emergence of new identities not contemplated by either of the traditional group-based categories.⁹⁷ Still, how do the theoretical insights translate into constitutional law and doctrine? The complexities of social identity are increasingly recognized at an abstract and theoretical level in Canadian constitutional jurisprudence; their concrete incorporation into our understanding of legal concepts is still very limited.

The constitutional recognition of diverse social groups has also been critiqued for its tendency to congeal group-based identities and to construct categories of essentialist and homogeneous group difference.⁹⁸ To what extent does identity politics lead to the legal privileging of some social groups in such a way as to result in new problems of exclusion or inequity?⁹⁹ Sherene Razack provides an account of how critiques of essentialism need not result in nonrecognition of the continuing significance of social and historical group-based differences.¹⁰⁰ For Razack, “the point of anti-essentialism is antisubordination” and the identification of “multiple systems of domination.”¹⁰¹ It requires, therefore, “a politics of accountability” which engages us in “a search for the ways in which we are complicitous in the subordination of others.”¹⁰² While acknowledging the

gender); Nitya Duclos, *Disappearing Women: Racial Minority Women in Human Rights Cases*, 6 CANADIAN J. WOMEN & L. 25, 27 (1993) (noting that identities such as race and gender are recognized by Canadian law but are not recognized together as grounds in actions); Mary Eaton, *Patently Confused: Complex Inequality and Canada v. Mossop*, 1 REV. OF CONST. STUD. 203, 206 (1994); Harris, *supra* note 95, at 584–85 (describing how the women’s experience can be better explained through many voices from different groups rather than just through a unitary experience); Iyer, *supra* note 95, at 205 (“Respect for the complexity of social identity and social relations requires an ongoing struggle against the centralizing tendencies of categorical thought.”); Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7, 7–10 (1989) (discussing multiple consciousness, examining the world from the multiple viewpoints of the oppressed, and how it should be used as a jurisprudential method).

97. For examples, in the Montreal context, some children are so fluently bilingual that they do not fit easily into the categories of anglophone or francophone, resulting in the spontaneous emergence of a new category, “bilinguals.” For a discussion of the positive dimensions of new conceptions of métissage, see FRANÇOIS LAPLANTINE & ALEXIS NOUSS, *LE MÉTISSAGE* (1997).

98. See Harris, *supra* note 95, at 585 (criticizing gender essentialism because it ignores a black woman’s experience); Macdonald, *supra* note 5, at 98 (explaining that certain brute facts such as family status and religion only acquire legal significance through state recognition and that particular identities do not have juris-generative power).

99. See Macdonald, *supra* note 5, at 91–94 (identifying three assumptions with republican legal consensus that are troubling: only certain identities are recognized, certain identities are more important than others, and the “tendency to essentialize identity for the purposes of giving or denying legal recognition”).

100. RAZACK, *supra* note 6, at 159.

101. *Id.* at 158.

102. *Id.* at 159. Razack emphasizes a politics of accountability rather than a politics of inclusion. *Id.*

risks of essentialism, she examines how interlocking systems of domination—white supremacy, patriarchy, and capitalism—constitute social hierarchies implicating identifiable subordinate and dominant groups.¹⁰³ In a similar vein, Linda Alcoff articulates the idea of “positionality,” which “conceive[s] of the subject as nonessentialized and emergent from a historical experience.”¹⁰⁴ Thus, identity is linked “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.”¹⁰⁵ Group-based claims are historicized, contingent and made in relation to specific institutional, structural, cultural, and social networks.

E. Group Representation and Conflict Within and Between Communities

According to constitutional recognition of diverse groups and moving beyond an individual-rights paradigm also raises difficult questions about who represents the group and what to do in the face of conflict both within and between constitutionally recognized social groups.¹⁰⁶ These questions have preoccupied jurists and often been the focus of litigation and conflict in the interpretation and application of various group-based constitutional guarantees. One legal response, expressly contemplated by the Charter, is a limitations clause, such that rights and freedoms guaranteed in the Charter may be subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁰⁷ This type of limitation clause allows judges to limit rights and freedoms to advance significant, pressing, and substantial government objectives. Of significance is the legal burden on the state to demonstrably justify the importance of upholding the infringement of rights and freedoms. In addition to the express limitation clause, other constitutional provisions contain explicit limitations, or have been interpreted by judges to contain internal limits when conflicting public policy concerns exist.¹⁰⁸

103. *Id.* at 158–59.

104. Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405, 433 (1988).

105. *Id.*

106. See James Tully, *Introduction* to MULTINATIONAL DEMOCRACIES 1, 3–4 (Alain-G. Gagnon & James Tully eds., 2001) (“The struggles over minority and multinational diversity overlap, compete, and undergo democratic negotiation as well.”).

107. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 1 (U.K.).

108. The equality-rights guarantees have been increasingly interpreted to have internal interpretive limits. Proulx, *supra* note 74.

The insights of Will Kymlicka, who has written extensively on multiculturalism in Canada, are helpful in delineating the logic and fairness of potential limits on the exercise of constitutional rights and freedoms.¹⁰⁹ He endorses both ethnocultural diversity and the liberal values of freedom, justice, and democracy. According to Kymlicka, liberal states “should . . . uphold the familiar set of individual civil and political rights” and “also adopt various group-specific rights and policies.”¹¹⁰ One important distinction Kymlicka elaborates is the difference between a challenge to group-based practices and traditions from within the group and a challenge from those external to the community.¹¹¹ Internal challenges deserve greater constitutional protection, since they raise questions about different conceptions of community identity within the community itself.¹¹²

Feminist postcolonial scholarship, which interrogates the denial of women’s rights within some group-based constitutional claims (i.e., freedom of religion), also provides significant insights into how to resolve some of these dilemmas without turning away from group-based claims.¹¹³ Feminist scholars challenge a monolithic understanding of community identity premised on the views of those who dominate within a community. Thus, when women assert their rights in ways that deviate from traditional customs or practices, feminists insist that community identity cannot be used to justify a denial of such rights.¹¹⁴ Women are integral to the very community whose identity is being litigated. Feminist scholars also

109. ETHNICITY AND GROUP RIGHTS (Ian Shapiro & Will Kymlicka eds., 1997) (discussing group rights throughout the world); WILL KYMLICKA, FINDING OUR WAY: RETHINKING ETHNOCULTURAL RELATIONS IN CANADA (1998) [hereinafter KYMLICKA, FINDING OUR WAY]; WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995); THE RIGHTS OF MINORITY CULTURES (Will Kymlicka ed., 1995).

110. WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 9 (2001) (referring to an emerging consensus in this regard, which he labels “liberal culturalism”). In this book, Kymlicka also explores the connection between the protection of minority rights and nation-building. *Id.* at 10.

111. KYMLICKA, FINDING OUR WAY, *supra* note 109, at 62.

112. *Id.*

113. VRINDA NARAIN, GENDER AND COMMUNITY: MUSLIM WOMEN’S RIGHTS IN INDIA 4 (2001); see Francisco Valdes et al., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1, 2 (Francisco Valdes et al. eds., 2002) (mentioning that racism cannot be fought “without [also] paying attention to sexism, homophobia, economic exploitation, and other forms of oppression or injustice”); see also AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 47–49 (2001) (expressing that tensions are increased when certain members’ rights within a group are ignored by the state). See generally THE GENDER OF CONSTITUTIONAL JURISPRUDENCE (Beverley Baines & Ruth Rubio-Marin eds., 2005); Ayelet Shachar, *Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies*, 50 MCGILL L.J. 49, 51–52 (2005).

114. NARAIN, *supra* note 113, at 4; Schachar, *supra* note 113, at 53.

highlight the larger historical context within which current debates occur. Heightened discrimination against women within certain communities reflects a reaction to the processes of colonialism and neocolonialism.¹¹⁵

F. Dialogue and Mediation: The Substance and Process of Constitutional Recognition

Recognition of multiple identities as integral to a conception of Canadian political nationality and citizenship must also go beyond the question of what rights are recognized to examine the further question of *how* diverse identities are recognized. In her article, *New Constitutionalism: Democracy, Habermas and Canadian Exceptionalism*, Simone Chambers describes “[t]he two main characteristics of a new constitutionalism are increased recognition and respect for diversity and a growing demand for popular consultation and accountability.”¹¹⁶ She explains that “[n]ew constitutionalism combines the centrality of rights found in modern constitutionalism with the role of practice in ancient constitutionalism.”¹¹⁷ For a growing number of scholars, therefore, dialogue across group-based differences is the essence of constitutionalism. Tully articulates “[a] philosophy and practice of constitutionalism informed by the spirit of mutual recognition and accommodation of cultural diversity,” and explains how this entails “the negotiation and mediation of claims to recognition in a dialogue governed by the conventions of mutual recognition.”¹¹⁸

The idea of dialogue within a context of “mutual recognition” has important implications. Firstly, it provides us with a middle ground between the dichotomous extremes of either nonrecognition (that is, assimilation into a dominant norm) or complete separation without bridging the divide of difference between communities. Secondly, it articulates a way of communicating across differences, endorsing a democratic constitutionalism that is attentive to adequate representation, mutual recognition, accountability, inclusive participation, consultation, and dialogue.¹¹⁹

115. NARAIN, *supra* note 113, at 13–24; Annie Bunting, *Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies*, 20 J.L. & SOC'Y 6, 15 (1993); Sherene Razack, *Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race, and Gender*, 8 CANADIAN J. WOMEN & L. 45, 48 (1995).

116. Simone Chambers, *New Constitutionalism: Democracy, Habermas, and Canadian Exceptionalism*, in CANADIAN POLITICAL PHILOSOPHY 63, 71 (Ronald Beiner & Wayne Norman eds., 2001).

117. *Id.* at 75.

118. TULLY, *supra* note 94, at 209.

119. *See* Council of the Haida Nation v. Minister of Forests, [2004] 3 S.C.R. 511, paras. 16–25.

CONCLUSION

Embedded in the national identity of Canada is an acceptance of linguistic, cultural, and regional differences. Historically, some dimensions of Canadian diversity, particularly the linguistic and religious diversity of Quebec within the Canadian federation, were addressed through the structural mechanisms of federalism. Over the past thirty years, however, we have witnessed the formal constitutional recognition of other collectivities and groups, most notably the aboriginal peoples of Canada and linguistic-minority communities. Strengthened equality-rights guarantees have also opened the door to the assertion of group-based claims and the entitlement to inclusion in the face of difference. Such formal recognition, however, is merely the beginning of a process of responding to complex questions about the contours of group-based rights and entitlements and of understanding the dynamic between formal law and social practice. It is hoped that the answers we begin to articulate will provide insights into a constitutionalism that makes us accountable for histories of systemic and institutionalized inequities and open to the creative protection, flourishing, and renewal of social and cultural diversity.

(discussing the importance of consultation); RAZACK, *supra* note 6, at 159 (discussing the need for “a politics of accountability”).