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TABLE OF CONTENTS

ARTICLES

REVIEW ESSAY

BOOK REVIEW

SOVEREIGNTY, RACISM, HUMAN RIGHTS: INDIAN SELF-DETERMINATION AND THE POSTMODERN WORLD LEGAL SYSTEM

Robert A. Williams, Jr.*

Among the numerous challenges facing indigenous peoples in their struggles for self-determination is that of engaging with the dominant discourse of colonizing powers. The paper identifies three such challenges to indigenous claims of self-determination. The first is the role of 'sovereignty' both as a legal concept which structures claims of indigenous rights in the United States and as a political concept invoked to delegitimate indigenous claims to self-determination. The second is the legacy of colonialism and racism which helps give shape to the legal model of sovereignty and defines the acceptable parameters of indigenous self-determination. In order that these two challenges be overcome, an alternative means to promote the decolonization efforts of indigenous peoples is suggested in the sphere of international human rights law. In the postmodern world — one shaped by sophisticated communication technologies, emergent international institutions, and a heightened awareness of global interconnectedness — indigenous peoples are capable of exerting influence at the international level invoking the discourse of human rights. The openings provided by the new international human rights agenda may prove to be the most effective vehicle with which to promote the decolonization efforts of indigenous peoples, transform the domestic policies of the advanced democracies and also improve the condition of indigenous peoples in other countries.

Parmi les nombreux dèfis à relever dans leur lutte pour l'autodètermination, les peuples autochtones doivent notamment combattre le discours dominant des puissances colonisatrices. L'article retient trois de ces dèfis. Le premier est le rôle de la souverainetè à la fois en tant que concept juridique structurant la revendication des droits autochtones aux États-Unis, et en tant que concept juridique èvoquè pour nier la lègitimitè des aspirations autochtones à l'auto-dètermination. Le second est l'hèritage colonialiste et raciste qui contribue à façonner le modèle juridique de souverainetè et définit les paramètres acceptables de l'autodètermination autochtone. Selon l'article, une façon possible de surmonter ces deux paramètres consisterait à promouvoir les efforts de dècolonisation des peuples autochtones dans le domaine du droit international en matière de droits de la personne. Dans le monde postmoderne — modelé par les technologies avancées de la communication, les institutions internationales naissantes et un sens aigu de l'interconnectivitè globale, les peuples autochtones peuvent exercer leur influence au niveau international en adoptant le discours des droits de la personne. Les ouvertures fournies par le nouveau programme des droits de la personne pourraient bien constituer la façon le plus efficace de promouvoir les efforts de dècolonisation des peuples indigènes, de transformer les politiques domestiques des dèmocraties èvoluèes et d'amèliorer la condition des peuples indigènes des autres pays.

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The mark of the modern world is the imagination of its profiteers and the counter-assertiveness of the oppressed. Exploitation and the refusal to accept exploitation as either inevitable or just constitute the continuing antinomy of the modern era, joined together in a dialectic which has far from reached its climax in the twentieth century.

I.M. Wallerstein, *The Modern World-System*[1]

I. Introduction

In this paper, I examine three central and problematic challenges confronting the self-determination struggles of indigenous tribal peoples in the world today. I point to these challenges as central because no indigenous group can hope to attain its collective aspirations for self-determination without meeting and overcoming these challenges in direct and decisive fashion. These challenges are problematic because each demands engagement with an imposing set of theoretical and practical arguments by which the oppressor's history consistently has opposed the decolonization efforts of indigenous peoples.

The three challenges I will be discussing revolve around: (1) the present-day models by which the majority society seeks to accommodate the claims for "sovereignty" asserted by indigenous peoples; (2) the continuing legacy of cultural racism directed against indigenous peoples perpetuated by the courts of the majority society in applying these models; and (3) the emerging discourse of indigenous human rights which asserts a higher law as governing the rights and status of the world's indigenous peoples.

Of necessity, my remarks on these complex challenges will be limited to certain critical aspects and problems raised by each. Further, the specific context I will be elaborating for these three challenges is similarly limited. For the most part, I will be addressing how these challenges affect the struggle of American Indian tribes in the United States for self-determination. Concededly, that struggle possesses certain aspects that are unique to the legal and political developmental context of Indian tribal rights and status in my

[1] I.M. Wallerstein, *The Modern World-System I: Capitalist Agriculture And The Origins Of The European World-Economy In The Sixteenth Century* (New York: Academic Press, 1974) 357.

country.[2] But I believe that my explorations into the three challenges of sovereignty, racism, and human rights for Indian tribes in the United States can illuminate a broadened horizon for understanding the indigenous rights struggles that are simultaneously occurring and accelerating within other western constitutional democracies, specifically Canada, New Zealand, and Australia.

The indigenous struggles for self-determination in all of these western settler-states inevitably share certain common elements. In all of these countries, as Professor J.G.A. Pocock has reminded us, "language, law, and values are in significant measure English in their derivation."[3] The political resurgence of indigenous peoples in each of these countries is in fact a reaction against a shared English legal heritage: the doctrine of discovery and other jurisprudential remnants of the European colonial era absorbed into the common law of England.[4] At the same time, and in paradoxical fashion, the indigenous political resurgence in these English-derived settler-states is being sustained and nurtured by a constitutive part of that same legal heritage; an abiding receptivity to the discourse of natural rights as generated out of the Enlightenment era writings of theorists such as Thomas Jefferson and John Locke and the organizing thematics of the French and American Revolutions.[5]

Paramount to the discourse of natural rights is its humanistic embrace of a theory of governmental legitimacy grounded upon the consent of the

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2 These aspects are covered comprehensively in the following texts; F.S. Cohen, *Handbook of Federal Indian Law* (Charlottesville, Mitchie Bobbs-Merrill, 1982); D.H. Getches, C.F. Wilkinson, R.A. Williams, Jr., *Federal Indian Law: Cases and Materials*, 3rd ed. (St. Paul, Minn.: West Publishing Co., 1993) [hereinafter *Federal Indian Law*]. See also W.C. Canby, Jr., *American Indian Law in A Nutshell*, 2d ed. (St. Paul, Minn.:West Publishing Co., 1988).

3 J.G.A. Pocock, "Law, Sovereignty And History In A Divided Culture: The Case Of New Zealand And The Treaty Of Waitangi" (The Iredell Memorial Lecture, Lancaster University, 10 October 1991) reprinted in *Federal Indian Law*, *ibid.* at 998.

4 On the doctrine of discovery and the English common law, see generally R.A. Williams, Jr., *The American Indian In Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

5 See A.P. d'Entèves, *Natural Law: An Introduction To Legal Philosophy*, 2d rev. ed. (London: Hutchinson University Library, 1970) at 51-63.

governed.[6] So long as indigenous peoples can continue to point out the embarrassing fact that they never consented to self-extinguish their distinct group identities and freely incorporate themselves within these English-derived settler-states, they will continue to be able to frame a compelling case for their fundamental human right of self-determination. Significantly, they can state this case in terms which a western constitutional democracy, by its own sustaining political and legal traditions, is obliged to respect and entertain.

The fact is that the demands of indigenous peoples for greater self-determination rights have gained the increasing attention of the English-derived settler-state governments during the past several decades. What is all the more significant is that these demands most often assert a claim for the restoration of indigenous peoples' jurisgenerative power;[7] that is, a claim for the power of indigenous communities to resume living by a law of their own choosing and creation, even when that law may appear as antithetical to the structure and spirit of the majority society's law.[8] At base then, indigenous self-determination demands can be seen as a potentially destabilizing threat to the monopoly of power traditionally exercised by settler-state governments over indigenous communities. The increasing attentiveness of English-derived settler-state governments to the jurisgenerative claims of indigenous peoples in spite of (or perhaps precisely because of) this threat underscores the deep resonances in the English-derived political and legal tradition to the simple assertion by a people of a natural right to determine their own form of self-government.

There is more at work here, of course, than the admirable qualities of a near-four centuries-old political and legal tradition to recall its theoretical groundings in a theory of consent, and entertain the complaints of those non-

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6 *Ibid.* at 57-62. The classic statement, of course is contained in the American Declaration of Independence of 1776: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, *governments are instituted among men, deriving their just powers from the consent of the governed*" [emphasis added].

7 On jurisgenesis and shared normative commitments among the citizenry of a law-creating community, see R.M. Cover, "Forward: Nomos and Narrative" (1983) 97 Harv. L. Rev. 4.

8 See J.G.A. Pocock, *supra* note 3 at 3.

English-derived indigenous peoples who have never contracted for their colonial domination. In each of these western constitutional democracies there are other common forces at work which are shaping the theoretical and practical contours of the decolonization efforts of indigenous peoples. Each of these countries, in varying but mutually reinforcing and significant degrees, is an influential participant in the consolidation of what I will be referring to throughout this paper as a *postmodern world legal system.*

My use of the term 'postmodern world legal system' to describe an increasingly globalized system of law and authoritative decision making in which indigenous peoples assert their rights to self-determination borrows from and extends a concept elaborated by the historian Immanuel Wallerstein. In his pioneering book, *The Modern World-System I: Capitalist Agriculture and the Origins of the European World Economy in the Sixteenth Century*,[9] Wallerstein contends that the "modern world system has boundaries, structures, member groups, rules of legitimation, and coherence. Its life is made up of the conflicting forces which hold it together by tension, and tear it apart as each group seeks eternally to remold it to its advantage."[10]

Wallerstein's book focuses on articulating the functioning of the modern world system which emerged out of the European world economy in the sixteenth century. I have borrowed and built upon his concept to describe the functioning of a distended by-product of this same system, a postmodern world legal system.

Briefly, by the term postmodern world legal system, I mean to refer to an evolving, globalized system of law and authoritative decision making which has emerged in the postmodern world.[11] The postmodern world, as

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9 I.M. Wallerstein, *supra* note 1.

10 *Ibid.* at 347.

11 The philosopher Jean-François Lyotard, uses the word "postmodern" to describe "the condition of knowledge in the most highly developed societies." The "postmodern condition," writes Lyotard, designates "the state of our culture following the transformations which, since the end of the nineteenth century, have altered the game rules for science, literature, and the arts." See J.F. Lyotard, *The Postmodern Condition: A Report On Knowledge*, (Minneapolis: University of Minneapolis Press, 1984). The "crisis of narratives" (see *ibid.*), out of which these transformations are generated applies equally to the narratives of law in a postmodern world. See

penetratingly described by the poet and statesman Václav Havel, is the world which has emerged out of the two most important political events in the second half of the twentieth century: the collapse of colonial hegemony and the fall of communism.[12]

The postmodern world, in other words, is a decolonized world, and a postmodern world legal system addresses itself to the central political task of our era. It seeks to link the various nation-states, international and regional organizations, informal trading blocs, institutionalized efforts toward economic integration and cooperation, non-governmental organizations and other non-state actors, including transnational corporations and multilateral lending institutions of the postmodern world through a diversity of overlapping and ever-expanding relationships of interdependence and mutual accommodation.[13]

The developing legal system which seeks to nurture the complex networks of economic, cultural, social and strategic cooperation characterizing the postmodern world is sustained by ever-improving communications technologies and media penetration around the world. It is accompanied by a historical shift in global rationality and relationality potentially every bit as significant as was the Industrial Revolution in shaping human consciousness. In this newly-emergent plural legal order,[14] domestic law and legislation, international law and standard-setting activities, global and regional trade agreements, treaties, tariffs and accords, and other multiple sources of law together with formal as well as informal sanctioning authority, function and

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generally, R.M. Cover, *supra* note 7 at 4-11.

12 V. Havel, "Postmodern World Needs New Principle" *The [Tucson] Arizona Daily Star* (8 July 1994) A13 (containing excerpts from the address of V. Havel, president of the Czech Republic, on the occasion of receiving the Liberty Medal on July 4, 1994, at Independence Hall in Philadelphia).

13 See S.J. Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective* (1989-90) Harvard Indian Law Symposium 191 at 211-212. See also R.A. Williams, Jr. "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) Duke L.J. 660 at 682-684 [hereinafter "Encounters"].

14 See S.E. Merry, "Legal Pluralism" (1985) 22 Law & Society Rev. 869; A. Ahmed An-Na Im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest For Consensus* (Washington: Brookings Institution, 1990) 1-15.

intersect in myriad ways. The overarching goal of this emerging legal order is to connect the various actors engaged in the system into ever-expanding networks of relationships defined according to consensually agreed upon legal modalities and norms. Processes of mediation and negotiation are widely institutionalized throughout the system. But normative linkages also arise *ad hoc* out of complex relational structures designed to encourage participation according to sophisticated calculations of self-interest. The notion that strategic interests are advanced through the mutualization and integration of political, social, and economic goals and agendas on a broadened, globally-defined scale constitutes, in fact, a paradigm for behaviour in a postmodern world legal system.

Thus, while the specific context for this paper is the struggle for indigenous self-determination carried on by American Indian peoples in the United States, it must be recognized that this struggle takes place within the larger, interactive context of an emergent postmodern world legal system and its developing norms, monitoring processes, and institutions. That indigenous peoples have increasingly turned to this system for assistance over the past several decades in their decolonization efforts makes good strategical sense. The genesis of a postmodern world legal system is intimately related to the decolonization processes spawned in dialectical reaction to European colonial expansion.[15] If there *is* a logic to history, then indigenous peoples have seized upon it in recognizing the liberationist trajectory of the jurisgenerative processes which have emerged out of the postmodern world legal system. Viewed from this perspective, the increasing focus and attention of this system on indigenous peoples' demands for self-determination marks a truly revolutionary development. In ways heretofore unimagined and unimaginable the postmodern world legal system links the aspirations of indigenous peoples for self-determination in the United States with the indigenous decolonization struggles occurring in the other western constitutional democracies and around the world as well.

Thus, my intent in this article is to engage in a localized examination of the challenges of sovereignty, racism, and human rights which confront the self-determination struggles of American Indian peoples under United States law. Such localized efforts, I believe, are essential to the larger project of

[15] See "Encounters," *supra* note 13 at 672-680.

theoretical and practical reconstruction of claims to indigenous self-determination which the jurisgenerative processes of the postmodern world legal system can sustain and accommodate on a global scale.

II. Sovereignty

A. Indigenous Claims for Sovereignty

The first challenge which confronts indigenous peoples in their struggles for self-determination in the postmodern world legal system involves the most central political questions for the cultural survival of indigenous groups. How are the claims for sovereignty asserted by indigenous peoples accommodated by the dominant societies which presently rule over them? Fundamentally, what models and institutions are capable of functioning fairly and effectively to assure the cultural survival of indigenous peoples as self-governing autonomous groups? How do the Western constitutional democracies deal with these peoples who insist upon the legal and political recognition of their aboriginality; that is, their rights and status as culturally distinct groups with an existence on the land antedating the majority society?

By virtue of their aboriginality, indigenous peoples are enabled to state their claims to sovereignty as originating in a higher law predating the majority law's constitutional settlement. "We were here first," indigenous peoples assert, and that fact, they claim, has moral, ethical, political, and legal significance; enough significance in fact, that their settler-state governments must respond to their demands for recognition of their aboriginal sovereignty, or else be held accountable for their cultural extinction as groups.

At the level of political theory, therefore, indigenous claims for sovereignty immediately confront the problem of developing models and institutions for determining indigenous rights which, at base, deny the foundational legitimacy of the unconstrained political power historically exercised over indigenous peoples and their territories by the majority society. Given their minority status in most of the countries of the world, how do indigenous peoples overcome the challenge of developing a political theory of their rights to sovereignty capable of moving the majority, by the sheer force of its moral coherence and political persuasiveness, to accede to their demands? Particularly given the state-centered nature of most of contemporary political

discourse in the West,[16] how do indigenous claims to sovereignty confront and overcome the problem of appearing to threaten the territorial integrity of the western nation-states within which indigenous peoples presently reside and assert their claims?

In the main, most indigenous claims to 'sovereignty' do not intend to rise to the level of a demand to secede. Instead, indigenous claims to 'sovereignty' more accurately can be said to comprehend a jurisgenerative demand on the part of indigenous peoples to live by a law of their own choosing and creation. An indigenous law, of course, holds the potential of being a law which is separate and distinct from the majority society's law, and might, at times, even be opposed to the spirit of the majority society's law. Indigenous claims to sovereignty thus do appear to threaten to undermine the legitimating power of the majority society's law, fragmenting and destabilizing its universality of application within the territorial borders of the state.

The first task, therefore, is to move the majority society to the point of resolving that, at least at the level of theory, indigenous peoples have a right to a restoration of their jurisgenerative sovereignty unconstrained by the majority society. Convincing the majority society that it should find a way to accommodate indigenous peoples' demands for sovereignty, is, in and of itself, a formidable task. And, even if indigenous peoples can convince the majority society to accept a political theory requiring it to recognize indigenous claims for sovereignty, indigenous peoples will still confront immense practical problems of implementing their theoretical sovereignty in the face of entrenched interests, equities, and expectations built up over the centuries since the majority society's conquest and colonization took place. A fierce resentment and resistance will most certainly be encountered from those members of the dominant society who see themselves as potentially disadvantaged by any type of threatening indigenous sovereignty claims.

Particularly where they represent a small minority within the general population, the challenge raised for indigenous peoples' in realizing their claims for sovereignty is one of developing workable models and institutions

[16] See S.J. Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs" (1994) 28 Georgia L. Rev. 309 at 362-363.

which are capable of acceptance and incorporation within the majority society's political system. At the same time, these models and institutions must maintain a legitimate and realistic capability of justly accommodating indigenous peoples' self-determining aspirations for jurisgenerative autonomy. As I will attempt to show in this part of the article, the models and institutions which presently serve to address indigenous peoples' claims to sovereignty in the western settler-states are generally incapable of meeting this central and problematic challenge confronting the indigenous struggle for self-determination in the postmodern world. Short of violence (which would be ill-advised in virtually every case of continuing western colonial domination of indigenous peoples), only a radical transformation of the ways in which settler-state governments seek to accommodate indigenous sovereignty claims will enable indigenous peoples to attain their collective aspirations for meaningful self-determination and assure their cultural survival.

B. The "S" Word

The challenge presented by indigenous claims for sovereignty is made all the more difficult by use of the word 'sovereignty' itself. It is, in many ways, unfortunate that this archaic word has assumed a central place in the contemporary language of indigenous struggle for self-determination in the postmodern world. The word 'sovereignty' emerged out of what has been called a "long and chequered" history connected with the medieval feudal world of Western Europe.[17] It has been termed an "incubus" by Professor Brierly, the leading writer on the international law tradition in the West; one of those concepts which "become our tyrants rather than our servants when they are treated as real existences and developed with disregard of their consequences to the limit of their logic."[18]

For western legal and political thought, the idea of 'sovereignty' emerged in the sixteenth century with Jean Bodin's publication of the *DeRepublica* (1576).[19] For Bodin, the idea of sovereignty required one final source from which a state's laws proceed. His theory of sovereignty represented a

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[17] J.L. Brierly, *The Law of Nations: An Introduction to The International Law of Peace*, 6th ed. by H. Waldock (Oxford: Clarendon Press, 1963) at 2-16.

[18] *Ibid.* at 46.

[19] *Ibid.* at 7.

counterweight to the fissiparous tendencies of feudalism at a time in Europe's history when unified monarchial states were only slowly and tortuously consolidating their territorial authority. Bodin's theory, of course, could not escape the historical context which necessitated its creation. The exercise of sovereignty, as conceptualized in Bodin's theory, required not just a sovereign, but a sovereign *state*, defined by territorial borders. Within those borders, the sovereign's law reigned supreme above any other human source of law.[20]

Less than a century later, Thomas Hobbes completed the idea of the sovereign as the holder of the strongest power in the territorially-defined state, no matter how that power might have been acquired. Unfortunately, Hobbes' amoralistic identification of sovereignty with might instead of legal right removed the concept from the sphere of jurisprudence, "where it had its origin and where it properly belongs, and ... import[ed] it into political science, where it has ever since been a source of confusion."[21]

The conceptual confusion had particularly devastating practical consequences for indigenous peoples, for in extending their territorial power to the New World and other non-Christian countries, Europeans immediately sought to consolidate their colonial claims according to a logic driven by this relentless Hobbesian-drawn language of sovereignty. Might, in terms of imperial claims on overseas territory, meant right, and acquiring the right of sovereignty over a colonial possession which other European imperial powers were obliged to recognize meant the exercise of an absolute and effective power of occupation over that territory.[22]

For indigenous peoples, the Hobbesian calculus of sovereignty effectively determined their subordinate status under the models and institutions subsequently established to define their rights by their invading settler-state governments. The European-derived theory of sovereignty could not

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20 *Ibid.* at 7-12.

21 *Ibid.* at 13.

22 See *Johnson* v. *McIntosh* 21 U.S. (8 Wheat.) 543 (1823) (describing the principle agreed upon by the "potentates of the Old World" that discovery by a European nation of territory occupied by indigenous tribal peoples "gave title to the government by whose subjects, or by whose authority it was made, against all other European governments, which title might be consummated by possession" in *ibid.* at 572-573).

accommodate a competing power exercising the untrammelled right to make laws within a colonial territory in the New World. The sovereignty of the New World's indigenous peoples, therefore, was "diminished," denied, or extinguished, depending on the positive law and jurisprudence developed by the Western settler-states' legislatures and courts. Indigenous peoples, by virtue of their "discovery" by Europeans, simply lost the unchecked power to live by a law of their own choosing.

This theoretical vanquishment of indigenous peoples' claims to an undisputed sovereignty on their aboriginal lands was both efficient and absolutely necessary. Without it the very practical and profitable processes of European colonial acquisition and consolidation as regulated by European notions of international law would have been greatly hindered. In theory and in practice, the colonizing nations of Europe were compelled to assert their superior sovereignty over the indigenous peoples of the territories they claimed as under their control.

Seen from this historical perspective of the word and its development, it becomes somewhat easier to understand why the demands for 'sovereignty' made by indigenous peoples are oftentimes perceived with such seeming dread by the western constitutional democracies. We are still captives of Hobbes' amoral, absolutist construction of the "S" word, and we still have difficulty conceptualizing law-making authority according to narratives which entertain ways of looking at the world in non-hierarchial, non-state centered terms.

And so a word which emerged out of the tangled history of Western Europe's struggle to consolidate state power and territory in the post-Renaissance period has become, almost by conceptual default, the ill-suited vehicle for indigenous peoples to attempt to undermine the distended by-products of European colonial acquisition; the European-derived settler-states. How far the 'sovereignty' vehicle is likely to travel in carrying the burden of indigenous peoples' aspirations to self-determination in the postmodern world is difficult to predict at this point, but it is useful to remember that in constructing their demands for jurisgenerative autonomy around the "S" word, indigenous peoples are driving head-on into the very historical foundations of the consolidation of the western settler-states. In light of this fact, it might be

apt to recall the admonishment of the African-American poet Audre Lorde; the master's house will not likely be torn down with the master's tools.[23]

Perhaps we are better advised to deal in realities, and not mere wordplay, when we are discussing the indigenous struggle for self-determination in the western constitutional democracies. There are strong arguments for abandoning the term sovereignty, not the least of which is that, for the most part, the perceived threat to the majority society whenever the term is too carelessly bandied about by indigenous peoples and their advocates in their more extreme moments is largely unintended. With but a few notable exceptions,[24] most indigenous people (at least most of the ones I talk to) when pressing their claims for sovereignty, are not seeking the partial or total disruption of the national unity and territorial integrity of their settler-state governments.

For most indigenous peoples, the term 'sovereignty' comprehends a range of imagined and even yet-to-be imagined alternatives for achieving their self-determining aspirations for jurisgenerative power over their lands and communities. An indigenous claim for sovereignty, in this sense, is simply an appeal for ending indigenous peoples' continuing state of disempowerment in the postmodern world, and an invitation to their settler-state governments to open up a dialogue on developing models and institutions capable of realizing at least some of those alternatives.[25]

Unfortunately, the present models and institutions administered by the settler-state governments to address indigenous sovereignty claims cannot accommodate even this very limited meaning of the term sovereignty. It should not be all that surprising, therefore, that in some contemporary instances, violence, as has happened at Chiapas in Mexico, at Oka in Canada, and at Wounded Knee in the United States, has been an unfortunate by-product where those demands have been too greatly disregarded or ignored. In truth, no western constitutional democracy has as yet developed models and

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23 A. Lord, "The Master's Tools Will Never Dismantle the Master's House" in *Sister Outsider: Essays and Speeches* (Trumansburg, N.Y.: Crossing Press, 1984) 110.

24 See, for example, M.K. Dudley & K.K. Agard, "A Hawaiian Nation II: A Call For Hawaiian Sovereignty" (Na Kane O Ka Malo, 1990).

25 See generally Anaya, *supra* note 16 at 339-360.

institutions that might allow indigenous peoples to escape their present state of disempowerment; or that invite meaningful dialogue on how they might realize their self-determining aspirations for jurisgenerative power over their own communities and lands.

C. The Marshall Model

Until such innovations do occur, violence, no matter how ill-advised, will always remain an alternative and a possibility. Innovation in this area, however, will be exceedingly difficult to achieve, given the rigid, unaccommodating nature of the existing models and institutions that do pretend to address indigenous sovereignty claims in the western constitutional democracies.

The models and institutions administered by the western settler-states to address indigenous demands have historically vested in the majority society a unilateral power to define and limit the scope of indigenous sovereignty, or to simply extinguish the group rights and cultural existence of indigenous peoples.[26] It is difficult to comprehend how indigenous peoples' claims for sovereignty can be justly accommodated by such models and institutions. They essentially provide the majority society with an unappealable veto power over those aspects of indigenous self-determination it finds abhorrent to the spirit and structure of its own laws, or simply inconvenient according to its own rationally-defined self-interests.

For the purposes of this paper, I will rely on the federal-tribal relationship as developed under United States law as my example of just how deficient the models and institutions developed to respond to indigenous sovereignty claims in the European-derived settler-states are. The modern-day relationship between Indian tribes and the United States government traces its origins to a series of early nineteenth century United States Supreme Court cases authored by Chief Justice John Marshall. In *Johnson* v. *McIntosh* (1823),[27]

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[26] See R.A. Williams, Jr., *supra* note 4 at 325-328; R.A. Williams, Jr., "Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination" (1991) 8 Ariz. J. of Intn'l. & Comp. L. 5 at 52.

[27] *Supra* note 22.

Cherokee Nation v. *Georgia* (1831)[28] and *Worcester* v. *Georgia* (1832),[29] Chief Justice Marshall authored a set of holdings which later United States courts would develop into the three core principles of the federal-tribal relationship under United States law. The first and most important of these principles is embodied in the Congressional Plenary Power doctrine, and holds that Congress exercises a plenary authority in Indian affairs. The second of these core principles is represented by the Diminished Tribal Sovereignty doctrine, which holds that Indian tribes still retain those aspects of their inherent sovereignty not expressly divested by treaty or congressional statute, or implicitly divested by virtue of their status. The third and final of these foundational principles, contained in the Trust doctrine, holds that in exercising its broad discretionary authority in Indian affairs, Congress and the Executive branch are charged with fiduciary-type responsibilities, similar to those of a guardian, when acting on behalf of its dependent Indian wards.[30]

Marshall's decisions, and the structuring principles derived from them, have determined not only the contours of the modern federal-tribal relationship under United States law. The "Marshall trilogy," as the decisions have been called, have been sifted and digested by courts in other English-derived settler states in their search for principles defining indigenous peoples' rights in their countries.[31] Concepts of aboriginal title and extinguishment, the guardian-ward relationship, and aboriginal sovereignty and self-government, which are found reflected and debated in the laws and policies of Canada, Australia, and New Zealand can be found problematized for the first time by an English-derived settler state court in Justice Marshall's famous Indian law decisions. Reform and innovation in responding to indigenous sovereignty claims in any of these countries, therefore, must grapple with the underlying structure of indigenous rights and status first elaborated in these early nineteenth century decisions.

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28 30 U.S. (5 Pet.) 1 (1831).

29 31 U.S. (6 Pet.) 515 (1832).

30 See R.A. Williams Jr., "Law and Native Americans," in Mary B. Davis, ed., *Native America In The Twentieth Century: An Encyclopedia* (New York: Garland Publishing, Inc., 1994) 312 [hereinafter "Law"].

31 See sources cited in *supra* note 26.

1. *Johnson* v. *McIntosh*[32]

There is a long and complex history leading up to the Marshall trilogy of decisions. This history must be accounted for in trying to explain why those western settler-state governments which have accepted many of the basic principles elaborated in Marshall's model of indigenous rights cannot ever realistically be expected to justly accommodate the claims for sovereignty made by indigenous peoples today.

The basic premises of Marshall's model of indigenous peoples' rights derive from the Christian European Crusades of the 11th through 13th centuries. These holy wars of conquest and colonization declared by the Roman Catholic Church were fought by armies led by Christian princes under a legal theory which denied rights of self-rule and property to the "heathen and infidel" peoples who "unjustly" occupied Jerusalem and the Holy Lands. According to medieval Church legal theory, the Pope in Rome, as Christ's vicar on earth, could authorize Christian princes to raise armies and reclaim lands and property held unlawfully anywhere in the world by "pagan" non-Christian peoples who violated Church-declared principles of "natural law."

This same medievally-derived Christian European legal tradition of crusading conquest and colonization was utilized by Christopher Columbus in the late fifteenth century to claim the territories he "discovered" in the New World for his colonial sponsor, the King and Queen of Spain. The seeming backwards stage of civilization of the tribal peoples encountered and described by Columbus on his first voyage convinced the Pope in Rome to confirm the titles to New World territories claimed by Spain by virtue of the Genoan captain's discoveries. By a series of papal bulls — legal proclamations backed by the sanction of excommunication from the Catholic Church — the Pope donated the entire New World to Spain and placed the indigenous tribal peoples of all territories discovered or to be discovered in the region under the jurisdiction and guardianship of the Spanish Crown.

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[32] The discussion of the historical background of *Johnson* v. *McIntosh* in this section of the Article has been adapted from "Law," *supra* note 30 at 312-313; R.A. Williams Jr., *supra* note 4. Those interested in a more detailed and fully referenced discussion of the role of Church crusading discourse in the development of the doctrine of discovery will find it in those sources.

Following Spain's discoveries in the New World, other Christian European monarchs soon sought to secure rights and privileges in infidel-held territories around the world. All of them proceeded under the medievally-derived legal theory of a European Christian nation's superior rights of self-rule and jurisdiction over the territory and resources held by non-Christian "savages."

The Protestant Reformation of the sixteenth and seventeenth centuries finally freed England to challenge papally-based Spanish claims to control entire infidel-held continents in the New World. Subsequent English monarchs simply adopted and refined the Catholic Church's medieval crusading legal tradition denying non-Christian heathen and infidel peoples rights to self-rule and territory in order to expand England's own claims over the entire continent of North America. From the initial settlement of its first permanent colony at Jamestown, English colonization of North America proceeded on the basis of a model which recognized the English Crown's superior rights of sovereignty in lands discovered by its subjects which were occupied by "infidels and savages."

Marshall's 1823 opinion for the United States Supreme Court in *Johnson* v. *McIntosh*,[33] in essence, formally accepted this medievally-derived Christian European legal tradition justifying conquest and colonization of non-Christian peoples as the basis of United States political power over American Indian tribes. *Johnson* involved the question of whether Indian tribes possessed the rights to complete sovereignty over the lands they occupied since time immemorial, including the right to sell their lands as sovereigns to whomsoever they pleased.

Chief Justice Marshall, writing for a unanimous court, held in *Johnson* that under that "great and broad rule" agreed to by "all the nations of Europe" discovery of territory in the New World gave the discovering European nation, in Marshall's words, "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[34] This doctrine of

[33] *Supra* note 22.

[34] *Ibid.* at 587. Marshall's opinion essentially collapses the distinctions between modes of acquisition of territory under the doctrine of discovery. I take his reasoning in *Johnson* to be that once "discovered" by a European nation-state, the indigenously-occupied country came under its sovereignty, and vested in it inchoate rights to title.

discovery, according to Marshall, was applied in the New World by all of the colonizing nations of Christian Europe, including England as part of the Law of Nations. As England's rights to territory in the New World had devolved to the United States upon its victory in the Revolutionary War, the doctrine of discovery thus provided the legal basis for the United States' superior rights of sovereignty over Indian occupied territories within its borders.

Marshall's opinion in *Johnson* explained the origins of the doctrine of discovery as follows:[35]

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy ... But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

Besides explaining that the basis of the Europeans' superior rights to the entire territory of the New World was the American Indians' cultural inferiority (their "character and religion afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy"),[36] Marshall also elaborated the consequences of the discovery doctrine for the Indians' rights of sovereignty. As Marshall explained: "[t]heir rights to complete sovereignty, as independent nations, were necessarily

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Marshall's analysis is essentially indifferent as to how those inchoate rights might be perfected; by purchase, conquest, or abandonment; no mater, "the rights thus acquired being exclusive," in Marshall's words, "no other power could interpose between them" (*ibid*). Other English-derived settler state courts, and continental writers on international law, have drawn more careful distinctions between modes of acquisition and rights acquired under the doctrine. Yet, despite the distinctions, the outcome historically has been the same. Indigenous peoples around the world have been dispossessed of their territories whenever the doctrine and its varying permutations have been applied.

35 *Ibid.* at 572-573.

36 *Ibid.* at 572.

diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[37] Future relations between the discovering European nation and the tribes were matters of purely domestic concern to the colonizing European sovereign. The rights thus acquired being exclusive, no other power could interpose between them under this model of diminished Indian rights constructed by Marshall from the premises of the medievally-derived discovery doctrine.[38]

Marshall's 1823 opinion in *Johnson* directly incorporated the doctrine of discovery and its medievally-derived justifications for denying non-Christian "savages" rights to territory and self-rule as the foundational source of the fundamental principles governing the federal-tribal relationship in the United States. *Johnson's* basic premises on superior European rights to aboriginally occupied territory and much of its analysis of the Doctrine's delimitations of the scope of indigenous sovereignty rights were subsequently adopted as a model for structuring the relations of other English-derived settler-states with their indigenous peoples as well.[39]

D. The Cherokee Cases[40]

Marshall's two subsequent controlling opinions for the United States Supreme Court in the *Cherokee cases* in 1831 and 1832 refined the discovery doctrine's basic premises of superior United States rights and diminished Indian sovereignty over Indian lands into a more workable framework and a set of institutional guidelines for structuring future federal Indian law and policy. The *Cherokee cases* — *Cherokee Nation* v. *Georgia*,[41] and *Worcester* v. *Georgia*[42] — arose out of the state of Georgia's attempts to abolish the tribal government of the Cherokee nation and distribute its lands under state jurisdiction, in violation of several treaties between the United States federal

37 *Ibid.* at 537-574.

38 *Ibid.* at 574.

39 See sources cited in *supra* note 26.

40 The discussion in this section of the article has been adapted from "Law," *supra* note 30 at 313-314.

41 *Supra* note 28.

42 *Supra* note 29.

government and the tribe. In 1830, the tribe filed an original action in the United States Supreme Court, *Cherokee Nation* v. *Georgia*,[43] challenging Georgia's assertion of lawful authority within its territorial borders.

As in *Johnson* v. *McIntosh*,[44] Chief Justice Marshall again wrote the Court's decision in this landmark case in federal Indian law. Dismissing the tribe's suit against the state, Marshall ruled that the Court lacked jurisdiction to hear the case because the Cherokee Nation was not a "foreign state" within the meaning of Article III of the United States Constitution's grant of judicial power, which vests the Supreme Court with original jurisdiction over suits between a state of the union and a foreign state.[45] Building on the model derived from the discovery doctrine's principles enunciated in *Johnson* v. *McIntosh* of superior sovereignty in the United States to Indian lands and diminished tribal sovereignty, Marshall wrote in *Cherokee Nation*:[46]

> It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

Marshall's decision in *Cherokee Nation* reaffirmed and measurably refined *Johnson's* reliance on the discovery doctrines's raw principles of conquest and power. *Cherokee Nation* made it clear that the United States' superior sovereignty over Indian territory was asserted independent of the Indians' political will. They were denominated as "domestic dependent nations" within United States law.[47] Even more significant, Marshall also made it clear in *Cherokee Nation* that United States courts were not the appropriate forum for determining Indian rights in this case:[48]

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43 31 U.S. (6 Pet.) 515 (1831).
44 21 U.S. (8 Wheat.) 543 (1823).
45 U.S. Const. art. III, s.2.
46 *Supra* note 28 at 17.
47 *Ibid.*
48 *Ibid.* at 20.

> If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

A considerable hagiography has developed around Marshall as the great defender of Indian rights in the United States Supreme Court's Indian law jurisprudence. Nonetheless, his opinion in *Cherokee Nation* clearly marks the inaugural point of a frequently-invoked tradition of judicial deference to majoritarian political processes in deciding the scope and content of indigenous sovereignty claims under United States law.[49]

Marshall's use of the "guardian-ward" analogy[50] in *Cherokee Nation* also elaborated a seemingly benign and even benevolent justification for the exercise of the majority society's unilateral political power over indigenous peoples. As the foundation of the modern Trust doctrine in federal Indian law, the guardian-ward metaphor permanently institutionalized the concept of tribal dependency as a key aspect of the federal-tribal relationship. The Trust doctrine would be adopted by later Supreme Court Indian law decisions to justify numerous violations of Indian treaties and other rights of tribes by the majority society's elected representatives in Congress at a time when tribal Indians were not even regarded as citizens of the United States.[51]

A year later, in 1832, in the second of the *Cherokee cases*, Marshall recapitulated the themes developed in his earlier decisions in *Johnson* and *Cherokee Nation* to write the most important and most frequently cited Supreme Court case in federal Indian law, *Worcester* v. *Georgia*.[52] In *Worcester*, Samuel A. Worcester, a white missionary, was arrested and

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[49] See, for example, R.A. Williams, Jr., "The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Law Jurisprudence" (1986) Wisc. L. Rev. 219 at 258-264 [hereinafter "The Algebra"].

[50] *Supra* note 28 at 18.

[51] American Indians were generally extended United States citizenship in 1924. See Act of June 2, 1924, Ch. 223, 43 Stat. 253, repealed by Act of June 27, 1952, Ch. 477, 66 Stat. 279, 280. On the trust doctrine in federal Indian law, see "The Algebra," *supra* note 49 at 258-267.

[52] *Supra* note 29.

imprisoned by Georgia under a state law which required non-Indians to obtain a license from the state in order to reside on the Cherokee Territory.

The *Worcester* Court's holding that Georgia had no jurisdictional authority to enact laws within the Cherokees' treaty-guaranteed reservation was based on Marshall's reasoning that Cherokee territorial sovereignty and exclusive federal authority in Indian affairs ousted the state's jurisdiction:[53]

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.

In upholding Cherokee sovereignty against state jurisdictional invasion, Marshall's *Worcester* opinion may well have earned for him a defendable reputation as a protector of Indian rights. *Worcester*, after all, could be read, as denying the 'conquest' theory as the source of the United States' superior sovereignty over Indian tribes. Marshall's treaty-based analysis of Indian rights in *Worcester* qualified many of the more extreme applications of the doctrine of discovery that his earlier opinions appeared to sanction. But Marshall in *Johnson* and *Cherokee Nation* had established clearly that Indian cultural survival could not expect any certain protection from the majority society's political process in a United States court. *Worcester* did nothing to change this basic political fact about Indian "legal" rights under United States law. Under the Marshall model, Indian tribalism in the United States, at most, might be tolerated by the majority society, until it was found to be too inconvenient or bothersome.

Significantly, and not surprisingly, given the strong desires of Georgia and the southern states for Cherokee lands, the decision in *Worcester* affirming Cherokee rights was never enforced by the Court.[54] As history records, the Cherokees, and the other southern tribes, despite Marshall's opinion for the United States Supreme Court in *Worcester* upholding Indian sovereignty, were forced under duress by Congress and President Andrew Jackson, representing

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53 *Ibid.* at 560.

54 See *Federal Indian Law*, *supra* note 2 at 149-155.

the political branches of the United States government, to leave their homelands, and march on the Trail of Tears to the Indian Territory across the Mississippi River.[55]

E. The Marshall Legacy

Despite his consistent ineffectiveness in protecting Indian rights during his tenure on the court, Justice Marshall did provide United States law with an important conceptual model of Indian rights in his trilogy of decisions. It is a model which functions relatively well in stabilizing the content of aboriginal rights, at least until the majority society, through its elected representatives, decides to rework that content, or simply extinguish the rights altogether. Marshall's concepts of aboriginal title, exclusive federal authority in Indian affairs, domestic dependent nation status for tribes, and the guardian-ward analogy have continued, in fact, to be relied upon by United States courts and policymakers as the basis for defining the federal-tribal relationship. All of the other English-derived settler-states — Canada, New Zealand and Australia — have incorporated, at one time or another, various principles found in the Marshall model into their own law on indigenous rights. Even in Canada, which has constitutionally enshrined the concept of aboriginal rights, the majority society's legislatures need only meet a "test of justification" in Canada's courts in order to interfere with an aboriginal right.[56]

It should always be remembered by indigenous peoples that the Marshall model and its various permutated versions in the other English-derived settler-states is fundamentally incapable of justly accommodating their demands for sovereignty. This is because, at base, it is driven by the same Hobbesian calculus which has tyrannized political and legal theory in the Western world for four centuries and which allows for only one supreme law-making authority within the territorial jurisdiction of the settler-state. Marshall's acceptance of the doctrine of discovery, in fact, can be interpreted as a

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55 See G. Foreman, *Indian Removal: The Emigration of The Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press, 1953). This, reportedly, is the case which prompted President Jackson to pronounce his infamous declaration; "John Marshall has made his decision, now let him enforce it!"

56 See sources cited in *supra* note 26; for the "test of justification" under Canadian law, see *Sparrow* v. *R.*, [1990] 1 S.C.R. 1075.

judicial redaction of Hobbes' *Leviathan* made suitable for the colonial setting. "Conquest," as Marshall stated in *Johnson*, "gives a title which the Courts of the Conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted."[57] A more concise restatement of Hobbes' might-makes-right principle cannot be found in the English-derived jurisprudential tradition, yet there it stands, unrepentant, at the very heart of Marshall's influential jurisprudence on indigenous "rights."

F. Indian "Rights" under the Marshall Model

Given the Marshall model's subservient acquiescence to a Hobbesian construction of sovereignty, it is not wholly inaccurate to regard the term "Indian rights" as something of an oxymoron in United States law. The Marshall model's Hobbesian-derived structuring principles subject all Indian sovereignty claims to the plenary power of the United States Congress. In effect, then, these sovereignty claims are ultimately weighed according to the majority society's unconstrained political processes. To speak of Indian "rights" in this type of context is therefore quite misleading. It would be better to concede Indian sovereignty as a privilege extended according to the unilateral whims of the majority society.[58] The Supreme Court itself has conceded as much in several of its relatively recent decisions on Indian sovereignty rights.[59] Time and time again during the past two decades, the Court has reminded Indian tribes that, "all aspects of Indian sovereignty are subject to defeasance by Congress."[60]

Despite its inability to assure Indian cultural survival in the United States, there is a clear utility to be found, at least for the majority society, in the Marshall model; a utility which perhaps explains it continuing vitality in United States law. As reflected in the shifting congressional policies towards

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57 *Supra* note 22 at 588.

58 See N.J. Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered" (1980) 31 Hastings Law J. 1215.

59 See, for example, *National Farmers Union Inc.* v. *Crow Tribe of Indians*, 471 U.S. 845 at 850, fn. 10 (1985); *Escondido Mutual Water Co.* v. *LaJolla, Rincon, San Pasqual, Paunia and Pala Bands of Mission Indians*, 466 U.S. 765 at 788 fn. 30 (1984). See also *United States* v. *Wheeler*, 435 U.S. 313 at 323 (1978).

60 *Ibid.*

Indian tribes over the course of two centuries, the Marshall model has proven itself to be readily adaptable to justifying the majority's ever-changing moods and responses to the fate of Indian tribalism in a European-derived settler-state. But it should always he remembered that this model of "Indian rights," precisely because it is the servant of the majority's unilateral will-to-power over Indian peoples, is incapable of generating any set of consistently applied principles accommodating Indian tribal sovereignty that might he perceived by the majority society as against its interests, or which might make life uncomfortable for its individual members.[61]

So long as United States Indian law and policy are based on the Marshall model, American Indian peoples in my country will always confront the vulnerable situation of their cultural survival being wholly dependent on the majority society's political will. Under the United States Constitution, the Congress requires a compelling reason to regulate speech.[62] Congress cannot establish a religion.[63] It must compensate individuals for takings of private property.[64] But for Indian peoples, Congress can breach its treaties with Indian tribes or even terminate tribal existence,[65] and the Court will say and do nothing, because the right of tribal sovereignty is not protected as a fundamental right belonging to Indian peoples under the rules and principles

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61 Contemporary scholars of federal Indian law are becoming more acutely aware of these fundamental defects of the Marshall model in protecting tribal rights. The idea that Indian tribalism's "right" to survival should be subjected to the political processes of the majority society has been increasingly questioned by a growing number of federal Indian law scholars. See, for example, N.J. Newton, "Federal Power Over Indians: Its Sources, Scope, and Limitations" (1984) 132 U. Pa. L. Rev. 195; R. Strickland, "Genocide-at-Law: An Historical and Contemporary View of the Native American Experience" (1986) 24 U. Kan. L. Rev. 713; R.N. Clinton, "Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government" (1981) 33 Stan. L. Rev. 979; D. Williams, "The Borders of the Equal Protection Clause: Indians as Peoples" (1991) 38 UCLA L. Rev. 759; R.L. Barsh & J.Y. Henderson, *The Road: Indian Tribes And Political Liberty* (Berkeley: University of California Press, 1980); M.S. Ball, "Constitution, Court, Indian Tribes" (1987) Am. B. Found. Res. J. 1.

62 U.S. Const., Bill of Rights, art. I.

63 *Ibid.*

64 U.S. Const., Bill of Rights, art. V.

65 See *Federal Indian Law*, *supra* note 2 at 229-251.

laid out in the Marshall model governing the relationship between Indian tribes and the United States.

The Marshall model, as elaborated in the federal-tribal relationship in the United States and as modified and adapted in its critical parts by the other western settler-state governments, confronts indigenous peoples with the central and problematic political challenge of convincing the majority society to accommodate indigenous sovereignty claims even when those claims disadvantage the majority. It contains no inherent recognition of a right of sovereignty belonging to indigenous peoples. In fact, it contains no inherent recognition of even a right to cultural survival belonging to indigenous peoples. In subjecting claims of indigenous sovereignty to the unconstrained political processes of the majority society, the Marshall model simply instructs United States courts to exercise their jurispathic power to declare and enforce the political will of the majority society as law.[66]

As a model for accommodating indigenous claims for sovereignty, therefore, the Marshall model is simply incapable of meeting the challenge of generating either a theory or practice of meaningful indigenous self-determination in the postmodern world. On pure utilitarian grounds, the majority can normally justify acting in its own self interest. No evil motives need attend disadvantaging of the minority, simply a calculus based on utility.

One of course could envision a scenario where this need not be the case; that the "plight" of a disadvantaged minority might move the majority society's courts toward benevolent action to protect minority rights.[67] But the Marshall model is not even capable of sustaining this type of vision of indigenous rights being aggressively protected by the majority society's courts

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[66] On the jurispathic power of the courts of the state, see R.M. Cover, *supra* note 7 at 40-44:

> [T]he jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. And from this fact we may come to recognize a special role for courts. Courts, at least the courts of the state, are characteristically "jurispathic."

[67] See G.E. White, *The Marshall Court and Cultural Change, 1815-35* (The Oliver Wendell Holmes Devise History of the Supreme Court, vols. III-IV) (New York: MacMillan, 1988) at 712-713.

upon any sort of consistent basis. This is because the legacy of European cultural racism against Indian peoples infects the model at its very core; so much so, in fact, that the model continues to perpetuate this legacy of racism whenever the courts of the majority society seek to apply it. It is that legacy to which we now turn our attention.

III. Racism

A. The Racist Attitude

I have focused the first part of my paper on the Marshall model, and by implication, the related and similarly constructed models based on the discovery doctrine which seek to accommodate indigenous sovereignty claims in the western constitutional democracies. I have argued that these or any other models which vest unilateral political power in the majority society over indigenous sovereignty claims are incapable of serving as vehicles to justly accommodate the aspirations of indigenous tribal peoples for jurisgenerative power over their communities and lands. Thus, the first challenge confronting the indigenous struggle for self-determination in the postmodern world is the radical transformation of the models which the western constitutional democracies rely on to justify their exercise of continuing political power over indigenous peoples. Only models liberated from the unconstrained political processes of the majority society can ever realistically be expected to justly accommodate the legitimate self-determining aspirations of indigenous peoples.

This challenge is made all the more difficult and urgent by a second central and problematic challenge confronting the indigenous struggle for self-determination in the postmodern world. This is the challenge represented by the continuing legacy of European-derived colonialism and racism perpetuated by the courts of the majority society in applying the Marshall model.

As we have discussed, the model structuring indigenous claims for sovereignty in the United States and in other western settler-states is grounded on principles which, at their core, assume the cultural inferiority of indigenous peoples as the basis for the superior sovereignty of European-derived settler-

states over indigenous peoples.[68] Such assumptions are nothing other than a pernicious form of racism, perpetuated to justify European colonial power over indigenous peoples.

It is the Tunisian-Jewish writer Albert Memmi, one of the most important theorists to emerge out of the post-World War II African decolonization movement,[69] who has provided us with one of the most penetrating analyses of the "racist attitude" in the colonial context.[70] Racism, Memmi wrote:[71]

> is the generalized and final assigning of values to real or imaginary differences, to the accusers' benefit and at the victim's expense, in order to justify the former's own privileges or aggression.

In the colonial context according to Memmi's analysis, the racist focuses on a perceived difference between himself or herself and the intended victim of racial discrimination. The racist perceives this difference as a deficiency: "they" do not use the land as we do and are therefore less "efficient;" or "they" have different skin pigmentation and are therefore "genetically inferior." On the basis of this negatively-perceived difference, the racist then legislates and enforces a regime of privileges and power discriminating against his or her victim. Memmi's analysis further suggests that so long as the colonizer continues to hold unilateral power over the colonized, there is a continuing compulsion to justify this power according to the same racist attitude which originally justified colonization. "Underneath its masks," Memmi has written, "*racism is the racist's way of giving himself absolution.*"[72] And so, through the thin veneer of law and the assumed rights of sovereignty and jurisdiction, the racist who has acquired and continues to hold power over his or her victim justifies what otherwise might be regarded as inhumane and irrational treatment of another human being through his or her racism.

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68 See text accompanying *supra* notes 32-39.

69 See, for example, A. Memmi, *The Colonizer and The Colonized* (New York: Orion Press, 1967).

70 See A. Memmi, "Attempt at a Definition" in *Dominated Man: Notes Toward a Portrait* (Boston: Beacon Press, 1969) at 185-186.

71 *Ibid.* at 185.

72 *Ibid.* at 194 [emphasis added].

The point which I would like to develop in this part of the paper (and the history of United States Indian law and policy provides an irrebuttable illustration of this point) is that indigenous peoples' self-determining aspirations will not be realized until the courts of the majority society are required to confront the continuing legacy of European colonialism and racism against indigenous peoples found deeply embedded in the models which are presently applied to indigenous rights claims. Only then will the majority society's unilateral political power to determine the scope and content of indigenous rights be revealed for what it truly is: the continuing perpetuation of a racist attitude against indigenous peoples. Then, and only then, will indigenous peoples be able to assert a higher law as transcending the domestic law of their colonizers; a law which rejects the thousand-year old legacy of European colonialism and racism in favor of a different vision of indigenous rights in the postmodern world legal system.

B. The Legacy of European Racism

The legacy of European colonialism and racism against indigenous tribal peoples is found deeply embedded in the laws and policies of the western settler-states. This legacy confronts the courts of the western constitutional democracies with a fundamental question of justice, morality, and law; that is, whether the racist and ethnocentric assumptions about "savage" and "barbarian" tribal peoples which Europeans brought with them from the Old World have any place or positive role to play in an enlightened democratic society which pretends to a leadership role of basic human rights in the postmodern world?

We find the legacy of European racism and colonialism against American Indian tribal peoples embedded and perpetuated by the majority societies' courts throughout the history of federal Indian law and policy. We have seen how Chief Justice Marshall formally incorporated the medievally-derived Christian European legal tradition justifying conquest and colonization of non-Christian peoples into United States law in his 1823 *Johnson* opinion.[73] Marshall's acceptance of the discovery doctrine into United States law perpetuated a racist legacy dating back nearly a millennia to Europe's Crusades against the heathen and infidel peoples of the Holy Lands. As

[73] See text accompanying *supra* notes 33-39.

Marshall himself recognized, the superior sovereignty asserted by Europeans over Indians in the New World was justified by the Indians' "character and religion."[74] The Indians' negatively perceived difference "afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[75]

In *Cherokee Nation* v. *Georgia*,[76] Marshall once again reinscribed this legacy of cultural racism against Indians peoples in United States law. The Indians' "habits and usages," according to Marshall, placed them in a state of pupillage to the United States from which they derive their "domestic dependent nation" status.[77]

The theme of Indian tribalism's cultural inferiority has been a persistent feature of United States law and policy toward Indian peoples; so persistent, in fact, that contemporary courts cannot avoid reinscribing this racist legacy whenever they are required to justify the majority society's unilateral power over Indian tribes.

Take, for example, the critical issue of tribal law-making authority over the reservation. As an institution, the reservation is venerated by federal Indian law scholars. Indian reservations in the United States have been termed islands of "measured separatism" where Indian peoples can perpetuate their unique cultural group existence and jurisgenerative autonomy insulated from the pressures of the majority society.[78]

It is true that Indian reservations are one of the most enduring aspects of the federal-tribal relationship. Negotiating treaties with tribes to establish an "Indian territory" in the "western" frontier regions of the country (the genesis of the reservation as an institution in United States policy) was an organizing principle of the United States' inaugural policy toward Indian tribes. This "boundary line" policy was developed after the Revolutionary War, in fact,

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74 *Supra* note 22 at 572.

75 *Ibid.*

76 *Supra* note 29.

77 *Ibid.* at 17-18.

78 See C. Wilkinson, *American Indians, Time and The Law* (New Haven: Yale University Press, 1987) quoted in *Federal Indian Law*, *supra* note 2 at 31.

by the same Founders who are revered as the architects of the United States' democratic heritage; George Washington, Thomas Jefferson, and John Quincy Adams, to name a few. But agreeing to treaties establishing the modern world's first consciously-designed system of racial apartheid was never intended by the Founding Generation to lead to the perpetuation of permanent homelands for Indian tribes. Having inherited the legacy of European colonialism and racism against indigenous tribal peoples brought to the New World by their forefathers, the Founders grounded their Indian policy upon a widely shared cultural belief that Indian tribalism was a doomed form of cultural existence. They believed firmly that the plenary political power of Congress over Indian affairs should be exercised through treaties that would, in fact, expedite the processes of the inevitable extinction of Indian tribalism from the face of North America. As the distinguished historian, Professor Reginald Horsman, has explained the role of treaties in American Indian policy during the post-Revolutionary period: "Agreements with Indian tribes were made to be broken."[79] Under the doctrine of discovery, the "civilized" nations of Europe conceded the sovereignty of the United States over the lands acquired from Great Britain in North America as a result of the Founders' victory in the Revolutionary War, though those lands were occupied by numerous Indian tribes:[80]

> [T]he only questions were how, when, and under what terms actual Indian dispossession would be arranged. For white negotiators, treaty language was merely a means of obtaining land with the least conflict and expense, and a means of deflecting Indian resistance until the next, inevitable cessions were necessary.

This racist belief of the majority society's cultural superiority over Indian peoples formed the basis of the Founders' first Indian policy. Institutionalized as policy, this racist belief continued to define the ethnocidal direction and thrust of federal-tribal relations for the next century-and-a-half. In applying the principles derived from the Marshall model to those political acts, the courts of the United States were powerless to protect Indians from the majority society's efforts to legislate its racist ideology into law. The racist policies enacted by Congress and enforced as law by United States courts during the late nineteenth and early twentieth centuries have left a legacy

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79 R. Horsman, *Expansion and American Indian Policy 1783-1812* (Norman: University of Oklahoma Press, 1992).

80 *Ibid.*

which determines much of the political geography of modern Indian country today. So long as this racist legacy remains unchallenged in modern federal Indian law and policy, Indian tribes will never be able to realize their self-determining aspirations for jurisgenerative autonomy over their reservations.[81]

C. The Founders' First Indian Policy

The Founder's first Indian policy was based on the firm conviction that the extinction of Indian tribalism on the eastern side of the Mississippi River, the nation's western-most boundary established by the Treaty of Paris of 1783 which ended the Revolutionary War with Great Britain, was an inevitability. They were equally convinced that this inevitability could be most easily facilitated by signing treaties with the tribes rather than fighting expensive Indian wars.

We see this widely-shared view reflected in the recommendations of Commander-in-Chief George Washington on the appropriate Indian policy to be pursued by the United States following the Revolution. Washington's recommendations were contained in a 1783 letter to James Duane, head of the Committee of Indian Affairs of the Continental Congress.[82] As Commander-in-Chief of the new nation, Washington's views on Indian policy had been sought out by the Congress and obviously carried great weight in the Founders' deliberations on Indian policy.

As a veteran of the French and Indian War, and the colonists' chief military commander during the Revolution, Washington was familiar with the tribes and their willingness to wage all-out war to defend against encroachments on the territories they claimed. In Washington's view, hostilities with the Indians for control over their lands on the frontier would be disastrously expensive in terms of lives lost and money spent for the United States.

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[81] See R.A. Williams, Jr., "Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes" (1992) 39 Fed. B. News & J. 6.

[82] Letter of George Washington to James Duane (7 September 1783), reprinted in *Federal Indian Law*, *supra* note 2 at 95-96.

At the same time, however, Washington recognized that any acceptable Indian policy had to have as its ultimate goal the settlement by citizens of the United States on the rich and fertile lands now held by the tribes. The western lands were the chief territorial prize of the war with Great Britain. Having been finally brought under the sovereignty of the United States by the Treaty of Paris, these lands were destined to be settled by United States citizens. This, of course, would require the ultimate displacement of the tribes, most of whom had sided with Great Britain during the war, from these lands. The question of policy for Washington was how best to manage this process of tribal dispossession without costly violence as the march of white civilization extended the new nation's settled western border territories to the Mississippi River.

Washington believed strongly that practical considerations, not vengeful reasoning, should direct the Congress' policy towards those "deluded" Indians who had sided with Great Britain in the War. They should be informed that all the territories they had claimed were now ceded to the United States by virtue of its victory in the Revolution, but, they should also be told that Congress was nonetheless prepared to be merciful. Not all of their lands would be needed by the United States. As a matter of policy, Washington advised, a boundary line was to be established by the United States at a point on the western frontier which would separate the two races. The Indians were to be allotted all the lands on the western side of this boundary. The United States would allow its citizens to settle all of the lands on the eastern side of this boundary. This line, therefore, would provide all the necessary assurances of security to both the tribes and the United States in the lands which each respectively held on their side of the boundary.[83] Subsequent purchases of

[83] Dictating this boundary line to the frontier tribes, still unsubdued and largely hostile to the United States, was, as Washington recognized, a sensitive matter. The tribal claims on the frontier were large and any boundary marking off their lands in essence sought to dictate a forced, uncompensated relinquishment of a part of their claimed territories on the eastern side of the line now asserted as belonging to the United States. Thus, Washington urged that, "care should be taken neither to yield nor to grasp at too much" in proposing the line. The Indians were to be told of the necessity "we are under, of providing for our warriors, our young people who are growing up, and strangers who are aiming from other countries to live among us" (*ibid.*). Washington's plan did contemplate a contingency should the Indians appear dissatisfied with the proposed territory allotted to them by Congress on their western

land that might in the future be agreed to by the tribes on their side of the boundary should be made only by authority of the Congress, or by the state legislature where the Indian lands were located within state boundaries.[84] Washington explained the functioning of this boundary line, dictated by the Congress to the Indians, as follows:[85]

> As the country is large enough to contain us all, and as we are disposed to be kind to them and to partake of their trade, we will ... establish a boundary line between them and us beyond which we will *endeavour* to restrain our people from hunting or settling, and within which they shall not come, but for purposes of trading, treating, or other business unexceptionable in its nature.

Washington urged the soundness and wisdom of the reasoning supporting his recommendations on Indian policy by a metaphor intended to vividly illustrate tribalism's fundamental incompatibility with a white agrarian civilization:[86]

> I am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their lands in preference to attempting to drive them by force of arms out of their country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho' they differ in shape.

As Washington went on to explain, there was nothing to be obtained by an Indian war but the soil the Indians lived on. Such a war was ultimately unnecessary, however, for the Indians would certainly sell their lands once

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side of the boundary, compensation should then be paid to them for their claims to territories on the United States' side of the line (*ibid*).

84 *Ibid.*

85 *Ibid.* [emphasis added]. Washington recognized the immense difficulties in enforcing his recommendations for the establishment of an Indian country on the western frontier within which Euro-America settlement was prohibited. As a former land speculator himself, though now apparently rehabilitated, Washington realized that white settlers on the frontier paid little attention to government efforts aimed at protecting Indian land rights. He suggested, therefore, that the Congress declare it a felony for any white person to survey or settle on the Indian side of the boundary line (*ibid.*).

86 *Ibid.* at 2.

devoid of game, at far less expense, "and without the bloodshed, and tbose distresses which helpless Women and Children are made partakers of in all kind of disputes with them."[87]

Washington's vision of an appropriate Indian policy for the United States was guided wholly by pragmatic considerations and his underlying racist convictions of Indian cultural inferiority. As opposed to acquisition by means of costly and violent wars, the Indians' much-desired lands could be had at a far cheaper price by simply waiting patiently until the inevitable progress of white civilization compelled the "Savage as the Wolf" to retire westward across the Mississippi. Wasbington's recommendations on the nation's frontier Indian policy were quickly adopted with little in the way of substantive modification, in a Report to the Congress issued by Duane's Committee on Indian Affairs in October of 1783.[88]

From the Founders' first deliberations on Indian policy following their War of Independence, the United States government pursued the vision Washington had advocated in consistent and systematic fashion in its early treaty negotiations and relations with Indian tribes.[89] The policy which emanated from this vision assumed tribalism's unassimilability with "civilized" society. The Founders' never seriously regarded the treaty agreements made with savage tribes as creating reciprocal and enduring interdependent relationships of mutual trust and solidarity. As Professor Horsman has noted: "For Indian negotiators, treaty language often represented solemn promises that they believed would be carried out."[90] But according to the Founders' vision of relations with North American indigenous tribal peoples, the treaties would never stand in the way of white America's destiny to supplant the Indian upon those treaty-guaranteed lands. The "Savage as the Wolf" was destined to recede in the wake of the advance of their superior civilization. Thus, the Indian policy that emerged out of the post-Revolutionary era assumed that the remaining territories reserved to the tribes by treaties would eventually be

87 *Ibid.*

88 See "Report of the Committee on Indian Affairs" (15 October 1783) in F.P. Prucha, ed., *Documents of United States: Indian Policy*, 2nd ed. (Lincoln: University of Nebraska Press, 1990).

89 See generally Horsman, *supra* note 79 at 3-4.

90 *Ibid.*

consolidated in the public domain and made availahle to advancing white settlers. The boundary line separating the races was viewed simply as a temporary and less costly alternative to Indian wars.

The choices left to the Indians under this policy emerged in clear outline and form. The Indian as savage either had to be removed completely from the territory of the United States, or be civilized. As the legal historian, G. Edward White, notes: "The idea that Indians in America should be allowed to perpetuate a radically different heritage from that of white settlers, and at the same time be treated as human heings having natural rights to autonomy and respect, was not seriously entertained" by United States Indian policymakers during this period.[91] The Indians needed to be civilized and assimilated into white society as rapidly as possible, or else be dispossessed of the lands left to them by treaties and displaced in favor of the needs of a superior society.

D. Perpetuating the Founder's Legacy

Much of the subsequent history of the federal-tribal relationship for the next century-and-a-half can be understood as the continual reiteration of these racist views of Indian tribalism's doomed fate in the majority society's legislative policies relating to Indian rights.[92] The unilateral enactment of the

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[91] See White, *supra* note 67 at 706.

[92] The removal policy of the first half of the nineteenth century which generated the previously discussed Cherokee cases (see text accompanying notes 41-43, *supra*) represents one famous example of the genocidal consequences of a unilaterally-exercised congressional plenary power over Indian affairs. Helen Hunt Jackson's 1881 crusading book *A Century of Dishonor: A Sketch of the United States* (New York: Harper, 1881), still represents the "classic indictment" of the removal policy. See A. Guttman, *States Rights and Indian Removal: The Cherokee Nation v. The State of Georgia* (Boston: D.C. Heath, 1969) at 81. Jackson's book described in vivid terms what happened to the Cherokees when they refused to follow the reasoning laid out in Washington's "savage as the wolf" metaphor:

> [T]he Indians, finding themselves hemmed in on all sides by fast thickening, white settlements, had taken a firm stand that they would give up no more land. So long as they would cede and cede, and grant and grant tract after tract, and had millions of acres left to cede and grant, the selfishness of white men took no alarm; but once consolidated into an empire, with fixed and inalienable boundaries, powerful, recognized and determined, the

Allotment Act and other assimilative programs of the late nineteenth and early twentieth centuries, for example, was justified according to the stated beliefs of "reformers" in Congress and elsewhere in the United States that the hundreds of Indian reservations established by earlier treaties with Indian tribes had failed in their ultimate goal of "civilizing" the Indians.[93] Treaty-guaranteed rights of tribal 'sovereignty' over the reservations were legislatively abrogated by enforcement of this "civilizing" mandate presumed to belong to the majority society.

As just one well-noted example, Congress, as part of its "civilizing" efforts to bring the white man's law to the Indian, approved legislation in 1885 authorizing the exercise of federal criminal jurisdiction over crimes committed by tribal Indians within their tribe's reserved borders. The Supreme Court was required to decide the constitutionality of this dramatic extension of federal power over Indian tribes in the 1886 case of *United States* v. *Kagama*.[94] The Court readily conceded that the Congressional exercise of criminal jurisdiction over Indians in their own country could be grounded neither in the Constitution (which spoke only of Congress' power to regulate "commerce" with Indian tribes), nor in any applicable treaty provision.[95] The Court, however, justified Congress' unilateral power to supplant tribal sovereignty by

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> Cherokee Nation would be a thorn in the flesh to her white neighbours. The doom of the Cherokees was sealed on the day when they declared, once and for all, officially as a nation, that they would not sell another foot of land. (Quoted in *ibid.* at 81).

See generally R.A. Williams, Jr., "Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law" (1989) 31 Ariz. L. Rev. 237 at 242-247.

The legacy of European racism and colonialism against indigenous peoples inherited from Washington and other members of the Founding Generation justified the majority society's unilateral breach of treaties required to implement the forced removal of Indian tribalism to the "Indian Territory" (in present day Oklahoma). According to the early nineteenth century advocates of removal: "[t]reaties were expedients by which ignorant, intractable, and savage people were induced without bloodshed to yield up what civilized peoples had a right to possess by virtue of that command of the Creator delivered to man upon his formation — be fruitful, multiply, and replenish the earth, and subdue it" (quoted in Williams, *ibid.* at 244).

93 See *Federal Indian Law*, *supra* note 2 at 167-214.

94 118 U.S. 375 (1886).

95 *Ibid.* at 378-79.

applying the guardian-ward legal principles first announced by Chief Justice Marshall:[96]

> These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

Kagama is based, in other words, on the Supreme Court's explicit understanding that under the principles elaborated in the Marshall model, the extent to which tribal sovereignty is accommodated under United States law has absolutely nothing to do with the Constitution. Rather, tribalism's survival in the United States is determined solely by the majority society's legislative exercise of pure power over Indian peoples regarded as culturally inferior and disempowered to act in their own best interests.

Kagama and a host of other similarly-decided cases upholding congressional plenary power in Indian affairs during this "civilizing" period of federal Indian policy[97] reveal the fundamental inability of courts applying the Marshall model to protect Indian sovereignty and other Indian rights from European-derived racism against Indian peoples. The model requires United States courts to uphold the majority society's belief in the Indian's cultural inferiority and disempowered status as law anytime that belief is legislated into Indian policy by the majority society's political processes. Further, the model's explicit reliance on the Indian's cultural inferiority and disempowered status to justify the majority society's unilateral power over Indian rights continually reinscribes this racist legacy each time the court applies it in upholding the majority society's superior sovereignty over Indian peoples.

This highly disturbing judicial process by which the legacy of European colonialism and racism are continually reinscribed in federal Indian law and policy is powerfully illustrated by the all-encompassing program of cultural assimilation and ethnocide ushered in by Congress's passage of the Allotment

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[96] *Ibid.* at 383-84.

[97] See, for example, *Federal Indian Law*, *supra* note 2 at 185-214.

Act in the year following the Supreme Court's *Kagama* decision. The General Allotment Act in 1887, in effect, sought to encourage the destruction of tribalism and the assimilation of Indians into white "civilization" by parcelling out treaty-guaranteed reservation lands to individual tribal members in severalty.[98] To further accelerate the process of disintegration of tribalism and the treaty-guaranteed tribal land base, the Act also invited the invasion of European-derived "civilization" into Indian country by the sale of "surplus" tribal treaty lands to desirous white homesteaders.[99]

As President Teddy Roosevelt once acknowledged, the Allotment Act was designed as "a mighty pulverizing engine" to destroy American Indian tribal culture as a way of life in United States society.[100] During the half-century in which the Allotment Act was in effect as the federal government's official Indian policy (1887-1934), the total of Indian tribal land holdings was reduced from 138,000,000 acres to 48,000,000 acres and the traditional tribal self-governing structures once sustained by those tribally-held lands were decimated.[101]

The allotment policy's fundamental legal premise that a European-derived society could unilaterally determine or even destroy the self-determining rights of American Indian tribes over their treaty-reserved territories finds comforting support in the principles structuring the federal-tribal relationship spelled out in the Marshall model. In *Johnson*, the Marshall Court held that under the doctrine of discovery the United States possessed superior sovereign rights to control and dispose of the lands claimed and occupied by Indian tribes.[102] Marshall's subsequent decision for the Court in the 1831 case of *Cherokee Nation* v. *Georgia*[103] refined the Doctrine's basic premises of superior United States rights and diminished tribal sovereignty over Indian territories. Indians tribes, Marshall wrote in *Cherokee Nation*, "occupy a

98. See *Federal Indian Law*, *supra* note 2 at 190-199.
99. *Ibid.*
100. *Ibid.* at 215.
101. See J. Collier, Memorandum, Hearings on HR. 7902 Before the House Committee on Indian Affairs, 73d Con., 2d Sess. (1934) at 16-18.
102. See text accompanying *supra* notes 32-39.
103. *Supra* note 28.

territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases."[104]

In justifying the majority society's ethnocidal pursuit of the allotment policy, the Supreme Court found unassailable jurisprudential refuge in Chief Justice Marshall's original conceptualization of the federal government's superior political sovereignty over dependent Indian tribes and their territory. According to the allotment-era Supreme Court, the Marshall model vested in Congress an unquestionable plenary power over Indian affairs, unrestrained by normal constitutional limitations. Thus, as an institution, it could do nothing to protect Indian rights.[105]

The most infamous Supreme Court case of the allotment period, *Lone Wolf* v. *Hitchcock*,[106] illustrates how the majority society's courts perpetuate the legacy of European cultural racism against Indian peoples by application of the Marshall model of Indian "rights." In a tribal chief's challenge to the fraudulent and coercive methods used by the federal government in forcing the Allotment Act upon his unwilling tribe, the Supreme Court stated: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[107] Congressional actions abrogating Indian treaty rights, or unilaterally terminating tribal sovereign powers, in other words, were political questions, not justiciable under the domestic law of the United States according to the *Lone Wolf* Court.[108]

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full

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104 *Ibid.* at 17. As Marshall further stated: "they and their country are considered by foreign nations, as well as ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their land, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility" (*ibid.* at 17-18).

105 See "The Algebra," *supra* note 49 at 258-265.

106 187 U.S. 553 (1903).

107 *Ibid.* at 565.

108 *Ibid.* at 568.

> power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.

In *Lone Wolf*, the Supreme Court was able to rely on the Marshall model's principles of Congressional plenary political power in Indian affairs and the diminished legal status of tribes as wards of the federal government to justify the majority society's political power and privilege to implement a racist policy consciously aimed at the genocidal destruction of American Indian tribes. Since *Lone Wolf* and the allotment era, there have been numerous other Congressional policy initiatives which have sought to extend the legacy of European racism against Indian peoples, including the legislative termination of 109 Indian tribes and bands by the United States Congress in the 1950s and 1960s,[109] the unilateral imposition of the Indian Civil Rights Act on Indian tribal governments in 1968,[110] and the Indian Gaming Regulatory Act[111] by which Congress, over strenuous tribal objections, limited tribal sovereignty over gambling in Indian country.[112]

The implementation of all of these legislative policies was based on the underlying racist assumption, supported by the Marshall model, that the majority society possesses unilateral political power to determine the rights and status of Indian peoples. And no United States court, in applying that model, has dared question that assumption.[113]

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109 See *Federal Indian Law*, *supra* note 2 at 229-251.

110 25 U.S.C.A §§ 1301-1303.

111 25 U.S.C.A § 2701-2721.

112 In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court held that in the absence of any Congressional legislation permitting state governments to regulate tribal sovereignty over gambling through civil regulatory laws, tribes could sponsor gaming operations on their reservations free of any state restrictions. In response to state hysteria over the Court's *Cabazon* decision, the Indian Gaming Regulatory Act was passed by Congress. States, under the Act, now can require tribes to negotiate over gaming rights.

113 While the modern Supreme Court has at times questioned the continuing vitality of the *Lone Wolf* doctrine where an outright uncompensated taking of treaty-protected Indian property is alleged, it has never questioned the continuing vitality of the Marshall model's fundamental principles of Congressional plenary power in any of its Indian law opinions. See M. Ball, *supra* note 61.

E. Perpetuating the Legacy in Modern Federal Indian Law

One of the more illustrative examples of how the majority society's courts perpetuate the legacy of European racism against Indian peoples through application of the Marshall model is provided by the United States Supreme Court's 1989 decision in *Brendale* v. *Yakima.*[114] *Brendale* involved the question of whether the Yakima Indian Nation in the state of Washington had the power to regulate land uses on property owned in fee by non-members within the allotted portions of its reservation. Central to the holding in *Brendale* was the decision by a majority of the Court's members to essentially ignore the 1855 treaty between the United States and Yakima Indian Nation, which the tribe argued established its authority to regulate all lands on its reservation. By the terms of that treaty, the tribes of the Yakima Indian Nation

[114] 492 U.S. 408 (1989). The *Brendale* litigation involved two cases in which the Yakima Nation sought to enforce its zoning ordinance to prohibit two proposed and undesired developments within the borders of its reservation. One of the developments was proposed on a small parcel of land located in the "closed," forested area of the reservation; so called because it has been closed historically to all outsiders except those who own property within it. The land was owned in fee by Phillip Brendale, who was part Indian, but not a member of the Yakima tribe. Brendale sought to subdivide his property into ten lots to be sold as summer cabins. The other development was proposed by Stanley Wilkinson, a non-Indian, who owned land in the "open" area of the reservation, so called because it is open to non-members of the Nation, and includes three towns incorporated under Washington state law. Wilkinson wanted to subdivide his property into twenty lots for single family houses. Both developments were prohibited under the Yakima Indian Nation's zoning code. Brendale and Wilkinson, however, applied for and received permission to proceed with their proposed plans from Yakima County, a political subdivision of the state of Washington, which claimed jurisdictional authority to zone all fee lands within the Yakima Reservation.

The Yakima Nation filed legal actions in United States District Court challenging both proposed developments and the County's exercise of zoning authority over land within the Yakima reservation boundaries. The District Court held that the Nation had exclusive land use regulatory jurisdiction over the Brendale property in the closed area, but lacked zoning authority over the Wilkinson property in the open area. The Ninth Circuit affirmed the District Court's decision with respect to the Brendale property in the closed area, but reversed as to the Wilkinson property in the open area, holding that the Yakima Nation had the jurisdictional authority to zone all lands within its reservation. Both cases were appealed and then consolidated for argument before the United States Supreme Court.

ceded most of their claimed aboriginal territory to the United States, retaining an area of roughly 1.3 million acres as the Yakima Indian Reservation. The treaty declared expressly that the reservation was for the Nation's "exclusive use and benefit."[115] This treaty promise of what would appear to be an unequivocally stated right of "measured separatism"[116] for the tribes on their reservation was reinforced by a stipulation that no "white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation without the permission of the tribe."[117]

Congress's subsequent passage of the General Allotment Act in 1887, however, breached this solemn treaty promise made in 1859 to the Yakima Nation of tribal retention and control over its reservation land base. Implementation of the allotment policy on the Yakima Reservation led eventually to opening up a substantial portion of the Nation's lands to settlement by non-members. While the Yakima Reservation was never formally disestablished, the result of allotment was to place approximately 20 per cent of the reservation lands in fee simple ownership held by non-Indians or non-member Indians of the tribe.[118] The question before the Supreme Court in *Brendale* was whether the Yakima Nation could regulate land uses on those parcels owned in fee by non-members of the tribe. The Supreme Court held in *Brendale* that, by opening up certain portions of the Yakima reservation to large numbers of non-Indians for settlement, Congress under the Allotment Act had essentially divested the tribe of sovereignty over these lands. The Yakima Indian Nation, in other words, could not regulate those areas on its reservation where the land had passed predominantly into ownership by non-members by operation of a nineteenth century genocidal legislative initiative aimed at "pulverizing" American Indian tribal culture.[119]

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115 *Ibid.* at 422.

116 See text accompanying *supra* note 78.

117 *Supra* note 114 at 422.

118 *Ibid.*

119 See text accompanying *supra* note 100. The Court reached this decision through three separate opinions. Justice White, in an opinion joined by Justices Scalia, Kennedy and Chief Justice Rehnquist, reasoned that the Yakima Nation lacked sovereign power over non-members in both the closed and open areas of the reservation, and therefore could not zone either parcel. Justice Stevens, in an opinion joined by Justice O'Connor, agreed only that the Nation lacked zoning authority in the open area. Stevens argued that the Yakima Nation could regulate land uses within

The holding of the *Brendale* case, in terms of its precedential authority in federal Indian law, is that Indian tribes only have self-determining law-making power over lands located in reservation areas that have no significant non-Indian presence.[120] Indian tribes lack the sovereign authority under *Brendale* to control non-Indian owned fee lands in reservation areas where the tribe has been displaced by a significant non-Indian presence. While *Brendale* strikes what appears to be a near-fatal blow to tribal efforts to maintain jurisgenerative autonomy over the reservation whenever Congress, by breach of a treaty promise, has permitted non-Indians to settle on a reservation, there is an even larger, more ominous significance to *Brendale*; that is the modern Supreme Court's unquestioning perpetuation of the racist premises of Indian cultural inferiority embodied in the Allotment Act into contemporary federal Indian law.[121] A majority of the Court in *Brendale* was of the view that the nineteenth century allotment policy rendered null and void any treaty rights the Yakima Nation might once have held to exclude non-Indians from the

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the closed areas of the reservation with only a minimal non-Indian presence. A third opinion authored by Justice Blackmun and joined by since-retired Justices Brennan and Marshall, argued in dissent and concurrence, that the Yakima Indian Nation could regulate all lands within the reservation. Thus, the Court's *Brendale* decision combines majorities represented by the White and Stevens opinions holding that the Yakima Nation possessed no zoning power over non-members in the open area, and majorities represented by the Stevens and Blackmun opinions, recognizing tribal authority over the closed area, to reach its outcome that the Yakima Nation has no jurisdiction over non-members in the open area, but does retain jurisdiction over non-member fee lands in the closed area.

120 See J.W. Singer, "Sovereignty and Property" (1990) 86 Northwestern U. L. Rev. 1 at 10-13.

121 In previous non-Indian decisions not complicated by federal Indian law principles, the Supreme Court has indicated that the power to regulate land uses within a community is one of the most essential functions performed by local government. The Court's decision in *Brendale* effectively held that Indian peoples do *not* possess this important self-governing power over their reservation communities. *Brendale's* result thus holds important consequences for Indian self-determination over treaty-guaranteed reservation territory. As one of the dissenting justices noted in *Brendale*: "This fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land" (*supra* note 114 at 458). *Brendale's* denial of this "vital" self-determining power to Indian tribal communities in effect severs this "unique historical and cultural connection to the land" belonging to Indian peoples (see cases cited in *Brendale*, *ibid.*).

entire reservation. According to *Brendale*, the promises in a treaty by which the United States recognizes an Indian tribe's self-determining rights over its reservation territory are, in essence, not relevant or meaningful in the Supreme Court's federal Indian law jurisprudence.

Of course, it has always been that way. The Supreme Court's announcement in *Brendale* that an Indian treaty is not relevant to questions of Indian rights where the majority society has breached that treaty is traceable back to the allotment era Supreme Court decision in *Lone Wolf* v. *Hitchcock*.[122] In *Lone Wolf*, it will be recalled, the court held that Congressional actions abrogating Indian treaty rights were political questions, not justiciable, in the courts of the United States.[123] On the issue of tribal law-making authority over the reservation, the modern Court has unquestioningly perpetuated the allotment era's racist legacy of treaty-breaking justified in *Lone Wolf*.

In 1981, in *Montana* v. *United States*,[124] the Court denied the treaty-based right of the Crow Tribe of Montana to regulate hunting and fishing activities of non-members on fee lands acquired through the Allotment Act's provisions: "Treaty rights must be read in light of the subsequent alienation of those lands" under the Allotment Act.[125] As the Court reasoned: "[i]t defies common sense that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when *an avowed purpose of the allotment policy was the ultimate destruction of tribal government*."[126]

Significantly, the *Brendale* Court's analysis denying tribal authority to regulate nonmember fee lands cited as its basis of decision *Montana's* recognition of "the avowed purpose of the allotment policy:" the "ultimate destruction of tribal government."[127] As Justice John Paul Stevens explained

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122 *Supra* note 106.
123 See text accompanying *supra* notes 106-108.
124 *Montana* v. *United States*, 450 U.S. 544 (1981).
125 450 U.S. 544 at 561 (1981).
126 *Ibid.* at 560, fn. 9 [emphasis added].
127 *Supra* note 114 at 423.

in joining *Brendale's* holding that the tribes, in spite of their treaty, no longer retained the power to regulate non-Indian fee lands in the open portion of the reservation with a significant non-Indian presence:[128]

> [T]he Indian General Allotment Act of 1887 (Dawes Act), however, to some extent reworked fundamental notions of Indian sovereignty. Under the Dawes Act, the President was authorized to allot reservation lands in severalty to resident Indians. Allotted lands were held in trust for members of the Tribe from a period of at least 25 years, after which the members received fee patents and could freely transfer the land to non-members. "When all the lands had been allotted and the trust expired, the reservation could be abolished." In this manner, the Dawes Act was designed ultimately to abolish Indian reservations while attempting to bring "security and civilization to the Indian."

In a number of frightening aspects, *Brendale* is a remarkably revealing case. A majority of the justices of the United States Supreme Court have adopted an attitude of judicial obliviousness to the fact that in the late nineteenth century the United States government exercised its plenary power in Indian affairs to destroy and abolish American Indian tribal governments, "rework fundamental notions of Indian sovereignty," and terminate the treaty rights of Indian tribes to exclude non-Indians from their reservations. This official stance of obliviousness enables the Court to accept, without any comment, criticism, or self-conscious recognition of its role in perpetuating these racist policies, that the exercise of this genocidal power in the nineteenth century has determinative consequences in its contemporary twentieth century Indian law jurisprudence. Of course, the Court's obliviousness to the pernicious effects of European-derived racism and colonialism on its contemporary jurisprudence is not surprising. *Blendale* is based squarely on comforting precedents derived from the Marshall model, which recognizes the majority society's unilateral power to extinguish Indian sovereignty, yesterday, today, or tomorrow, unimpeded by the courts or the Constitution of the United States. That, after all, always has been the law of the land in the United States.

We now begin to grasp a clearer picture of the enormity of the challenge presented by the legacy of European racism and colonialism against Indian people to the self-determination struggles of American Indian tribes in the United States. A five person majority of the Supreme Court of the United

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[128] *Ibid.* at 436.

States in the year 1989 felt unconstrained by considerations of law, justice, or morality in extending and reinscribing Congress's 19th century racist policy of destroying, abolishing, and reworking Indian peoples' treaty guaranteed rights of self-determining, law-making authority over their territories. By holding in *Brendale* that the Allotment Act terminated any treaty rights the tribes might have once held to exclude, or exercise the lesser power of regulating, non-Indians on the reservation, the Supreme Court has perpetuated the legacy of European-derived colonialism and racism against indigenous tribal peoples into modern federal Indian law.

As *Brendale's* treatment of the issue of American Indian tribes' treaty-guaranteed rights of self-determination illustrates, the legacy of European racism against Indian peoples is unavoidably reinscribed in modern federal Indian law whenever the Court applies the Marshall model to uphold the majority society's exercise of unilateral political power over Indian peoples. So long as the Marshall model retains its vitality in federal Indian law, that law will remain inescapably and irredeemably racist. A central and problematic challenge which confronts the indigenous struggle for self-determination in the postmodern world, therefore, is to expose how the courts of the majority society perpetuate and extend a thousand year old European-derived legacy of colonialism and racism against indigenous peoples by applying principles derived from the Marshall model and similarly constructed systems of indigenous rights. They must convince the courts of the majority society that any system of law which requires a court to concede to the majority society a unilateral power to determine the scope, content, and even the existence of indigenous rights, even when that power is grounded in a racist past and racist premises, cannot provide a stable, much less a just, foundation for protecting the cultural survival of indigenous peoples.[129]

[129] This statement applies with equal force to the present situation in Canada. See *Delgamuukw* v. *The Queen in Right of the Province of British Columbia and the Attorney General of Canada* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), where Chief Justice McEachern of the Supreme Court of British Columbia rendered the truly frightening opinion that "the difficulties facing the Indian populations of the territory ... will not be solved in the context of legal rights." As Professor Sidney Harring has demonstrated in his superb treatment of Canadian courts' performance in the field of Indian rights: "Canadian judges have not adequately addressed the issue of Native rights, deferring legal issues concerning Native people to legislative power." See S.L. Harring, "The Liberal Treatment of Indians: Native People in Nineteenth Century

IV. Human Rights

A. Indigenous Human Rights and the Postmodern World Legal System

The third challenge I want to discuss in this paper is integrally related to the first two challenges. It is the challenge which arises from the recognition by indigenous peoples that current European-derived racist and ethnocentric models of indigenous rights generally are incapable of justly accommodating their self-determining aspirations for jurisgenerative autonomy. Increasingly, therefore, indigenous peoples have turned to the emerging global discourse of indigenous human rights in contemporary international law and standard-setting activities in their struggles for self-determination.

I can only explore briefly in this article this third and final challenge which arises by the turn to the discourse of human rights by the indigenous rights struggle. In many ways, the contours of this challenge are only barely discernible upon the horizon of the emerging postmodern world legal system. We can see selected aspects of this challenge beginning to assume form in the demands for self-determination made by indigenous peoples which appeal to international law as a higher form of law, transcending the domestic policies and laws of their colonizers. These demands and appeals, it must be recognized, are subject to the myriad forces and interests which vie for recognition and legitimacy in the postmodern world legal system. While indigenous peoples certainly cannot hope to control these centrifugal forces and interests, they must confront the challenge of influencing them in ways that persuade the postmodern world legal system to embrace the promotion and advancement of the decolonization and self-determination efforts of indigenous peoples.

Mobilizing the progressive impulses of the postmodern world legal system to overcome the pressures that western settler-state governments will bring to bear on maintaining their privileges of unilateral power over the cultural survival of indigenous peoples will be no easy task. Several significant factors, however, do converge favourably for indigenous peoples in meeting the challenge of achieving their decolonization and self-determination goals

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Ontario Law" (1992) 56 Sask. L. Rev. 297 at 360.

in the postmodern world. Because the postmodern world is characterized by ever-increasing interdependencies, ever-improving communications technology, and burgeoning international institutions, the domestic policies and judge-made law of the western settler-states regarding indigenous peoples is increasingly influenced by what Professor S. James Anaya describes as a "multifactoral process of *authoritative* and *controlling* decision[s] operating across national frontiers."[130] In the postmodern world legal system, states with indigenous tribal populations as well as states without, non-state actors, including transnational corporations, international lending institutions, international non-governmental organizations and even liberation movements are all capable of exerting influence on western settler-states' policies and judicial decision making processes regarding indigenous peoples rights.

The emergence of international human rights discourse as an integrative, progressive force in this evolving postmodern world legal system is also an important factor which favors indigenous peoples in their decolonization efforts. The emergence of international human rights is one of the most important and revolutionary developments of our era. International human rights law has proven itself capable and effective in directly and indirectly influencing the domestic laws and policies of those states which desire acceptance and integration into the postmodern world legal system. By the sheer force of its consolidating vision of universal norms sanctioning a government's conduct toward its citizens, international human rights discourse "seeks to expand the competency of international law" over spheres previously reserved to the asserted prerogatives of the sovereign nation-state.[131]

The primary reasons that the contemporary discourse of international human rights has assumed an increasing role in regulating instances of egregious state conduct against human rights are relatively simple and easy to grasp. The major participants in the postmodern world legal system rely heavily on domestic and regional stability and international and multilateral harmonization of interests and goals. Human rights law has had "a socializing impact on the human community"[132] because governments, particularly

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130 Anaya, *supra* note 13 at 212.

131 *Ibid.*

132 See T. Burgenthal, "The Rights Revolution" in A. D'Amato, ed., *International Law Anthology* (Cincinnati: Anderson Pub. Co., 1993) at 205-206.

powerful western ones, increasingly take human rights considerations into account in developing their foreign policy. Diplomats as well as multinational corporations have no trouble in recognizing that a nation's oppression of its own people is a sign of weakness and instability. More and more, the benefits of political and economic linkages with other countries are determined according to a calculus that includes the dimension of human rights:[133]

> Governments now know that there is a political and economic price to be paid for large-scale violations of human rights. That knowledge affects their conduct; not because they have suddenly become good or altruistic, but because they need foreign investment or trade, economic or military aid, or because their political power base will be seriously weakened by international condemnation.

Now I do not mean to say by all this that international human rights law is destined to change the world as we now know it at the closing of the twentieth century. Such a destiny will be achieved only by real live human beings, pursuing visions of the world much different from those that have previously dominated humanity's thought and action throughout much of the course of the world's history. I do believe strongly, however, that international human rights law can be used as an effective tool for human beings committed to pursuing such different visions.

Since the 1970s, indigenous peoples have looked increasingly to international human rights discourse to articulate their vision of their rights and status in a postmodern world legal order. One of the more important forums which indigenous peoples have found to generate dialogue in the postmodern world legal system on their demands for decolonization and expanded rights of self-determination is the United Nations Working Group on Indigenous Populations.[134] The Working Group is a unique body within the institutional human rights structure of the United Nations. It was created by the U.N. Economic and Social Council (ECOSOC) in 1982. Its mandate as a forum devoted exclusively to the survival of indigenous peoples includes the urgent task of developing international legal standards for the protection of indigenous peoples' human rights. Its five members are drawn from the select group of international law experts sitting on the U.N. Sub-Commission

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[133] *Ibid.*

[134] On the Working Group's history and institutional structure see "Encounters," *supra* note 13 at 676-682.

on the Prevention of Discrimination and Protection of Minorities. With its global agenda and expert membership, the Working Group represents the single most important initiative ever undertaken on behalf of indigenous peoples' rights by the institutional standard-setting machinery of the international human rights process.[135]

In recent years, the Working Group's sessional agenda has focused increasingly on developing a standard-setting international legal instrument for the protection and promotion of indigenous peoples' human rights. The information gathered through more than a decade of indigenous peoples appearing before the Working Group and expressing their vision of the human rights they want protected by the postmodern world legal system has evolved into a Draft Universal Declaration on Rights of Indigenous Peoples. The Working Group Draft Declaration is intended to be forwarded ultimately to the U.N. General Assembly for ratification. Once so ratified, the Universal Declaration on Indigenous Rights would assume its place among other authoritative international human rights instruments as declarative of the international community's minimum legal standards for the protection of indigenous peoples' human rights to survival.

The adoption of a Universal Declaration on the Rights of Indigenous Peoples thus would be another important factor favouring indigenous peoples in their decolonization efforts. As a standard-setting instrument for international law purposes, its alternative vision of indigenous human rights could be employed in international legal and political forums around the world; in the U.N. Human Rights Commission, on the floor of the U.N. General Assembly, or in regional bodies such as the Inter-American Commission on Human Rights. Not only could a United Nations Universal Declaration speaking to indigenous human rights be cited as authority in the international legal system, it would command attention and response in many domestic political and legal arenas as well. Its prescriptions could be used in a variety of highly-publicized forums by any number of indigenous and non-indigenous groups and individuals to challenge state action threatening the survival of indigenous peoples. Perhaps the greatest significance of a U.N. Universal Declaration on the Rights of Indigenous Peoples in fact would be its capacity to translate the vision of indigenous peoples of the human rights

[135] *Ibid.*

they want protected into terms that settler-state governments, particularly in the West, will listen to seriously.

Eventual adoption by the U.N. General Assembly of the Working Group's Draft Declaration could provide a unique stimulus to the contemporary global movement for recognition, protection, and promotion of indigenous peoples' human rights. The Draft's broad scope of recognition for indigenous human rights specifically addresses many of the most serious concerns raised by indigenous peoples during the course of their interventions at the Working Group since 1982. In its present form, the draft expressly recognizes the unique nature of indigenous peoples' collective rights, the centrality of indigenous peoples' territorial rights to indigenous survival, indigenous peoples' rights to attain a measure of self-determining autonomy, and the need to provide effective mechanisms for international legal protection of indigenous rights.[136] While the present Draft will most certainly undergo substantive revision and refinement of its terms as it progresses through the institutional standard-setting machinery of the U.N. human rights process, the Draft will serve to increase and focus the attention of the postmodern world legal system on the necessity of an international legal instrument devoted to the protection of indigenous peoples' survival.

Such increased attention is certain to lead to a closer scrutiny of the models and institutions which presently determine indigenous peoples' rights in the western settler-states. The western constitutional democracies, in particular, are principal supporters as well as beneficiaries of the economic, cultural, and strategic relationships which arise out of the postmodern world legal system and its integrating constellation of human rights norms. The domestic policies and judge-made law of these countries toward indigenous peoples, therefore, are particularly amenable to the progressive, ameliorating influences of the international human rights process and its developing norms on indigenous rights.[137] In turn, legal developments in these advanced

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[136] See U.N. Draft Declaration on the Rights of Indigenous Peoples, U.N. DOC. E. CN. 4/sub. 2/1993/29 (23 August 1993).

[137] Those who might doubt the ability of international human rights law to influence indigenous rights policies and judge made law in the United States or other western settler-states, (see, for example, R. Lawrence, "Learning to Live with the Plenary Power of Congress over Indian Nations" (1988) 30 Ariz. L. Rev. 413 at 428), should

democracies, because of the interlinked nature of the postmodern world legal system, can produce ameliorating effects in the laws and policies regarding indigenous peoples in other countries.

It is foreseeable, therefore, that the principles contained in the Draft Universal Declaration on Indigenous Rights and other developing international norms on indigenous rights[138] will come to assume a more authoritative and, at times, even constraining role on state policies and judicial decisions affecting indigenous peoples rights. The third and final challenge confronting indigenous peoples in their decolonization efforts is therefore ultimately a

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consider the example set by the Australian High Court's landmark decision in *Mabo* v. *Queensland*, (1992) 107 A.C.R. 1 overturning centuries of racist policies and law denying basic human rights to aboriginal peoples under the *terra nullius* principle derived from the doctrine of discovery. Justice Brennan's *Mabo* opinion declared:

> The fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country ... Whatever the justification advanced in earlier days for refusing to recognize the rights and interest in land of the indigenous inhabitants of settled colonies, an unjustified discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the [United Nations] Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international law it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of international human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands (*ibid.* at 28-29).

[138] One source for these developing norms on indigenous rights will most certainly be *The 1989 International Labour Conference Convention 169, Concerning Indigenous and Tribal Peoples in Independent Countries*. See R. Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples" (1990) 15 Okla. City U. L. Rev. 209.

moral one. Indigenous peoples must strive to assure that the principles and norms of international human rights discourse respond to a higher law aimed at a radical transformation of the present-day racist models relied on by western settler-state governments to respond to indigenous rights demands. Such a transformation will only be possible if the emerging discourse of indigenous human rights in international law remains responsive to new visions and new ways of thinking about the rights and status of indigenous peoples in a postmodern world legal system.

V. CONCLUSION

Confronting the challenges of sovereignty, racism, and human rights will require a fundamental change in our vision of the rights and status of indigenous peoples in the world. Instead of policies enacted unilaterally by the majority society, we must envision a model of indigenous sovereignty which empowers indigenous peoples to escape their continuing state of disempowerment in the world. Instead of perpetuating the legacy of European racism each time they are asked to justify the majority society's exercise of unilateral power over indigenous peoples, the courts of the majority society must embrace a vision which rejects the Marshall model and similarly constructed systems of the law applied to indigenous people's rights. Instead of the interests of settler-state governments in maintaining their privileges of power over indigenous peoples, the principles and norms of international law must respond to indigenous human rights and must search out new visions of a higher law aimed at a radical transformation of the present-day racist models of indigenous peoples' rights and status in the postmodern world.

In the end, the very nature of the postmodern world legal system has determined that these new visions of indigenous rights will not be dictated by indigenous peoples alone. Such transforming visions will be arrived at, if at all, through dialogue and negotiation on a global scale. Indigenous peoples, western settler-states, states without indigenous tribal populations within their borders, non-governmental organizations and a myriad of different voices will influence this process by which the challenges of sovereignty, racism, and human rights confronting the world's indigenous peoples will be addressed.

And as this process moves forward, we will all need to learn to listen respectfully to each other's visions.[139]

A. THE POWER OF STORIES

I believe this process for addressing the challenges confronting indigenous peoples in their struggles for self-determination can be moved forward if we remember the transforming power of stories. Stories can help us transcend our ordinary ways of thinking about the world, and the rights and status of indigenous peoples' in that world. Stories can lead us toward new approaches for addressing the challenges which confront indigenous peoples' struggles for self-determination.[140]

1. The *Gus-Wen-Tah*

Consider the story of the *Gus-Wen-Tah*. The *Gus-Wen-Tah*, or Two Row Wampum represents an indigenous response to the problem of sovereignty as historically constructed by the West. The principles embodied in the *Gus-Wen-Tah* were the basis for all treaties and agreements between the great nations of the Haudenosaunee (Iroquois) Confederacy and the great nations of Europe. These basic principles were the covenant chain linking these two different peoples by which each agreed to respect the other's vision. Instead of the Marshall model and its Hobbesian vision of sovereignty which presently dominates our ways of thinking about the jurisgenerative rights of indigenous communities to control their lives and territories, the vision of the *Gus-Wen-Tah* can help us imagine a much different model of indigenous rights which seeks to justly accommodate the claims for sovereignty asserted by indigenous peoples.[141]

> When the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bed of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your

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139 See "The Algebra," *supra* note 49 at 219-225.

140 See "Encounters," *supra* note 13 at 701-02.

141 Quoted in House of Commons, Special Committee on Indian Select Committee *Indian Self-Government in Canada: Report of The Special Committee* (Ottawa: Queen's Printer, 1983).

> ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.

2. *People* v. *Woody*

There is a second story I want to tell about indigenous rights. It can be found in a somewhat obscure case in the United States on Indian rights, *People* v. *Woody*, decided by the California Supreme Court in 1964.

We have seen how the courts of the majority society perpetuate the legacy of European colonialism and racism whenever they apply the principles of the Marshall model to questions of indigenous rights. *People* v. *Woody* envisions a much different role for the judiciary in protecting and promoting indigenous rights in a multicultural society.

The case involved American Indian religious use of peyote, a hallucinogenic drug which is "the theological heart" of the religious ceremonies of the Native American Church.[142] The California Supreme Court, like many American courts before and since, was asked to perpetuate one of the most brutal expressions of the legacy of European racism and colonialism against American Indian peoples: the dominant society's suppression of Indian religious freedom. Overturning California's conviction for peyote use by a Native American Church member on the constitutional grounds of protection of freedom of religion, Justice Tobriner's opinion for the court sought to envision the reasons why the majority society's court should protect American Indian religions from the tyranny of the majority.[143]

> In a mass society, which presses at every point toward conformity, the protection of self-expression, however unique, of the individual and group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night in a desert hogan near Needles, California.

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[142] 394 P. 2d. 813 (1964).

[143] *Ibid.* at 821-22.

3. The Miners' Canary

The final story I want to tell about indigenous rights is about a metaphor used by the greatest scholar of United States federal Indian law, Felix Cohen. Cohen's career as an Indian rights advocate is marked by an extraordinary moral commitment to helping the majority society understand the importance of recognizing and protecting the basic human rights of Indian peoples. The most enduring and powerful expression of his vision of indigenous peoples rights is contained in his metaphor of the miner's canary:[144]

> The Indian plays much the same role in our American society, that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities reflects the rise and fall in our democratic faith.

Like the Two Row Wampum and *People* v. *Woody*, the story of the miner's canary attempts to evoke within us the imaginative capacity to see different ways of approaching the central and problematic challenges of sovereignty, racism, and human rights confronting the self-determination struggles of indigenous tribal peoples in the world today. Instead of a model which vests the majority society with unilateral power to determine the terms of Indian tribalism's survival in the world, instead of the majority society's courts perpetuating the legacy of European racism and colonialism against Indian people, Cohen's metaphor of the miner's canary envisions the emerging voices of indigenous peoples asserting a higher law as governing their rights and status in the world.

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[144] F.S. Cohen, "The Erosion of Indian Rights, 1950-53" (1953) 62 Yale L. J. 348 at 390.

Domestic Legal Aid: A Claim to Equality

Patricia Hughes*

The provision of legal aid in domestic matters is severely circumscribed when compared to the resources devoted by government to the provision of legal aid in criminal matters. Examining these practices in light of the Charter of Rights and Freedoms, *the author argues that by providing inadequate resources in matrimonial matters, governments are engaging in discriminatory practices which reinforce already existing relationships of domination and subordination. By making the provision of legal aid in domestic disputes equivalent to that in criminal matters, the author concludes access to justice would be facilitated equally and the legal system would be better equipped to respond to claims of social inequality.*

L'aide juridique fournie aux victimes de violence au foyer est très limitée par rapport à celle que le gouvernement offre en matière d'affaires criminelles. Invoquant la Charte des droits et libertés, *l'auteure soutient que ces pratiques gouvernementales sont discriminatoires et renforcent des rapports existants de domination et de subordination. L'auteure conclut que la prestation de services juridiques équivalents tant en matière de violence familiale que d'affaires criminelles faciliterait un accès équitable à la justice, et que Le système judiciaire serait alors plus en mesure de répondre aux allégations d'inégalité sociale.*

Introduction

Domestic legal aid[1] apparently is at a serious disadvantage in comparison with criminal legal aid on several measures: the financial resources allocated to it are less; the delivery system is less accessible; and lawyers who do domestic legal aid are less well compensated for their work.[2] Since the

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1 "Domestic" matters in this context refer to matrimonial and domestic violence matters.

2 M.J. Mossman, "Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change" (1993) 15 Sidney L. Rev. 30. Lawyers may be less well compensated because the tariff is lower and/or because the work required for domestic cases is not covered as well (for example, more paperwork may be required in domestic matters than is usually the case in criminal matters and it is not compensated to the extent that court work is [court appearances' occurring more often in criminal cases]). The distinction occurs across Canada. Indeed, there may be no legal aid for domestic issues at all, as was the case in New Brunswick, for example, when the government eliminated the existing domestic legal aid system in

systems themselves are differentially provided, those who need legal aid for domestic matters are at a disadvantage compared to persons who use the criminal legal aid system.

The discrepancy between the two systems is particularly significant because it likely is gender-related. On the one hand, while men and women both commit crimes, they tend to be of different kinds and in a different dynamic with each other; more men commit serious violent crimes than do women, for example, and more men commit crimes of violence against women than the reverse.[3] On the other hand, while men and women both engage in matrimonial litigation, women as a group are less likely to have the financial resources to pursue the litigation than are their male partners; furthermore, women are more likely than are men to seek civil remedies against men for the violence men have committed against them, particularly in the domestic context. The factual underpinning for the conclusion that men make greater demands on the criminal legal aid system than do women and that women have greater need for domestic legal aid assistance needs to be definitively established.[4] The assumption that this is the case is consistent with what we know about male and female criminal behaviour, relations between men and women in the private or domestic sphere and the relative economic positions of men and women.[5] The legal argument developed here is based on the

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1988 for about a year, but it is more likely that domestic legal aid is available but to a lesser extent than is criminal legal aid. Also see, the Report on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) at 208-209.

3 See, for example, E. Adelberg and C. Currie, eds., *Too Few to Count: Canadian Women in Conflict with the Law* (Vancouver: Press Gang Publishers, 1987) at 23-33.

4 In *R.* v. *Rowbotham* (1988), 25 O.A.C. 321 (C.A.), the Court noted at 367 that the "vast majority of accused persons charged with indictable offences are defended under the [Ontario Legal Aid] Plan." As a working premise, one can surmise that since more men commit crimes, more men than women need and use the criminal legal aid system. Ironically, the claim to legal aid in *Rowbotham* was being made by a woman charged with conspiracy to traffic.

5 See, on the the relations between women and men in the private sphere and the relative economic positions of women and men, D.G. Stewart and L.E. McFadyen, "Women and the Economic Consequences of Divorce in Manitoba: An Empirical Study" (1992) 21 Man. L. J. 80; P. Armstrong, "Economic Conditions and Family Structures" in M. Baker, ed., *Families: Changing Trends in Canada*, 2nd ed. (Toronto: McGraw-Hill Ryerson, 1990) 67; A. Propper, "Patterns of Family

assumption that the demands placed on the two systems of legal aid are gendered.

If that is the case, the failure of a legal aid program to provide resources to domestic matters in a manner equivalent to that provided to criminal matters deprives more women of access to the legal system than it does men. This proposition in turn invites consideration of how the equality provisions of the *Charter of Rights and Freedoms*[6] might be employed to address the discrepancies in access to and benefits from the two systems of legal aid. In this article I suggest in skeletal form how a claim to an improved domestic legal aid system might be made under section 15 of the *Charter*, reinforced by (but not dependent upon) the interrelationship between sections 15 and 7.[7] My purpose is to provide a formative framework for a *Charter*-based analysis, a catalyst which is amenable to further development and refinement.

As indicated, it is a fair working assumption that in collective terms, women and men use the legal system for different purposes (as well, of course, for the same purposes). The different purposes are not random, however, but are often (although not always) closely connected with each other. Thus, among other criminal charges for which men seek legal counsel

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Violence" in Baker, ed., *ibid.*, 272; Canada, *Report of the Commission on Equality in Employment* (Ottawa: Supply & Services, 1984) (Chair: R.S. Abella) at c.2.

6 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Equality rights are guaranteed by sections 15 and 28 which read as follows:

> **15.** (1) 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.
>
> (2) 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.
>
> **28.** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

7 Section 7 reads as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

are those involving abuse of women, sexual and non-sexual. Women, on the other hand, need the assistance of the legal system to defend themselves against violence by men (through seeking a restraining order, for example) or to remove themselves from abusive or otherwise subordinate domestic relationships. While men who use legal aid are by definition economically disadvantaged, the women who require the assistance of the legal system in fighting the oppression of men are, generally speaking, economically disadvantaged in comparison with men,[8] including the men who have abused them or who are fighting their attempts to obtain custody of their children or to obtain support.[9]

In short, men receive the assistance of the state in defending their abuse of women, while women receive less assistance fending off the abuse or removing themselves from it. In domestic matters, the woman is more likely to be the financially subordinate partner. This inferior economic status can, in part, be traced to expectations about women's place in the home and the relative status of women in the economy. While this may be slowly changing, it has not yet changed to the extent that the economic differences between particular women and men are solely or even primarily a consequence of individual (or at least non-gender related) factors, rather than gendered patterns. This connection highlights the unfairness of the different resources allocated to the two systems, and implicates the state in the continued subordination of women. Put another way, both women and men require the legal system to defend themselves, yet find that it is not equally available to them. To the extent that they do not have equivalent access to it, women are denied the protection of the legal system: they are, in the literal sense of the phrase, denied "the equal benefit of the law" guaranteed by section 15.

This denial is reinforced by reference to section 7. Section 15 rights are, as are other rights and freedoms, to be considered in relation to other *Charter* rights; none exists in a vacuum, but rather they inform and modify or expand

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8 *Supra* note 5.

9 Of course, men are also subject to the criminal acts of other men, but not often in the domestic sphere; women also engage in violent criminal acts against men, but this occurs far less often than the reverse and, when it occurs in the domestic sphere, the woman's violent acts may well be a response to her male partner's violent acts against her.

each other.[10] Thus, reference to section 15 equality rights might help support restrictions on freedom of expression guarantees in some circumstances.[11] In particular, because of section 28's guarantee of sex equality, any rights guaranteed by the *Charter* are guaranteed equally on the basis of sex, including those guaranteed by section 7, the interpretation of which must reflect the reasons women and men (differentially) require access to the legal system. In this context, interpretations of section 7 and section 15 inform each other: interpretations of section 7 which exclude the reality of marginalized groups are not available to members of all groups equally.[12]

In fact, the claims on the legal system made by men and by women find a home in the interests protected by section 7 of the *Charter*. The right not to be deprived of liberty except in accordance with the principles of fundamental justice of course underlies the need for access to the legal system to defend oneself against a criminal charge. The right not to be deprived of security of the person except in accordance with the principles of fundamental justice can be said to require that those who are threatened by criminal acts are entitled to receive the protection of the legal system. Similarly, those who seek autonomy through use of matrimonial law are entitled to recourse to state support when they are unable to afford private counsel. Indeed, it has been said (in reference to forcible treatment of involuntary patients at a mental facility) that:[13]

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[10] *R.* v. *Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295: the purposive approach to interpreting the rights and freedoms guaranteed by the *Charter* involves looking at the larger objects of the *Charter*, the language chosen to articulate the rights and, where applicable, the meaning and purpose of other rights.

[11] *R.* v. *Butler*, [1992] 1 S.C.R. 542.

[12] As Justice Wilson says, constitutional guarantees must be responsive to women's reality: the Hon. B. Wilson, "Women, the Family, and the Constitutional Protection of Privacy" (1992) 17 Queen's L.J. 5 at 13.

[13] *Fleming* v. *Reid (Litigation Guardian)* (1991), 82 D.L.R.(4th) 298 (Ont. C.A.) at 312. Although this case deals with forcible treatment, the general principle can be applied more broadly and is consistent with the way the law is increasingly responding to violence against women (including the increasingly controversial policy of mandatory charging of violent partners and changes in the *Criminal Code*'s treatment of sexual assault).

> the common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by section 7.

Historically, the legal system (personified by lawmakers, adjudicators and enforcement officials) has been unable or unwilling to protect women from violence; it also has been instrumental in maintaining many women's subordination in the private sphere or the family.[14] The growing recognition of the obligation of the legal system to respond to (for example) violence against women in the home should be reflected in a progressive and purposive interpretation of section 7 of the *Charter*.[15] Women's need to protect themselves against violence is only one reason that women require domestic legal aid; but the conjunction of assistance to men charged with assaulting women with the lack of assistance to women appealing to the legal system for help in fending off abusive men graphically illustrates the unfairness of the legal aid system.

When the legal aid system discriminates against women by providing inadequate means to engage in matrimonial disputes, it facilitates and aids those who are able to use the legal system to perpetuate the subordination of women. The argument that gendered access to legal aid contravenes section 15 does not require that legal aid itself receive constitutional protection;[16] rather, it requires an acknowledgement that a failure to ensure that women can protect their security interests as well as men can protect their liberty interests (through access to legal aid) is a denial of equality. Section 15 thus reinforces the argument that the guarantees under section 7 should be interpreted in a manner which acknowledges the different needs of men and women. The lack

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[14] For a brief recent review of the place of women in the family, see Wilson, *supra* note 12. While some women view the family as a refuge or locus of strength, and other women consider it a source of oppression, the *law* has treated all women as a subordinated class.

[15] The Supreme Court of Canada articulated in its first *Charter* decision that the *Charter* is to be interpreted as a progressive document which looks to the future: *Law Society of Upper Canada* v. *Skapinker*, [1984] 1 S.C.R. 357.

[16] That is not the argument being made here; however, on this point, see David Schneiderman and Charalee F. Graydon, "An Appeal to Justice: Publicly Funded Appeals and *R.* v. *Robinson; R.* v. *Dolejs*" (1990) 38 Alta. L. Rev. 873.

of support for women to protect their security interests, particularly given the state's failure to protect women and its involvement in women's subordination, constitutes a failure to adhere to the very basic principle of fundamental justice: the expectation that the judicial system will serve to protect rather than aid and abet in subordination.

A challenge under section 15 requires that there be inequality and that the individual making the claim is thereby disadvantaged. Furthermore, the individual must be a member of an enumerated group or one analogous to those enumerated in section 15. These factors together constitute the kind of discrimination prohibited by section 15.[17]

As Justice McIntyre explained in the *Andrews* case, discrimination in one form is a distinction which "withholds or limits access to opportunities, benefits, and advantages available to other members of society."[18] Once the complainant has established a *prima facie* case under section 15, the inquiry shifts to section 1 to permit the government to show that the limitation of rights is "reasonable," "prescribed by law" and "justified in a free and democratic society."[19]

In *Andrews*, the Supreme Court of Canada stated that the analysis under these sections should be kept distinct.[20] In more recent cases, however, the line between the two stages of analysis has been blurred.[21] This has significant repercussions for the ability of a complainant to make a case under section 15: it changes who has the obligation to do what, requiring the complainant to adduce evidence which the government would otherwise

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17 *Andrews* v. *The Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R.* v. *Turpin*, [1989] 1 S.C.R. 1296; *R.* v. *Swain*, [1991] 1 S.C.R. 933.

18 *Andrews*, *ibid.* at 174.

19 The test under section 1 was described in *R.* v. *Oakes*, [1986] 1 S.C.R. 103 as a two step process: that the objective sought to be achieved must be sufficiently pressing to override a constitutional guarantee; and the limitation on the right must satisfy "the proportionality test" (the means chosen to achieve the objective must be rationally connected to it, must impair the right as little as possible, and there must be proportionality between the effects of the means and the objective). Also see *R.* v. *Edwards Books and Art*, [1986] 2 S.C.R. 713.

20 *Supra* note 17.

21 See, for example, *R.* v. *Hess*, [1990] 2 S.C.R. 906 and *Turpin*, *supra* note 17.

adduce; it reduces the onus on the government to demonstrate that the limitation on the right is justified; and it makes it less likely that the analysis will pass the section 15 hurdle. My discussion of section 15 necessarily takes the apparent ambivalence of the Supreme Court on the interrelation between sections 15 and 1 into account.

The Nature of the Inequality

"Rights" are of value only to the extent that they are enforceable. There are rights we designate as "legal" (for example, the right to a fair trial), but it is through legal process that we enforce certain political and social rights (such as the right to vote or the right to bodily integrity). Beeause of differences in the lived experience of men and women, they make different claims on the legal system. These claims, while different, are of equivalent importance, yet for those who require financial assistance, their access to the legal system is not equivalent. The difference in resources accorded to the criminal and domestic legal aid system has a negative disparate impact on women: women are disproportionately excluded from use of the legal system to deal with the problems *they* experience.[22] The disparate funding of the two legal aid programs, consistently in favour of criminal legal aid, assumes that a model based on male experience is representative of the needs of the population as a whole, when in actuality it has the effect of excluding women. Put another way, while both legal aid programs are available to both men and women, the one which is considered the more important is the one which is used more by men than hy women.

The importance the legal system plays in the western system of "justice" is reflected in the recognition that those who cannot afford to pay for legal assistance should be able to apply for legal aid. While not actually equalizing everyone's access to the legal system, legal aid nevertheless is an important

[22] It is well-established that "adverse effects discrimination", as well as direct discrimination, is prohibited by section 15: *Andrews*, *supra* note 17 at 165; *Symes* v. *Minister of National Revenue* (1993), 161 N.R. 243 (S.C.C.) at 311. In this context, both men and women may apply for criminal legal aid and both are subject to the limited domestic legal aid program; but women do not need criminal legal aid as much as men do and they need domestic legal aid more than men do; thus the inferior position of domestic legal aid constitutes a disparate impact on women.

and necessary access point. An inferior domestic legal aid program therefore impedes the development of equality when women require the system more for these purposes than men do and when men have greater access for the purposes for which they are more likely to need access. This is part of the gendered pattern of "what matters" in society or, in this context, the gendered nature of matters given legal recognition.

Not all women need to claim legal aid; nor do all women need access to the legal aid system for reasons related to abuse or because their integrity requires that they leave a subordinate relationship; nor do all men require criminal legal aid or require it because they are charged with violence against women. In addition, the urgency of the claim may be mediated by different experiences *among* women (and not only between men and women). But neither the experience nor the claim has to be universal, as long as patterns of treatment and conduct reflect gendered relations of violence and subordinance/dominance.[23]

That pattern is seen in the interrelationship between criminal charges against men and the domestic experiences of women. For example, economically disadvantaged men receive legal aid to assist them in defending themselves against charges relating to their treatment of women, treatment which is reflective of men's systemic dominant position in relation to women (ironically, an opportunity to perpetuate oppression to which economically advantaged women must contribute through taxation); therefore, economically disadvantaged women should be able to use state provided assistance through legal aid to remove themselves and their children from circumstances of subordination or to pursue civil remedies against abusers. *It is the opportunity to use the legal system to make social claims effective that is at issue.*

[23] In *Symes*, Justice Iacobucci acknowledged that "an adverse effect felt by a sub-group of women can still constitute sex-based discrimination" *(ibid.* at 328). Consider, for example, the defence of self-defence, now defined to reflect the life experiences of both women and men: *R.* v. *Lavallee*, [1990] 1 S.C.R. 852. Not all women are abused or kill their abusers or, if they do, they are not all affected by abused women's syndrome. Nevertheless, self-defence must take into account the gendered *pattern* of women's use of self-defence, rather than be defined by the circumstances and way in which men (but not all men) defend themselves.

In short, the reasons women require access to the legal system are imbedded less often in their own actions than in their status as a subordinate class economically, socially and, in the broad sense, politically; this subordination has been reinforced by the legal system and the state itself and it is therefore incumbent upon the state to ensure that economically-disadvantaged women have the means to use the legal system to remedy their subordinate status at least to the extent that economically-disadvantaged men have the means to protect themselves.

The Nature of the Discrimination

"Sex" is a protected ground enumerated in section 15, reinforced by section 28. Nevertheless, not all differences in treatment based on sex have successfully passed the section 15 hurdle. For example, a provision of the *Criminal Code* which makes it an offence for a man to engage in sex with underage girls is not discriminatory because biologically only men can penetrate and girls need protection more than boys do.[24] It might be argued that the standard with respect to the differential treatment of men could justifiably be lower than cases in which women are disadvantaged, since men historically are not a disadvantaged group. In *Hess*, however, one Justice compared the treatment of men under the *Criminal Code* to a hypothetical law which made it an offence for women to carry out self-induced abortion. Since in both cases, only one sex could engage in the prohibited activity, it is not discrimination to make the activity an offence. This approach suggests a throwback to the days of *Bliss*, and biological determinism, which *Andrews* indicated was not good law under section 15;[25] more significantly, it masks the very different meaning the prohibition might have for one sex compared to the other. Regardless of how undesirable this approach might be, this development must be and is considered within the section 15 analysis here.

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[24] *Hess*, *supra* note 21. The provision was declared of no force and effect under section 7 because it did not require *mens rea*: it did not matter whether the man believed the girl was under age. Furthermore, the provision had been amended before the case reached the Supreme Court.

[25] *Bliss* v. *Attorney General of Canada*, [1979] 1 S.C.R. 183. The Supreme Court explicitly rejected the approach taken in *Bliss* as being appropriate for interpretation under the Charter in *Andrews*, *supra* note 17 at 170. McIntyre J., speaking for the majority on this point, firmly rejected the "similarly situated" test which had applied in *Bliss*.

A different type of characterization issue has arisen in cases in which the courts have accepted the link between the identity of the complainant and the denial of a benefit; in some cases, they have glossed over the fact that the complainant belongs to a category of non-recipients because recipients have been defined in a way which automatically excludes the group to which the complainant belongs. For example, it has been held that the denial of spouses' allowance to same sex partners under the old age pension regime is not discriminatory. It was held that the exclusion is not on the basis of sexual orientation, but because the partners fell into a category of non-spouses who were not entitled to share in the benefits accorded to those in spousal relationships.[26] This misses the point that the term "spouse" is defined with a heterosexual bias which fails to accord recognition to the reality of gays.[27]

In a variant of this approach to characterizing the differential treatment, the court may conclude that in not enjoying equivalent access to legal aid, women are not discriminated against because they are women, but simply because they are less likely to make comparable (to men) use of the available legal aid system. That is to say, the discrimination arises from the fact that they do not *need* criminal legal aid to the same extent that men do; however, should they need it, it is available to them in the same way it is available to men. This analysis obscures the significance of women's different experience; not taking that into account means that women are disadvantaged by a system and government decision which has decided to value the experiences (and therefore needs) of men more than it does the experiences (and therefore needs) of women.

Furthermore, interests characterized as "economic" are less likely to be afforded protection under the *Charter*. Access to legal aid might be misconstrued as an economic issue, rather than one related to the protection of the legal system. Section 15 has not yet been interpreted to add explicitly

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[26] *Egan* v. *Canada* (1993), 103 D.L.R. (4th) 336 (FCA); leave to appeal to the Supreme Court of Canada granted October 14, 1993. The majority accepted that sexual orientation was a ground protected under section 15, but not that it was the reason for the different treatment.

[27] *Ibid.* Linden J.A. recognized this in his dissent, especially at 358-359, 364: "It would be paradoxical indeed if a decision under s.15 were itself to be based on prejudice and stereotyping."

economic grounds to the enumerated list.[28] Section 7 does not encompass property or other economic rights directly, security of the person could encompass an economic component.[29] Similarly, while section 15 may not prohibit discrimination on explicitly economic grounds, the fact that the interest which gives content to the equality claim is considered to have an economic component should not act as a bar to a finding of discrimination under section 15. In *Tétreault-Gadoury*, for example, the Supreme Court of Canada held that a provision excluding persons 65 years of age or over from eligibility for unemployment insurance benefits was contrary to section 15.[30]

The *Symes* case also dealt with disparate impact on the basis of gender (different responsibility for raising children having different impact on need for childcare to work outside the home), an economic element (deduction of business expenses) and a broader social goal (improved access to the workplace for women).[31] It is therefore useful to compare the two situations briefly. The majority in *Symes* acknowledged that women disproportionately bear the *social* cost of child care responsibilities, but maintained that, in order to link the disparate impact to the impugned section of the *Income Tax Act*, proof was required showing that women disproportionately bear the *financial*

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28 See, for example, *OPSEU* v. *National Citizens Coalition* (1987), 60 O.R. (2d) 26 (H.C.), aff'd (1990), 74 O.R. (2d) 260 (C.A.): income tax provisions providing for deduction of political contributions which seemed to favour self-employed persons rather than employees did not infringe section 15 since taxpayers earning income from employment are not a group suffering discrimination on a ground analogous to section 15 groups; *Lister* v. *Ontario (Attorney General)* (1990), 67 D.L.R. (4th) 732 (Ont. H.C.J.): legislation prohibiting doctors or dentists from incorporating professional practices did not discriminate because doctors and dentists were not treated differently on the basis of personal characteristics. Schneiderman and Graydon argue that social status or poverty is analogous to the existing grounds: *supra* note 16 at 890-892.

29 *Irwin Toy Ltd.* v. *Quebec (Att. Gen.)*, [1989] 1 S.C.R. 927 at 1003. Also see *Wilson* v. *British Columbia (Medical Services Commission)* (1988), 53 D.L.R. (4th) 171 (B.C.C.A.); leave to appeal refused, [1988] 2 S.C.R. viii: restrictions on doctors' freedom to practise where they wished is a denial of their section 7 right to liberty (in part because of the vagueness of the relevant provisions).

30 *Tètreault-Gadoury* v. *Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22. By the time of the decision, the federal government had repealed the relevant provision.

31 *Supra* note 22.

cost. In their view, this was not established.[32] The issue in a legal aid challenge is whether women and men require legal aid for different reasons. Furthermore, the majority in *Symes* had some difficulty with Ms. Symes' status as a self-employed lawyer and evidently saw the need to speak on behalf of female employees who could not make business deductions for their child care expenses.[33] Obviously, a challenge to legal aid does not involve women who on anyone's view could be considered "privileged." In particular, and perhaps most significantly, the claim for more equitable access to legal aid or for a domestic legal aid program equivalent to the criminal legal aid program does not rest on an economic ground. Rather, it rests on a challenge to the integrity of the legal system itself and its ability to protect all members of society.

Why the Discrimination is Not Justified under Section 1

Before considering the section 1 analysis, I make brief reference to a possible defence based on section 15(2) which provides that the prohibition against discrimination "does not preclude any law, program or activity which has as its object the amelioration of conditions of disadvantaged individuals or groups." At least one court has held that legal aid is an affirmative action program designed to help economically disadvantaged persons.[34] This designation of legal aid could provide the basis for refusing to explore the legal aid program sufficiently to understand the differential impact of the current system on women. Placing a program within the parameters of section 15(2) does insulate it somewhat from review. There has not been a great deal of judicial consideration of this provision, but it seems obvious that it should not be subject to the same tests as posed by section 1.[35] Affirmative action

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32 *Ibid.* at 321, 324.

33 *Ibid.* Cf. L'Heureux-Dubé J.'s dissent in which she disputes this analysis and points out at 399 that in his challenge to the requirement that he be a Canadian citizen before he could be called to the British Columbia bar, Mr. Andrews was not denied his declaration of invalidity on the basis that he was a white, male lawyer of British descent and therefore "privileged" in comparison with other non-citizens.

34 *Deutsch* v. *LSUC Legal Aid Plan* (1985), 48 C.R.(3d) 166 (Div. Ct.).

35 In *Hess*, *supra* note 21, in her dissent, McLachlin J. states at 945 that "subsection 15(2) is potentially far-reaching in its application. Interpreted expansively, as the Attorney General suggests, it threatens to circumvent the purpose of section 1." She suggests that the only test is whether the object of the legislation is to improve the

programs permit governments to assist persons who have been disadvantaged, to remedy past discrimination, and to limit the continuation of discrimination or promote equality. It is questionable whether legal aid is an affirmative action program in this sense,[36] but, in any event, since the ground of disadvantage is economic, it is unlikely that a program designed to assist economically disadvantaged persons could constitutionally discriminate against women.

The significance accorded the protection of the accused against the state will no doubt underlie the government's defence of the discrimination the legal aid system practises against women. Access to funded legal

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circumstances of disadvantaged groups. In the *Hess* context, since young women cannot benefit from the exclusion of young men from the protection of the Criminal Code provision or from the failure to treat them similarly, "[s]ection 146(1) does not constitute a true 'affirmative action program', in the terms of the marginal note to section 15(2)" (at 946). With respect; the negative way of phrasing this comparison is confusing; it would be preferable to ask the extent to which the program does actually address the disadvantages of the group in whose favour it was enacted. The negative approach appears similar to the view expressed in *Manitoba Council of Health Care Unions* v. *Bethesda Hospital* (1992), 88 D.L.R.(4th) 60 (Man. Q.B.): pay equity legislation was not considered an affirmative action program because it did not discriminate against an advantaged group (in this case, men); for a criticism of this approach, see P. Hughes, "Pay Equity Fails as Affirmative Action" (1992) 2 Employment and Labour Law Reporter 37. In *Harrison* v. *University of British Columbia*, [1990] 3 S.C.R. 451 at 474-476, Wilson J. stated that a disadvantaged group under section 15(2) would be defined in the same way as those who fall within section 15(1). It has been said that a program satisfied section 15(2) only if the purpose was to assist a disadvantaged group and the need to exclude others from the benefits conferred by the legislation was properly considered: *Harrison* v. *University of British Columbia* (1988), 49 D.L.R. (4th) 687 (B.C.C.A.) at 703. Provision of family benefits to single mothers, but not to single fathers, was not justified under section 15(2) because the object of the family benefits program was the relief of poverty; it was not enacted to overcome past discrimination: *Reference re Family Benefits Act (NS), Section 5* (1986), 75 N.S.R. (2d) 338 (C.A.). Generally, see C. Sheppard, *Study Paper on Litigating the Relationship Between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993).

36 The program ordered by the Supreme Court of Canada in *Action Travail des femmes* v. *Canadian National Railway Co.*, [1987] 1 S.C.R. 1114 is a good example of an affirmative action program, although it was not ordered as a remedy to a *Charter* challenge but under the *Canadian Human Rights Act*.

representation for criminal matters was not explicitly included as a guaranteed right; rather, it has been drawn from other rights and protections, building on the protections for the accused developed through the common law. The rights enjoyed by an accused are reflected in section 7 of the *Charter*[37] and, specifically in the context of legal representation, in the right "to retain and instruct counsel without delay and to be informed of that right" found in section 10(b), as well as in section 11(d)'s guarantee of a fair trial. To make these rights meaningful, the courts have treated them as encompassing funded access to legal representation for some purposes and under some circumstances.[38] The right to retain and instruct counsel under section 10(b) means "the right to have access to counsel free of charge where the accused meets certain financial criteria set up by the provincial Legal Aid plan, and the right to have access to immediate, although temporary, advice from duty counsel irrespective of financial status."[39] There is a distinction between the right to retain counsel under section 10(b) and the right to have counsel provided at the expense of the state; to the extent that legal aid does not provide assistance, sections 7 and 11(d) require that funded counsel be provided to accused who cannot afford a lawyer.[40]

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37 *R.* v. *Seaboyer*, [1991] 2 S.C.R. 572.

38 *Re Munroe and the Queen* (1990), 97 N.S.R.(2d) 361 (S.C.), aff'd 98 N.S.R.(2d) 174 (C.A.): the placing of limits on funds allocated under a provincial legal aid plan is not a denial of the accused's rights even when the charge is murder; *Panacui* v. *The Legal Aid Society of Alberta*, [1988] 1 W.W.R. 60 (Alta. Q.B.): not granting complete choice in counsel is not a contravention of the *Charter*; *R.* v. *Robinson* (1990), 63 D.L.R.(4th) 289 (Alta. C.A.): the Charter does not require that legal aid provide assistance or free transcripts on appeal; *Saint-Jacques* v. *Legal Aid New Brunswick (Regional Director)* (1988), 92 N.B.R. (2d) 1 (Q.B.): only accused charged with a serious and complex crime are entitled to legal aid under section 10(b); *Rockwood* v. *The Queen* (1989), 49 C.C.C.(3d) 129 (N.S.C.A.): denial by legal aid to an accused of the lawyer of his choice is not a contravention of sections 7, 10(b) or 11(d).

39 *R.* v. *Brydges*, [1990] 1 S.C.R. 190 at 215. This case determined that information about the availability of legal aid and duty counsel is to be part of the arresting officer's caution to the accused. Also see *R.* v. *Cobham*, [1994] 3 S.C.R. 360: an individual is entitled to be advised of the right to free and immediate duty counsel when ordered to provide a breathalyser.

40 *Rowbotham, supra* note 4 at 369-370 for a discussion of when counsel is actually required in light of the test of whether counsel is essential to a fair trial. Also see *Brydges*, *ibid.* at 217: the issue of whether there is a constitutional right to have the

The Supreme Court has said that "the right to counsel [in the context of section 10 of the *Charter*] ... is aimed 'at fostering the principles of adjudicative fairness,' one of which is 'the concern for fair treatment of an accused person'."[41] It has been said that criminal legal aid reflects the values of a free and democratic society, including "respect for the inherent dignity of the human person" and "respect for and confidence in the fairness of the judicial process and in particular the process as it is applied to the criminal law."[42] The integrity of the legal process and the values we consider integral to the democratic system are broader than, but in keeping with, the Supreme Court's concern about adjudicative fairness. The integrity of the legal process is brought into doubt by a system which allocates more resources to those accused of abuse than to those who are subject to it or those who seek to leave an abusive situation. The importance accorded representation for an accused should not be permitted to justify exclusion of women from meaningful access to legal aid; it does, however, support the contention that the inequality cannot be "remedied" by reducing resources allocated to criminal legal aid.

Conclusion

There is no question that criminal legal aid rests on the protection of the accused from the power of the state; these are principles which are fundamental to our legal system.[43] In this context, then, it is clear that legal aid is not properly characterized as an "economic right," but as necessary to the protection or exercise of fundamental rights or protections in liberty and security, including bodily integrity and autonomy. It is the integrity of the

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assistance or representation of counsel arises when an accused does not qualify for legal aid and duty counsel cannot furnish a full defence — it is then a matter for sections 7 and 11(d) of the *Charter*.

41 *Brydges*, *supra* note 39 at 203, citing Wilson J. in *Clarkson* v. *The Queen*, [1986] 1 S.C.R. 384 at 394.

42 *Panucui*, *supra* note 38 at 78.

43 There may, however, be equally strong interests which should receive recognition; in these cases, of course, the difficulty lies in balancing the interests (this is the challenge the amendments to the sexual assault provisions in the *Criminal Code* seek to meet, for example); also see Bill C-72, *An Act to Amend the Criminal Code*, 1st Sess., 35th Parl., 1994-95 (1st reading 24 February 1995) with respect to extreme self-induced intoxication and general intent offences involving violence.

legal system itself which is at issue. Legal aid is necessary to the enhancement of women's equality, manifested through individual claims which reflect a reality patterned on collective gendered experiences. In other words, unequal criminal and domestic legal aid systems are inconsistent with section 15 not only because they are different and have differential impact on women than on men (that is, they are unequal and discriminatory *within* section 15), but because without access to an adequate legal aid system, women are prevented from achieving the various forms of equality encompassed by section 15.

Access to domestic legal aid is one of the means by which women are able to attain equality before and under the law; without it, they do not have the equal protection or equal benefit of the law *in the broader sense*, and not merely with respect to the legal aid program itself. Criminal legal aid has significance for men's experience; domestic legal aid has significance for women's experience. To argue that women may also use the same legal aid system as men use is equivalent to saying, with Anatole France, that the rich are equally prohibited from sleeping under bridges as are the poor: the significance of the prohibition is clearly different — crucial for one, meaningless for the other. Not recognizing that criminal legal aid simply does not have the same meaning for women as it does for men is to ignore the importance in section 15 that treating people equally (that is, the same) may result in inequality.

While the rights of accused have been long acknowledged, there is increasingly a recognition of women's right to have access to law. There have been a number of cases in which women's right to be free from harm has been acknowledged as a reason for limiting other Charter rights: with respect to pornography, for example.[44] The need to respond to violence against women, or to recognize the significant part violence plays in the collective experience of women, has been recognized in other ways, as well, such as by redefining the defence of self-defence.[45] The preamble to the *Criminal Code* sexual assault provisions explicitly acknowledge the differential experience of

[44] *Butler*, *supra* note 10. While *Butler* and the submissions made to the Court by LEAF have been criticized as not reflecting all women's experience, the decision nevertheless grounds much of the harm of pornography in its portrayal of object groups.

[45] *Lavallee*, *supra* note 23.

women (and children) with respect to violence.[46] And the same theme has resounded through non-*Charter* cases, such as those recognizing the particular vulnerability of women to sexual harassment.[47]

A woman who is afraid she will lose her children if she leaves her abusive husband requires access to legal representation, just as she does in order to obtain a (civil) restraining order. A woman who is worried that a divorce will leave her penniless similarly needs access to legal information and representation. Seen as a collective experience, mediated by diversity (the greater economic disadvantage and vulnerability to violence of women with disabilities, for example) and as a systemic pattern, having these matters dealt with by the legal system is as important to women as the protections enjoyed by the accused are to men. In a very real way, these are section 7 security of the person interests for women, while accused's rights are section 7 liberty interests for men. The denial of effective access to the legal system in order to protect those rights because of differential impact on the basis of sex is therefore a denial of the section 15 equality rights which can be remedied only by an equivalency between provision of domestic and criminal legal aid.

[46] *Criminal Code*, R.S.C. 1985, c. C-46, as am. by *An Act to Amend the Criminal Code (sexual assault)*, S.C. 1992, c.38.

[47] *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

SEX, TAX AND THE *CHARTER*: A REVIEW OF *THIBAUDEAU* V. *CANADA*

Lisa Philipps* and Margot Young*

Section 15 of the Charter *offers the promise of redressing many systemic inequalities in the law. This paper considers the implications of section 15 for the taxation of child support payments, an issue raised in the* Thibaudeau *case. While endorsing the Federal Court of Appeal's decision that the current tax regime is unconstitutional, the authors take issue with the Court's reasoning in reaching this result. In the first part of their paper, the authors address a number of shortcomings in the Court's equality analysis, arguing that the process employed by the Court ignored critical aspects of equality theory. The process of categorization in equality analysis (its inevitability, inexactness and complexity) is discussed. In the paper's second part, the arguments raised by the federal government to justify its legislative scheme are examined. Most troubling, the authors argue, is that each rationale proceeds from and reinforces familial ideologies which render child support largely a matter of private transfers from men to women. Lastly, a cautionary note about the use of the* Charter *to redress social and economic inequality is provided. Judicial decisions under section 15 of the* Charter *should be considered only as the beginning of a larger political process intended to relieve conditions of disadvantagement.*

Les droits à l'égalité promettent de redresser de nombreuses inégalités systémiques de la Loi, y compris en matière d'impôt sur le revenu. Le présent article examine les implications de toute analyse effectuée à cette fin en vertu de l'art. 15 de la Charte *en ce qui touche l'imposition des pensions alimentaires reçues par les conjoints ayant la garde — question soulevée par le cas* Thibaudeau. *Bien qu'appuyant la décision de la Cour d'appel fédérale ayant conclus que le régime fiscal actuel est inconstitutionnel, les auteures remettent en question le raisonnement qui la motive. En première partie, elles relèvent plusieurs carences de l'analyse de la Cour et notent que d'importants aspects du processus de catégorisation employé renforcent en fait les stéréotypes liés au sexe tout en ignorant des inégalités complexes qui se chevauchent. En seconde partie, les auteures examinent les arguments que présente le gouvernement fédéral pour justifier son texte législatif. Ce qu'elles estiment le plus préoccupant est le fait que chaque argument renforce l'idéologie familiale dominante qui perçoit surtout le soutien de l'enfant comme un transfert privé entre homme et femme. Finalement, l'article lance une mise en garde contre le recours à la* Charte *en vue de redresser toute inégalité socio-économique. De l'avis des auteures, les décisions judiciaires prises en vertu de l'art. 15 de la* Charte *ne devraient être considérées que comme le commencement d'un processus politique plus vaste visant à éliminer certains désavantages.*

* Faculty of Law, University of Victoria. We are especially indebted to Hester Lessard for her helpful suggestions on several earlier drafts of this paper. Many thanks also to Joel Bakan, Bernard Kalvin, Marlee Kline, Andrew Pirie and Claire Young for their comments and insights. Responsibility for the final product is, of course, ours alone.

It would be astonishing if any decision under the *Charter of Rights and Freedoms*[1] did not raise important social and political issues that speak beyond its immediate doctrinal implications. Nowhere is this more evident than in the jurisprudence under section 15 of the *Charter*. So it is no surprise that the decision of the Federal Court of Appeal in *Thibaudeau* v. *Canada (M.N.R.)*[2] regarding the tax treatment of child maintenance payments draws our attention to a number of critical and widely relevant issues of social and economic justice. Yet, one senses a judicial reluctance to situate Suzanne Thibaudeau's legal challenge in the broader context: a context that ultimately makes sense of what is at stake for her and other women in similar situations. Part of this reticence is due to the general blindness — willful or not, and one suspects that it has to be the former — that Canadian society shows to issues of poverty and, particularly, to poverty's gendered nature.[3] However, a large part of the motivation to frame Thibaudeau's claim in terms as legally and politically neutral as possible stems from the claim's origin within the tax system.

There has been tremendous resistance to seeing the *Income Tax Act*[4] for what it is: a social policy document, influenced by notions of just distribution and ideologically-specific understandings of ideal forms of social ordering. Instead, the *ITA* often is viewed as a politically and morally neutral document, structured by dictates of financial accounting, economic theory and tax

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

2 (1994), 114 D.L.R. (4th) 261 (F.C.A.) [hereinafter *Thibaudeau*], rev'g 92 D.T.C. 2111 (T.C.C.).

3 By referring to poverty's gendered profile we do not wish to adopt uncritically a stance captured by the popular slogan 'feminization of poverty.' For the classic account of poverty as a female problem see D. Pearce, "The Feminization of Poverty: Women, Work and Welfare" (1978) 11 Urban and Social Change Rev. 28. As a number of commentators have pointed out, while women *are* represented disproportionately within the ranks of the poor, so too are men of colour, and disabled men. See, for example, J. Brenner, "Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth" (1987) 1 Gender and Society 447; P. Sparr, "Reevaluating Feminist Economics: Feminization of Poverty Ignores Key Issues" (September, 1984) Leftfield 12. Not unpredictably, poverty is distributed along the same lines as other disadvantages in our society. Race, disability, age, and gender all help to configure its demographics.

4 R.S.C. 1985, c.1 (5th Supp.) [hereinafter the "ITA"].

principles that permit no political shades or shaping. Thus, Galligan J. of the Ontario High Court of Justice has written in *Ontario Public Service Employees Union* v. *National Citizens Coalition Inc.* that:[5]

> The *Charter* ... is an important piece of legislation which constitutionally protects important rights and freedoms of people who live in this country. It seems to me that it comes very close to trivializing that very important constitutional law, if it is used to get into the weighing and balancing of the nuts and bolts of taxing statutes.

And in *Thibaudeau*, Létourneau J.A., in a comment distressingly revealing of the understanding of social policy that informs his dissent, stated: "The *Income Tax Act* is essentially economic legislation, which may even be described as amoral ...."[6]

Yet, the Canadian public has not been so reluctant to attach a larger political significance to *Thibaudeau*. Both this case and the earlier decision in *Symes* v. *Canada (M.N.R.)*[7] have generated numerous commentaries about the gender and class politics of certain tax provisions. The Canadian media, in reaction to the Court's decision in *Thibaudeau*, ran a host of articles, editorials, opinion pieces, and letters commenting upon the issues the case raises.[8] The federal government has responded by setting up a national task force looking into the issues underlying *Thibaudeau*.[9] Hearings organized by

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5 87 D.T.C. 5270 at 5272, aff'd 90 D.T.C. 6326 (Ont. C.A.). This passage was also quoted with approval by the Federal Court of Appeal in *Canada (M.N.R.)* v. *Symes*, 91 D.T.C. 5397 at 5405-06, in rejecting another s.15 challenge to the *ITA*. For a discussion of the *Symes* case, see text accompanying notes 60-63, *infra*.

6 *Thibaudeau*, *supra* note 2 at 289.

7 [1993] 4 S.C.R. 695 [hereinafter *Symes*].

8 See, for example, M. Oxby, "Not all single parents win under new tax ruling" *Calgary Herald* (17 May 1994) D11; B. Cox, "MPs back motion for tax-free child support" *[Halifax] Chronicle Herald* (31 May 1994) A11; M. Gold, "Women slam appeal of child-support ruling" *The [Montreal] Gazette* (19 May 1994) B1; K. Selick, "Hollow victory for women on child support payments" *Toronto Star* (20 May 1994) A23; E. Beauchesne, "Tax-free ruling a catalysis for social reform" *Vancouver Sun* (16 May 1994) A5; B. Cohen, "Thibaudeau muddies child-support waters" *Financial Post Daily* (12 May 1994) 26.

9 S. Finestone, Secretary of State (Status of Women) and liberal MPs D. Walker and G. Sheridan have been appointed to the task force. The task force was due to report in mid-August, 1994.

the task force have been well-attended and "lively."[10] In fact, it is one of the ironies of these cases that tax law — traditionally considered not subject to or implicated in the politics of the day — currently serves as a leading, if not *the* leading, vehicle for presenting the judiciary with some of its toughest gender equality issues to date.

Thus, *Thibaudeau* represents an important juncture in both taxation law and equality rights doctrine. This article will address what we see as two major challenges facing the Supreme Court of Canada in rendering judgment in the appeal of this case. First, the Court has an opportunity to clarify the meaning and parameters of "adverse effect" discrimination under section 15 of the *Charter*. Second, and especially in tackling the section 1 issues in the case, it must contend with the historical imperviousness of tax law to any form of scrutiny which looks beyond the closed logic of the tax system itself. The case may serve as a watershed in opening up taxation law to the kind of normative questioning about fairness and equality to which all social policy instruments are properly exposed.

We argue here that the majority in the Federal Court of Appeal mishandled these issues. Though we strongly endorse the majority's finding that the current system of taxing child support in the hands of custodial parents is unconstitutional, the reasoning used to achieve this result is seriously flawed and creates the potential for mischief in future equality rights cases.

Part I of this paper begins by setting out the facts in *Thibaudeau* and examines the reasoning underlying the Court of Appeal's conclusion that the *ITA* infringes section 15 of the *Charter*. This discussion provides an occasion to consider the processes of categorization that underlie a section 15 analysis — both in terms of the recognition of characteristics associated with group identities and with respect to the selection of categories relevant to a particular equality claim. We argue that the Court suffers from a number of

[10] A recent Toronto hearing of the task force met with raucous challenges to Sheila Finestone's chairship. Representatives of the men's rights group "In Search of Justice" called for her removal claiming that she is a male-bashing supporter of women's rights. Individuals making submissions to the task force from feminist perspectives were also booed and heckled by the audience. See A. Mitchell, "Men boo women at support hearings" *[Toronto] Globe and Mail* (7 July 1994) A1.

misconceptions about how categorization should function in equality law. The first part of our argument is that the Court relies upon an overly simplistic construction of sex difference as a marker of group identity. We discuss the ideological nature of such an understanding of sex difference, arguing that the Court in *Thibaudeau* is drawing upon certain prevailing notions of sex identity. Secondly, we point to the Court's failure to comprehend the complex and overlapping nature of group identities generally. The result of these shortcomings is a section 15 analysis that is a poor fit with existing anti-discrimination law.

In Part II of the paper we consider the government's failed attempt to justify the taxing provision under section 1 of the *Charter*. We agree with the majority's conclusion in *Thibaudeau* that the law fails to meet its ostensible objectives. Our complaint, however, lies with the Court's unquestioning acceptance of the governmental objectives themselves. The rationales offered to justify the taxation of child support are plagued by contradictions and incorrect statements about the principles of tax law and policy. More importantly, these rationales betray the law's reliance upon a set of problematic assumptions as to how women and men relate, or should relate, to one another and to child care responsibilities. A close analysis of the government's section 1 argument shows that the taxation of child support is structured by our society's dominant familial ideology, which assigns unpaid child care work to women, and makes the welfare of women and children a question of private transfers from individual men. This part of our critique points once again to the need for recognition of the political and ideological content of tax laws, and to the importance of *Charter* review as one means of expanding tax discourse to get at inequities which have eluded traditional analysis.

In *Symes*, Iacobucci J. attempted to dispel the notion that tax laws are somehow protected from *Charter* scrutiny, or are entitled to special deference by virtue of their status as "economic" legislation. While allowing that "a degree of deference" *may* be warranted in applying section 1, he denied that this should affect any of the earlier stages of *Charter* analysis and stated that

the *ITA* "is certainly not insulated against all forms of *Charter* review."[11] A further clear direction of this nature is badly needed. The dissent of Létourneau J. in the Federal Court of Appeal in *Thibaudeau*, as well as some of the arguments made during the Supreme Court hearing,[12] indicate that this particular prejudice is not going to expire easily.

But despite what we see as the merits of constitutional review in this case, our discussion also reveals the limits of litigation strategies as vehicles for achieving social justice. We turn to this issue in the concluding section of the article, which examines the potential impact of *Thibaudeau* on the larger struggles around child support and poverty that underpin the legal details of the case. While we conclude that a Supreme Court ruling in favour of Thibaudeau is desirable because it could alleviate hardship for many divorced women and their children, we identify two dangers which may also attend such a decision. Most immediately, there is a risk that non-custodial fathers will seek and obtain excessive downward variations of child support. We respond to this concern with an argument about the kind of approach that family courts and lawyers should take to such applications. The second danger, which is more difficult to address, is that a favourable decision may actually reinforce the trend towards greater privatized responsibility for "dependents" within the nuclear family. Ultimately, we conclude that an adequate response to the problems raised in this paper would involve a much broader move to deprivatize and "defamilialize"[13] not just the tax treatment of child support but the social benefits and entitlements of women and children more generally.

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11 Symes, *supra* note 7 at 753. Also at 753, Iacobucci J. confirmed that "the danger of 'overshooting' relates not to the *kinds* of legislation which are subject to the Charter, but to the proper interpretive approach which courts should adopt as they imbue *Charter* rights and freedoms with meaning" (emphasis in original).

12 Jean-Marc Aubry, lawyer for the federal government, suggested that the case is "above all a tax issue" and that it "has nothing to do with concepts of equality or inequality, nothing to do with human dignity." See S. Fine, "Judges skeptical over child-support" *Globe and Mail* (5 October 1994) A1.

13 See S.A.M. Gavigan, "Paradise Lost, Paradox Revisited: The Implications of Familial Ideology for Feminist, Lesbian, and Gay Engagement to Law" (1993) 31 Osgoode Hall L.J. 589 [hereinafter "Paradise Lost"].

Part I. Equality and Sex Difference: Section 15 of The *Charter* and Adverse Impact Discrimination

The facts giving rise to the *Thibaudeau* case are simple and familiar. Suzanne Thibaudeau has custody of two children from her former marriage. For the tax year in question (1989), Ms. Thibaudeau received a monthly payment of $1,150 for child maintenance from the children's father, her former husband. She received no allowance for herself.[14]

At issue is the tax status of this child maintenance payment. Section 56(1)(b) of the *ITA* requires that the recipient of child maintenance payments from a former spouse include such payments in computing her income.[15] Absent the provisions of this paragraph, it is unlikely that such payments would be taxable.[16] Another provision, section 60(b), allows the former spouse making the maintenance payments to deduct such payments in computing his income for tax purposes. Together these two provisions are part

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[14] Thibaudeau is described by the Court as "gainfully but fairly *modestly* employed" (*supra* note 2 at 265 [emphasis added]). Such a description is certainly consistent with statistics on the general economic status of women. Single-parent mothers have the highest poverty rate of any family group. In 1992, 58.4% of families headed by single women lived in poverty: National Council of Welfare, *Poverty Profile 1992* (Ottawa: Ministry of Supply and Services Canada, Spring 1994) at 14-15. Women generally face a higher risk of poverty than men. In 1992, women had a poverty rate of 17.4% while men had a rate of 13.1% (*ibid.* at 69). For a more detailed discussion of women and poverty, see J. Pulkington, "Private Troubles, Private Solutions: Poverty Among Divorced Women and the Politics of Support Enforcement and Child Custody Determination" (1994) 9 Can. J. Law & Society 73 at 76-85.

[15] Although the *ITA* itself uses gender-neutral language, our use of gender-specific language is both purposeful and important. Critical to the perspective informing this paper is the factual reality that the vast majority of individuals receiving child maintenance payments are women while those providing the payments are men. According to Revenue Canada figures, 98 percent of those reporting receipt of alimony or child support for tax purposes are women. (A. Mitchell, "Men boo women at support hearing" *Globe and Mail* (7 July 1994) A6). Although some men do receive child maintenance payments from their ex-spouses, separated custodial parenthood is predominantly a female experience. To mask this reality by use of gender-neutral language would hide what makes this an issue of gender inequality, as it would deny the specific experiences of women as a disadvantaged group.

[16] See *infra*, text associated with notes 199-203.

of what is known as the inclusion/deduction system for child maintenance payments.[17] Thibaudeau raised before the Tax Court the claim that the inclusion of child maintenance payments within her income violated her section 15 equality rights under the *Charter*.[18] More specifically, Thibaudeau claimed that the *ITA* unconstitutionally discriminated against her on grounds analogous to those enumerated in section 15, namely, her status as a separated custodial parent receiving maintenance payments for children.

The Tax Court dismissed Thibaudeau's claim, despite the Court's initial finding that the applicant was in fact, for the purposes of section 56(1)(b), a member of a group characterized by factors analogous to those enumerated in section 15.[19] The Judge (Garon T.C.C.J.) found that the effect of section 56(1)(b) — rendering child maintenance income for tax purposes — did not result in prejudicial consequences for the appellant. He reached this assessment by accepting the argument that as long as the family court or the parties themselves in voluntary agreement took into account the tax consequences to both the payer and the recipient, the parent who receives the payment suffers no prejudice.[20] Child maintenance levels would be correspondingly "grossed up."[21] The Judge pointed to recent case law establishing a judicial responsibility to so factor in tax consequences.[22] If the court fails to do this, the Judge argued, the recipient's remedy lies in the exercise of her right to appeal to obtain the adjustment to which she is entitled to under law. And, he stated, a responsibility lies with those custodial parents negotiating their own child support to satisfy themselves that the agreement takes into account tax consequences. As a result, Thibaudeau's claim was ultimately rejected as she had not shown that the section in question creates

17 See also ss. 56(1)(c), 56.1, 60(c), and 60.1 of the *ITA*.

18 *Thibaudeau*, *supra* note 2 at 2111.

19 The group is described by the Tax Court as composed primarily of separated or divorced women with personal financial self-sufficiency who have custody of children for whom they receive taxable alimony payments (*ibid.* at 2118).

20 *Ibid.* at 2121.

21 This "gross up" thus should reflect both the tax savings realized by the payer and the tax costs experienced by the recipient. As our later discussion of the reality of how child maintenance levels are set (or not set) illustrates, this is a rather problematic assumption. See text associated with notes 170-174, *infra*.

22 Garon, T.C.C.J. cites a number of cases establishing such a legal principle. See *supra* note 18 at 2120.

a distinction that has the effect of imposing burdens, obligations, or disadvantages on an individual or group not imposed on others.[23]

Thibaudeau applied for judicial review of this decision to the Federal Court of Appeal. Leave to intervene was granted to the group "Support and Custody Orders for Priority Enforcement" (SCOPE). The participation of SCOPE at the review level resulted in an important expansion of the grounds on which discrimination was claimed. Thibaudeau continued to frame her claim in terms of her status as a separated custodial parent receiving child maintenance payments while SCOPE added the claim of sex-based discrimination.[24]

The Federal Court of Appeal judgment, written by Hugessen J.A. and concurred in by Pratte J.A., accepted Thibaudeau's argument, structuring it as a claim of discrimination on the basis of family status. The Court found that this discrimination could not be saved by section 1 of the *Charter*. SCOPE's argument about sex discrimination was rejected: the Court held that section 56(1)(b) did not differentiate on the basis of sex, an initial conclusion that barred further analysis of possible sex discrimination.[25]

Our analysis of these results in *Thibaudeau* has two parts. The first is an examination of Hugessen J.A.'s treatment of SCOPE's claim of sex discrimination. It is our argument that in articulating a test for adverse impact

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23 Such a requirement is, of course, the second stage of the s. 15 analysis set out by McIntyre J. in *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*]. See text accompanying notes 39-41, *infra*.

24 We use the term "sex" to capture the identity associated with male and female groups. Thus the term is used interchangeably with "gender," superficially because this is how the term functions in discussions of s. 15 and more philosophically because we believe that *both* sex and gender are socially constructed. For discussion of this latter point, see J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); C. Smart, "Law, Feminism and Sexuality: From Essence to Ethics?" (1994) 9 Can. J. Law & Society 15; A. Fausto-Sterling, "The Five Sexes: Why Male and Female Are Not Enough" (March/April 1993) The Sciences 20. See also text accompanying note 95, *infra*.

25 The federal government has successfully sought both an appeal of the judgment and a stay of the Court of Appeal's declaration of unconstitutionality pending the result of the appeal. (Supreme Court of Canada: Bulletin of Proceedings: June 17, 1994 Motions 14.6. 1994 at 1036.) The appeal was argued before the Supreme Court in October 1994.

discrimination to deal with SCOPE's claim, Hugessen J.A. mistakenly inserted a qualitative requirement, a consideration improperly invoked at this stage of the section 15 analysis. Our second focus is less obvious, perhaps, but is equally important. We look at Hugessen J.A.'s conceptualization of the difference between the two sexes and how this manifests both a particular and traditional understanding of sex identity and a more general miscomprehension about the process of categorization essential to equality theory and doctrine. It is these larger, ideological misunderstandings which ultimately account for Hugessen J.A.'s problems with adverse impact doctrine and for the difficulty he has juggling the complementary complaints of family status and sex discrimination raised by the claimant and intervener.

Equality Tests and Sex Discrimination

In *Andrews*, the Supreme Court of Canada marked out afresh the analysis to be followed in determining whether there has been an initial infringement of section 15. The Court was forced to do so by the confusion surrounding the manipulation of the more traditional test of equality, the "similarly situated test:" the notion that equality entailed treating "likes alike."[26] As has been restated endlessly, the similarly situated test is essentially empty.[27]

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[26] The similarly situated test was described by McLachlin J.A. (as she then was) in the British Columbia Court of Appeal in the following way: "the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are 'similarly situated be similarly treated' and, conversely, that persons who are 'differently situated be differently treated'" (*Andrews* v. *Law Society of British Columbia* (1986), 2 B.C.L.R. (2d) 305 (C.A.) at 311). The source of such an understanding of equality is the Aristotelian statement that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to the unalikeness" (*Ethica Nichomaces* trans. W. Ross, Box V3, at 1131a06 (1925)). The modern formulation of this as the "similarly situated test" owes much to an article by J. Tussman and J. TenBroek, "The Equal Protection of Laws" (1949) 37 Calif. L. Rev. 341. For a critical discussion of the test's application in the Canadian context, see G. Brodsky and S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 147-65.

[27] For academic commentary on this point, see for example, M.D. Lepofsky and H. Schwartz, "Constitutional Law — Charter of Rights and Freedoms — Section 15 — An Erroneous Approach to the Charter's Equality Guarantee — *R.* v. *Ertel*" (1988) 67 Can. Bar Rev. 115.

Specifically, two sorts of problems can be identified. First, in a world of infinite variety and difference, the test provides no guidance as to when two individuals or two groups of individuals are to be considered alike or similarly situated. Instead, it is left to the political and ideological intuitions of the decision-maker to construct these initial yet crucial assumptions.[28] And, more often than not, current political prejudices dressed up as rationality, common sense, or nature — precisely the sorts of assumptions equality doctrine, in theory, aims to challenge — structured these starting premises.[29] The result was a number of cases in both the United States and Canada where equality doctrine served only to reinforce existing systemic discrimination.[30]

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[28] MacKinnon describes these deliberations with respect to sex equality as an endless and ultimately fruitless obsession with the question of whether men and women are the same or different in any specific instance. If they are the same, then different treatment is illegitimate. If they are different, then equal treatment is illegitimate. And, MacKinnon argues, women are put in the untenable position of needing to be just like men in order to justify demands for basic respect and equal status in society and of having also to assert an essential alienness in order to legitimate recognition of the special needs that flow from their distinctive social treatment and identity. For an expansion of these ideas, see C. MacKinnon, "Legal Perspectives on Sexual Difference" in D. Rhode, *infra* note 93.

It is worth adding that it is not our contention that judicial deliberation ever escapes the fact of ideological influence. Rather, we identify this as a distinct problem of the similarly situated test because the test makes it particularly easy both to do this and to deny it at the same time. (For a more extensive illustration of judicial importation of ideological thought into legal discourse, see M. Kline, "The Colour of Law: Ideological Representations of First Nations in Legal Discourse" (1994) 3 Social & Legal Studies 451 [hereinafter "Colour of Law"]).

[29] Several early cases illustrate this manipulation of the notion of similarly situated. See, for example, *Bliss* v. *Attorney General of Canada*, [1979] 1 S.C.R. 183 at 190, where Ritchie J. stated in relation to disadvantagement in the employment context on the basis of pregnancy that "any inequality between the sexes in this area is not created by legislation but by nature." For a discussion of how this works in the context of sex discrimination, see C. MacKinnon, *Sexual Harassment of Working Women* (New Haven: Yale University Press, 1979) at 120: "In this way, substantive judgements are made about which differences between the sexes are 'real' or 'relevant' (in terms of permissible differential consequences) without explicitly investigating which real differences and consequences may result from sexism itself."

[30] See, for example, *Bliss*, *ibid.*; *R.* v. *Gonzales* (1962), 132 C.C.C. 237 (B.C.C.A.); *Gilbert* v. *General Electric*, 429 U.S. 125 (1976).

The second and connected problem with the similarly situated test is that this conception of equality reduces itself to considerations of formal equality concerns alone. By formal equality, we mean an understanding of equality that prescribes similar treatment of all individuals regardless of varying personal circumstances. Individual treatment is assessed outside of its actual context or impact; individuals are viewed as abstracted from group membership or affiliation.[31] Distinguished from this is a substantive notion of equality which places the individual back into her or his social, political, and economic context, recognizing that, in a world of systemic group-based inequalities, formally similar treatment of individuals may result in great actual inequality. Now, the similarly situated test does not, in itself, mandate a formal equality approach (because it really says nothing specific about the most important judgments that need to be made in relation to equality). That is, it doesn't rule out a substantive approach to the issue of equality — it simply leaves the issue open. But this fact, in combination with the prevailing liberal ideological orientation of legal actors, has meant that equality analyses were more often than not marked by failure to contextualize the complainant's situation and thereby take into account the substantive effects of the treatment in question. So understood, equality doctrine becomes unable to recognize much inequality which, of course, restricts its remedial potential.

One way of thinking about these two problems with the similarly situated test and their relation to each other is to look at how the results each problem identifies deal with difference. The first problem (rationalization or naturalization of the different treatment) uses individual context — personal attributes of the claimant — to locate a difference that disqualifies the equality claim. The claimant is, by virtue of her or his personal context, *not* similarly situated and therefore cannot complain about unequal treatment. The second problem — formal abstraction — ignores the broader context that would make seemingly similar treatment actually different. Here the claimant again loses out, but this time because no different treatment is recognized on which to base an equality claim. Either way, a critical equality perspective is avoided through manipulation of the characteristics of similarity and difference.

[31] For a critique of formal equality, see Brodsky and Day, *supra* note 26 at 150-51.

The test that replaced the similarly situated formulation — the 'enumerated and analogous grounds' test — is initially discernible in *Andrews*[32] and further clarified in *R.* v. *Swain*[33] and *R.* v. *Turpin*.[34] We identify this new test as being only roughly mapped out in *Andrews* because of its somewhat ambiguous articulation by McIntyre J., the author of the majority opinion on the section 15 aspect of that case. While McIntyre J. does clearly reject the similarly situated test,[35] he continues to discuss discrimination as something identifiable in terms of inappropriate or even irrelevant stereotyping. So, for example, McIntyre J. states that:[36]

> [d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

This formulation of discrimination, based as it is on the assumed reasonableness or appropriateness — terms McIntyre J. does not use but implicitly invokes — of the distinction at stake, suffers from the same flaws as the similarly situated test. It fails to recognize that apparently reasonable or neutral ways of distinguishing individuals — such as merit or capacity — are just as suspect as traditionally identified discriminatory grounds, such as race and gender (grounds, incidentally, once assumed to be unproblematic).[37] And, if one unpacks the analytic steps that underlie the claim that a distinction is reasonable, one discovers the similarly situated test. A claim, for example, that it is reasonable to exclude women from firefighting is based on the assumption that women *naturally* do not have the physical capacity of men, that they are not similarly situated. Likewise, the claim, say, that it is reasonable not to promote female candidates who have children, based on the

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32 *Andrews*, *supra* note 23.

33 [1991] 1 S.C.R. 933 [hereinafter *Swain*].

34 [1989] 1 S.C.R. 1296 [hereinafter *Turpin*].

35 In *Andrews*, McIntyre J. said of the "similarly situated test": "mere equality of application to similarly situated groups or individuals does not afford a realistic test for a violation of equality rights. For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application" (*Andrews*, *supra* note 23 at 167). He continues (at 168) to conclude: "... the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the *Charter*."

36 *Ibid.* at 174-75.

37 See, for example, *Bradwell* v. *State of Illinois*, 83 U.S. (16 Wallace) 130 (1872).

common sense knowledge that such women will not put their work ahead of everything else, again relies on the notion that such women are not similarly situated to male candidates. This is an example of the first problem identified in relation to the similarly situated test. The problem of difference is located in the claimant rather than in the social structures — here the criteria and equipment used in firefighting or the social organization of child care — in which the claimant finds herself situated. So despite his attempt to leave behind the similarly situated test, McIntyre J.'s invocation of merit or of natural capacities threatens to fold his judgment back into the very test he rejects.[38]

Yet, McIntyre J.'s judgment *is* clear in its explicit rejection of the similarly situated test and as such must be read as pointing to a different way of identifying treatment that is contrary to section 15. This is possible if certain elements of the judgment are emphasized. His invocation of the discrete and insular minority test, when read in conjunction with Wilson J.'s plurality judgment, does lay a basis for a new section 15 test. The test can be summarized as follows.[39] First, it calls for a determination of whether or not the state action in question establishes an inequality. Does the legislation, say, create a distinction in treatment or impact between the claimant and others? Second, the claimant must establish that the effect of the impugned distinction is discriminatory. This means both that it imposes a burden, obligation, or disadvantage on the claimant not imposed on others and that the imposition

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[38] Some commentators read this confusion in McIntyre J.'s judgment as evidence that *Andrews* does not reject the similarly situated test (see, for example, D. Gibson, "Equality for Some" (1991) 40 U.N.B.L.J. 2.). This is a difficult position to maintain given McIntyre J.'s clear rejection of the test. As well, equality cases which follow *Andrews* reinforce rejection of the test. Wilson J. writing for the Court in *Turpin* states that the similarly situated test was "clearly rejected by this Court in *Andrews*" (*Turpin, supra* note 34 at 1332). La Forest J. in *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 279 writes: "Simply put, I do not believe that the similarly situated test can be applied other than mechanically and I do not believe it survived *Andrews*." A more tenable interpretation is that McIntyre J.'s judgment fails to articulate clearly a new analysis and is thus somewhat contradictory.

[39] As discussed above, McIntyre J.'s analysis in *Andrews* is not as methodical in laying out this test as is often attributed to it. However, subsequent case law and commentary has treated his analysis as establishing the test described above; it is this latter treatment that we adopt (*Symes, Swain*). For a more detailed summary of what we describe as a three step analysis, see *Symes*, per Iacobucci J., *supra* note 7 at 761.

of such a burden rests upon grounds enumerated in section 15 or on grounds analogous to those enumerated.[40] This last two-fold step completes the analysis of whether an infringement of section 15 has occurred. Any further considerations — such as the reasonableness or justifiability of the particular distinction at stake — lie within a section 1 analysis.[41] For example, the hiring and promotion criteria mentioned in the previous illustrations are tested only *after* a finding that they create inequalities. 'Difference' no longer functions as an obvious or natural disqualification of the claimant's equality argument but rather its relevance must be justified and explained by the state, against the backdrop acknowledgment of the equality interest.

It is the last stage of the equality test that provides the most interesting and progressive potential for section 15. It does this by requiring the Court to engage in an examination of the historical, political, and social position of the group, under whose auspices[42] the claimant launches her or his claim.

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40 In some of the cases dealing with s. 15, the assessment of social and political context is set out as a separate third step (see *Swain, supra* note 33 at 992). *Andrews*, arguably, and *Turpin*, certainly, do not do this. Instead, Wilson J. in *Turpin* is clear that the determination of discrimination itself involves examination of the larger context: "[i]n determining whether there is discrimination ... it is important to look ... to the larger social, political and legal context" (see *Turpin, supra* note 34 at 1331). We would argue that this latter understanding of the elements of the *Andrews* and *Turpin* tests is preferable, as it gives a substantive aspect to what is meant by discrimination and therefore fits with the underlying purpose of s. 15.

41 McIntyre J. writes in *Andrews, supra* note 23 at 182:

> A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection of benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory ... [A]ny consideration of factors which could justify the discrimination and support the constitutionality of the impugned enactment would take place under s.1.

Wilson J. in *Turpin, supra* note 34 at 1325-35 reiterates more forcefully this division of analysis as does Lamer C.J. in *Swain, supra* note 33 at 992.

There has been some debate in the literature about whether non-analogous grounds will also be recognized under s. 15. For a re-cap of this debate, see P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 1164, fn. 77 [hereinafter *Hogg*].

42 This articulation of s. 15 equality rights shifts the focus of analysis to one that is group based and away from a purely individual focused analysis. For a discussion of this assessment, see Galloway, *infra* note 51.

Analogous grounds include grounds that identify a "discrete and insular minority,"[43] a phrase the Court adopts from American jurisprudence. Wilson J., in that part of her judgment in *Andrews* which concurs with McIntyre J.'s equality analysis, emphasizes that the determination of what is a "discrete and insular minority" for these purposes will look to "the context of the place of

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[43] For the American statement of this notion, see *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938). Hogg takes issue with this understanding of analogous grounds, arguing that it is the involvement of immutable personal characteristics that identifies analogous grounds (Hogg, *supra* note 41 at 1167-71). But such an understanding of what is analogous seems hard to maintain. It is so, first, because not all of the grounds identified by the Supreme Court as potentially analogous share the characteristic of immutability. For example, place of residence is not ruled out as a possible ground of discrimination (*Turpin*, *supra* note 34 at 1333). Unless one allows a very loose and socially contoured understanding of immutability to be operative — in which case, it is unclear why we should state the requirement at all — many forms of discrimination currently and powerfully at play will escape s. 15 scrutiny. Second, the requirement of immutability would lead the analysis back to assessment of the characteristic at issue and away from a more substantive examination of the effects of disadvantagement. It locates the problem in the individual, not in the social structures which often normalize or naturalize the individual's situation. It would do this by focussing solely and formally on the nature of the distinction, ignoring the Court's call for a purposive, contextual and larger understanding of s. 15 protection. In some sense, then, Hogg's test would collapse the *Andrews* test back into early rejected versions of the similarly situated test.

Yet, one can still take issue with the Court's use of the discrete and insular minority notion, although for different reasons. The term fails to capture both the nature of discrimination as it is actually experienced by disadvantaged groups in Canadian society and the extent to which the dimensions along which discrimination is deployed overlap and are "layered" (see text associated with notes 127-35, *infra*). Many groups one would want s. 15 to protect, that is, groups subject to historical and current disadvantagement and stereotyping, are by virtue of the extent and complexity of their disadvantagement not "discrete and insular" (for a discussion of this critique, see Gibson, *supra* note 38). For example, persons living in poverty are not very helpfully described as a discrete group. They are a heterogenous group, with many different life circumstances and personal attributes, linked together only by the economic disadvantage they share. The requirements of discreteness and insularity could deny recognition of poverty as a ground for systemic disadvantagement, something it obviously is. On this point, see M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L.J. 65; M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law" (1994) 2 Review of Const. Studies 76.

the group in the entire social, political and legal fabric of our society."[44] In *Turpin*, writing for the Court, Wilson J. qualifies this by stating that this term functions as one of the "analytical tools" useful in determining whether the interest the claimant advances is of the sort section 15 protects.[45] The point of so defining discrimination is, Wilson J. argues in *Andrews*, that legislative distinctions "should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others."[46] This is the purpose underlying section 15.

This understanding of discrimination also has implications for grounds already enumerated in section 15. Here the Court's requirement of a larger context of disadvantagement seems to mean that groups identified by the enumerated ground must also be independently already disadvantaged.[47] It means that the immediate disadvantage the legislation imposes, even along enumerated lines, will generally only be a constitutional concern if it occurs against a backdrop of previously existing disadvantage.[48] This is what will distinguish the group under issue from other, relatively privileged, groups experiencing similar negative treatment, as any negative treatment these latter groups experience will not feed into and contribute to a general preexisting pattern of disadvantagement. And this, after all, is the concern the Supreme Court has identified with section 15 equality rights: "remedying or preventing discrimination against groups suffering social, political and legal

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44 *Supra* note 23 at 152.

45 *Supra* note 34 at 1333.

46 *Supra* note 23 at 152.

47 One might attempt to limit the impact of the contextualization requirement by distinguishing between enumerated and non-enumerated groups with respect to its application. Why, however, would one want to make this distinction? Such a distinction belies the Court's oft-repeated intent to give a purposive interpretation to all *Charter* provisions, imports an unnecessary and meaningless formal distinction into equality doctrine and is at odds with how the Court proceeds in a number of cases involving an enumerated ground. See *R.* v. *Hess*; *R.* v. *Nguyen*, [1990] 2 S.C.R. 906 [hereinafter *Hess*]; *Weatherall* v. *Canada (Attorney General)* (1993), 105 D.L.R. (4th) 210 (S.C.C.) [hereinafter *Weatherall*]; and *Swain*, *supra* note 33, all of which involve an enumerated ground.

48 Wilson J. in *Turpin*, *supra* note 34 at 1332 writes:

> A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.

disadvantagement in our society."[49] The consequence of this is that it will only be in rare circumstances that members of groups lying on the privileged side of the distinction will be able to initiate successful equality claims. So, as between otherwise privileged men and women, say, prejudicial treatment women experience will usually (until the world changes) be played out against a backdrop of general gendered social disadvantagement.[50] Negative treatment of such men will probably not. Thus, it may be only rarely that these men will be able to claim section 15 protection when experiencing disadvantagement imposed by state action.[51] *Weatherall* v. *Canada (Attorney General)* supports this understanding when La Forest J., for the Court, accepts that similar treatment (frisk searches by members of the opposite sex) will have a different effect for discrimination law on men as opposed to women, although, as we suggest later, this case is less than straightforward in its reasoning.[52] The different effect is, at least in part, due to the different current and historical position of women in society.[53] Racialized groups will similarly have a background condition of disadvantagement contouring any negative differential treatment they receive. The dominant white group, otherwise undifferentiated, will likely not.

Thus, the questions the *Andrews* test asks represent a concern about the kind of impact the negative treatment will have. Will it contribute to an already present pattern of disadvantagement, of prejudice, or will it have an effect that is not otherwise compounded? Between any two groups — one of

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49 Per Wilson J. in *Turpin*, *supra* note 34 at 1333.

50 This is not to say that all women are equally disadvantaged or that no women are relatively privileged. It is simply to acknowledge that women face a gendered reality men do not.

51 We say "rarely" because the Supreme Court appears to have left room for invalidating state action that so disadvantages men as to affect their overall social position and status and thus constitute them as a generally disadvantaged group. See *Hess*, *supra* note 47 at 928; *Weatherall*, *supra* note 47 at 210 in relation to men's status *qua* men with respect to use of s. 15. For a discussion of this issue, see D. Galloway, "Three Models of (In)Equality" (1993) 38 McGill L.J. 64 at 75. For a critique of the argument that otherwise advantaged groups cannot claim s. 15 in relation to a legislative disadvantagement, see D. Gibson, *supra* note 38.

52 *Ibid.* Also see text associated with note 105, *infra*.

53 *Ibid.*

whom suffers historic or systemic negative stereotyping or disadvantagement, the other who doesn't — there always will be a difference in constitutional relevance even where the law in question applies the same immediate treatment to both. This is why the Supreme Court has explicitly built in a requirement of contextualization. Only through such means can equality doctrine attempt to insure that the remedial potential of section 15 is not muted and abused by attending to the equality complaints of the already relatively privileged.

The result of this reconceptualization of the section 15 test is that the similarly situated test is improved upon in two ways. First, assessment of the rationality of the distinction in question is rendered irrelevant. It is no longer one of the questions properly asked under a section 15 analysis.[54] Instead, as mentioned, such justificatory concerns are saved for the section 1 analysis.[55] Thus, common prejudices and unexamined political assumptions arguably have reduced play, at least in relation to the initial stage of the test.[56] Second, the court is specifically directed to contextualize, to look to wider social and historical patterns of disadvantagement, as part of answering the question whether the treatment at issue will be actionable under section 15. Thus, the doctrine is forced to move away from a purely formal analysis of inequality.

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[54] This point needs qualification as our analysis gives a somewhat false picture of the coherence of the total body of Supreme Court doctrine in the area of equality law. In particular, two cases come to mind that muddy the waters we have in the last part of this discussion so painfully cleared. The Supreme Court decisions in *Hess* and *Weatherall* diverge significantly from the analysis we argue successfully emerges from *Andrews* and *Turpin*. However, we would argue that *Hess* and *Weatherall* should not be read as displacing the analogous groups test. Instead, they represent a particular and conceptually troubled application of equality doctrine to the enumerated ground of sex. For a more detailed discussion of this, see note 47, *supra*.

[55] To return to this earlier point, Wilson in *Turpin*, *supra* note 34 at 1325 states the following: "In defining the scope of the four basic equality rights it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under s. 1 of the *Charter*." She goes on to say at 1328 that the "test of whether a distinction is 'unreasonable,' 'invidious,' 'unfair,' or 'irrational' imports limitations into s. 15 which are not there."

[56] We do not mean to imply that judicial ideology is thus rendered irrelevant to a s. 15 analysis. For a discussion of how insertion of preconceptions and biases are facilitated by the *Andrews* test, see text accompanying note 123, *infra*.

Hugessen J.A.'s analysis of SCOPE's sex discrimination claim purports to follow this model but runs afoul of the analytical separation the process sets out. He begins by looking to see whether or not there is an initial inequality — the first step of the *Andrews* test. This stage in *Thibaudeau* is somewhat complicated by the need to incorporate an adverse effects analysis. The text of section 56(1)(b) contains no reference to either sex. Thus the section cannot on its face be found to discriminate on the basis of sex. Instead, SCOPE's claim requires a finding that the *effect* of the provision is discriminatory. SCOPE needs to show that the legislation has an adverse impact on women. On its own this is not a problematic requirement: the Supreme Court of Canada has recognized the legitimacy of such an approach to establishing unequal treatment and has stated that it is the effect of the discriminatory action, in every case, that is the focus of anti-discriminatory provisions.[57] But, Hugessen J.A. incorrectly adds (and this is a problem) a qualitative dimension to the adverse effect that must be found at this stage.

Hugessen J.A. does this by stating that in order to establish adverse effect discrimination on the basis of sex, it is not sufficient to show that more women are affected. Rather, one must show that those women affected, regardless of their number, are more adversely affected — that is, differently affected — than the equivalent group of men. Hugessen J.A. states this in the following manner:[58]

> Indeed, in my view it is not because *more* women than men are adversely affected, but rather because *some* women, no matter how small the group, are *more adversely* affected than the equivalent group of men, that a provision can be said to discriminate on grounds of sex.

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[57] The Supreme Court first recognized this in the context of human rights legislation. (See *Commission Scolaire Régionale de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525; *Central Alberta Dairy Pool* v. *Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Central Okanagan School District No.23* v. *Renaud*, [1992] 2 S.C.R. 970; *Ontario Human Rights Commission and O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*]; *Canadian National Railway Co.* v. *Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 [hereinafter *C.N.R.* v. *Canada*]). Also, the Supreme Court has stated that treatment of discrimination in the context of human rights cases is applicable to interpretation of s. 15 of the *Charter*. (For statements of this latter principle, see *Andrews supra* note 23; *Symes*, *supra* note 7; *Rodriguez* v. *British Columbia (Attorney-General)*, [1993] 3 S.C.R. 519 *per* Lamer C.J. in dissent).

[58] *Supra* note 2 at 271 (emphasis in original).

So, the difference between men and women negatively affected has to be qualitative not merely quantitative.[59] Thus, a showing of adverse effect discrimination demands that the burden the legislation *alone* places on any *one* woman be different from that placed on any *one* man. This effectively means that any demonstration of a similar burden being placed on both an individual woman and an individual man would rule out the possibility that the prejudicial effect could be understood as sufficiently sex-specific to constitute sex discrimination.

Hugessen J.A. relies on *dicta* by Iacobucci J. in *Symes*[60] to support these statements, giving a reading to Iacobucci J.'s comments that is far from convincing. Because Hugessen J.A.'s understanding threatens to mark out a new and disturbing course for adverse effect doctrine, it is worth sidetracking somewhat to review the *Symes* case and to make more explicit our argument that Hugessen J.A.'s interpretation of it should be rejected.

In *Symes*, the Supreme Court of Canada had been asked to declare that if child care expenses are not deductible as a business expense under the *ITA*, such a denial of deductibility was an infringement of rights guaranteed by section 15 of the *Charter*. Beth Symes, a full-time partner in a law firm, had argued that the wages she paid to a child-care giver constituted legitimate business expenses, under the terms of section 9 and 18 of the *ITA*, as the employment of a nanny enabled her to engage in an income producing business. Alternatively, should such an interpretation of business expenses be denied by the Court (and it was, on the grounds that section 63, by granting a more limited form of deduction for child care expenses, effectively precluded any other deductibility), Symes argued that this understanding of business expenses had a disparate negative impact on women and thus infringed section 15's guarantee of sex equality. Iacobucci J. refused to make this constitutional finding, stating that it had not been established that women disproportionately bear the *financial* burden of child care, despite Symes'

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59 Hugessen J.A. writes at 271, *ibid.*: "But surely it cannot be the case that legislation that adversely affects both men and women is discriminatory on the grounds of sex solely because the women (or men) in question are more numerous." And, also at 271: "The focus, surely is not on numbers but on the *nature* of the effect; on quality rather than quantity."

60 *Supra* note 2 at 270.

clear showing that the *social* costs of child care were disproportionately born by women.[61] Only if women disproportionately paid child care expenses would sections 9, 18(1), and 63 of the *ITA* have any gender-specific effect. Thus the first step of the *Andrews* test — identification of different treatment on the grounds claimed — was not met.

While a frustrating refusal to judicially "connect the dots,"[62] this decision does not, as such, close the door to judicial recognition of sex discrimination in Thibaudeau's context. Iacobucci J. noted that:[63]

> If, for example, it could be established that women are more likely than men to head single-parent households, one can imagine that an adverse effects analysis involving single mothers might well take a different course, since child care expenses would thus disproportionately fall upon women.

However, Iacobucci J. went on to make a series of *obiter* comments on the nature of discrimination and, in so doing, generated some confusion as to how the Supreme Court understands indirect discrimination. These comments were relied upon by Hugessen J.A. to anchor his ultimately destructive treatment of the doctrine in *Thibaudeau* and thus deserve examination.

Iacobucci J. correctly recalls that in previous Supreme Court of Canada cases on adverse effect discrimination, the Court had noted that the discriminatory actions in question (pregnancy discrimination and sexual harassment in *Brooks* v. *Canada Safeway Ltd.*[64] and *Janzen* v. *Platy Enterprises Ltd.*,[65] respectively) could only negatively affect some women and no men. These statements were made in support of seeing pregnancy discrimination and sexual harassment as sex discrimination and specifically

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61 *Symes, supra* note 7 at 763.

62 L'Heureux-Dubé J. in her dissenting judgment in *Symes* does not hesitate to infer from the conclusion that women disproportionately pay the social costs of child care that women also disproportionately pay child care expenses. She terms such an inference "inescapable," noting as well that in the immediate case before the Court Ms. Symes had proven that she did incur such expenses. See *Symes, supra* note 7 at 821 per L'Heureux-Dubé J.

63 *Symes, supra* note 7 at 766-67.

64 [1989] 1 S.C.R. 1219 [hereinafter *Brooks*].

65 [1989] 1 S.C.R. 1252 [hereinafter *Janzen*].

rejecting the claim that sex discrimination was not present in a situation where only some, not all, women were affected.[66] Iacobucci J. notes that, in contrast, the discrimination alleged in *Symes* could negatively affect both some men as well as many women. The question is thus raised whether such prejudicial effects are gender-specific enough to constitute sex discrimination.

Iacobucci J. addresses this concern by reminding us that there is a difference between being "negatively affected" by a provision and being able to establish that such a negative effect is in fact an "adverse effect" in law.[67] This makes sense, as we know that the last step of the *Andrews* test requires that the effect be looked at in context. Similar treatment of two differently situated groups will thus have a different legal character under section 15 with respect to each group. However, what becomes confusing about Iacobucci J.'s *dicta* at this point is whether he is saying more than this.

The Court in *Thibaudeau* believes that he is. Hugessen J.A. apparently is troubled by the notion that two groups, both with members who are negatively affected by the same treatment, can nevertheless be distinguished for the purposes of equality law. He resolves this dilemma by asserting that Iacobucci J. must mean that the treatment itself must be different: that women must be more and thus differently adversely affected, not that simply more women are adversely affected. Yet, such an understanding of Iacobucci J.'s statements is incompatible with other statements Iacobucci J. makes (one of which is reproduced above)[68] about the facts in *Symes* possibly showing adverse effects discrimination on the basis of family or parental status. To resolve this apparent contradiction, Hugessen J.A. reads Iacobucci J.'s use of the terms "disproportionately" affected and " 'more likely' to suffer" as importing a qualitative aspect, and thus uses *Symes* to support the result in *Thibaudeau*, as described earlier.[69]

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66 This limits the applicability of statements made in both of these cases to a very specific set of facts and to a particular theoretical concern. For more discussion of this point see text associated with notes 114-15, *infra*.

67 *Symes*, *supra* note 7 at 770.

68 See text associated with *supra* note 63.

69 *Thibaudeau*, *supra* note 2 at 271.

There are a number of problems with this understanding of the law on adverse effect discrimination. Most obviously, it involves an interpretation of Iacobucci J.'s words that seems forced and artificial. As well, regardless of whether Hugessen J.A. does or does not correctly invoke *Symes*, the resulting statement of adverse effects discrimination that emerges from *Thibaudeau* fits badly with previously articulated principles of equality doctrine and theory. As such, it should not be adopted, for the following reasons.

Hugessen J.A.'s importation of a qualitative consideration at this stage of a section 15 analysis simply collapses the different steps of the analysis set out in *Andrews*.[70] In so doing, Hugessen J.A.'s judgment undermines the advance *Andrews* represents in our understanding of equality concerns. The *Andrews* framework already takes into account the character of the effect on the targeted group. It does this by forcing the decision-maker to assess the historical and social context of the group in question. This is, as mentioned, the last stage of the *Andrews*' test. At this stage the court must determine whether the group of which the claimant is a member is one already historically or currently disadvantaged.

Why would Hugessen J.A. want to insert another qualitative distinction into the first step of the *Andrews* analysis? Surely a quantitative difference alone would satisfy the Court's concern that section 15 deal with those cases where different treatment contributes to the overall maintenance of already existing patterns of disadvantagement or discrimination. And, if it turns out that the group under study is an otherwise disadvantaged group (according to the last step of the inquiry), then the impact of the legislation on it will always, in any case, be qualitatively different from any impact the legislation will have on the privileged group from which it is distinguished. This is the inevitable import of the rationale underlying *Andrews*' last requirement.[71] Besides, if the last stage of the test cannot be satisfied — meaning that the disadvantage in question is not overlaid on to a general pattern of disadvantagement — then the claimant's challenge can be dismissed. So the requirement of qualitative

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70 *Supra* note 23.

71 And it is, as well, the inevitable import of the often repeated statement and truism that similar treatment of differently situated persons results in inequality: "identical treatment may frequently produce serious inequality." See *Andrews*, *supra* note 23 at 164, *per* McIntyre J.

difference at the first stage is unnecessary and misleading. The inquiry into existing disadvantagement that the last stage of the test requires is more than adequate insurance that examination of context and differential impact takes place. Hugessen J.A.'s analysis at the first stage need only inquire into whether there is any difference, and a quantitative difference will suffice.[72]

However, insertion of a qualitative requirement during the first stage of the analysis — although certainly redundant — is not necessarily damning had Hugessen J.A. done it properly. Unfortunately he does not. His error — a significant one — is failing to contextualize the experiences at stake in the analysis. Rather than looking at the wider social context in which men and women taxpayers function, Hugessen J.A. searches for a qualitative distinction within the state action itself. But, the Supreme Court has made clear that contextualization is an important part of any section 15 analysis. This is why the Court required contextualization as a distinct stage. As Wilson J. in *Turpin* writes:[73]

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[72] Such a quantitative requirement is consistent with American jurisprudence dealing with adverse impact discrimination under *The Civil Rights Act of 1964, Title VI* (42 U.S.C. s.2000e *et seq.*, federal human rights legislation). The United States Supreme Court has held that "to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants ... in a significantly discriminatory pattern" (*per* Stewart J., *Dothard* v. *Rawlinson* 433, U.S. 321 at 797 (1977), 53 L. Ed. 2d 786, 96 S. Ct. 2720). Thus, a height and weight requirement that excluded roughly 41% of women and somewhere around 3.5% of men was found by the Court to have a discriminatory impact on women (*ibid.*). In the same case, Rehnquist J., stated that a finding of discrimination is sufficiently based on "a significant discrepancy between the numbers of men, as opposed to women, who are automatically disqualified by reason of the height and weight requirements" (*ibid.* at 803). Similarly, tests which result in a 58% pass rate for whites and a 6% pass rate for blacks have been found, for that reason, to be prima facie discriminatory on the basis of race (*Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), 28 L. Ed. 2d 158, 91 S. Ct. 849). Antidiscrimination law has not developed in this way under the American *Bill of Rights* as the Supreme Court has held that a violation of the constitutional guarantee of equal protection of the laws requires overt differential treatment or a finding of intent to discriminate (*Washington* v. *Davis* 426 U.S. 229 (1976); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979); *McCleskey* v. *Kemp*, 481 U.S. 279 (1987)).

[73] *Supra* note 34 at 1332.

> A determination as to whether or not discrimination is taking place, if based exclusively on an analysis of the law under challenge is likely, in my view, to result in the same kind of circularity which characterized the similar situated similarly treated test clearly rejected by this Court in *Andrews*.

After all, contextualization is what saves a section 15 analysis from being reduced to ineffectual statements of formal equality. Hugessen J.A. sidesteps this safeguard by importing the qualitative assessment into the first step and neglecting to carry it out in a way that is sensitive to context. His formulation of the adverse impact discrimination test as requiring a qualitative difference observable in isolation from a contextualized analysis allows him to "pre-empt" the Supreme Court's "reminder" to contextualize. Thus Hugessen J.A.'s test reverts to the problems experienced by the earlier similarly situated test, representing a backwards step for equality doctrine. He misses seeing that the identical treatment of women and men, once one factors in the specific contexts of the subgroups involved, will seldom, if ever, have the same meaning for anti-discrimination law.

Had Hugessen J.A. given appropriate contextualized consideration to the effect of section 56 in *Thibaudeau*, what would he have found? A number of things seem obvious. Female custodial parents face a hostile world. They are disadvantaged in terms of labour force participation and access to education and training opportunities. Their skills and labour are less valued than those of male custodial parents. This is in large part because, as women, they are already embedded in society-wide patterns of gender-based disadvantagement and prejudice.[74] Male custodial parents, while they may share some of the immediate disadvantages which are imposed on separated custodial parents, like section 56(1)(b), do not share this larger context of gender disadvantagement. Still attached to these men are those privileges and advantages granted to men and denied to women.[75] Because of this, there

[74] To the extent that male separated custodial parents face similar burdens to those experienced by their female counterparts, it is possible to say they have been "feminized."

[75] This is not to deny that many men are disadvantaged on grounds other than gender. So men of colour, or poor men, are not necessarily properly considered privileged. It is merely to assert that the disadvantages many men experience in our society are not attributable to their gender in the way that the disadvantages many women experience are.

will seldom be an absence of qualitative difference in something done to women, relative to the same thing done to men. Only by ignoring this context can Hugessen J.A. conclude that men and women are equally burdened by section 56(1)(b) of the *ITA*.

Sex Difference and the Categorization Process

The failings of Hugessen J.A.'s analysis do not lie simply in a misapplication of doctrinal requirements. They can more importantly be accounted for in terms of his reliance on prevailing ideological assumptions about the difference between men and women and the nature of group identification generally. The following discussion examines this claim, arguing that the ideological assumptions informing Hugessen J.A.'s judgment are in tension with more sophisticated social and legal understandings of gender and group identity.

Our intent in this paper is not to engage in a detailed discussion of ideology and its effects within law. Rather, it is to outline the main features of the critical framework within which we have placed our analysis. There are multiple definitions and theoretical uses of the term 'ideology.'[76] For our purposes, we use the term to mean specific clusters of beliefs, attitudes and images through which meanings and values are attached to people, practices, policies, and institutions, in such a way that the power relations of a society are presented as natural and uncontestable. The concept of ideology thus "presumes that the 'common sense' of a society has developed historically, within particular relations of race, gender, class and sexual identity and so on."[77] Ideologies are to some degree internalized by individuals, particularly (though not exclusively) by members of the dominant social group, so that they operate as an unstated framework of assumptions informing all our thought processes, transforming how we understand daily experiences.[78] Whether or not they are self-consciously recognized, ideologies affect what

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[76] For discussions of the history of theories of ideology see M. Barrett, *The Politics of Truth: From Marx to Foucault* (California: Stanford University Press, 1991); and T. Eagleton, *Ideology: An Introduction* (London: Verso, 1991).

[77] "Colour of Law", *supra* note 28 at 452-53.

[78] G. Walker, *Family Violence and the Women's Movement: The Conceptual Politics of Struggle* (Toronto: University of Toronto Press, 1990) at 108.

explanations of events we are likely to accept or reject, what aspects of social relations we tend to regard as natural, normal or essential, and what alternative visions of the world we are prepared to consider as reasonable or realistic.[79]

We do not suggest that the images presented by dominant ideologies describe the lived realities of all, or even very many, people. These ideological paradigms do not necessarily coincide with people's diverse experiences, nor are they the only sets of beliefs or assumptions which exist in our society about social and political order. As Marlee Kline points out, ideologies are not smoothly and unproblematically reproduced,[80] and strands of resistance can arise within discourse to challenge dominant ideologies.[81] So with respect to any one area of social and political life there will be multiple, cross-cutting, competing, and often contradictory pictures of ideal orderings.

Nor do we intend that ideology simply be understood as a false or illusory belief system. The concept of ideology has often been criticized as implying that there is a single, objectively knowable, real world which is hidden from those who "buy into" ideological beliefs. The result of such a concept, the critique argues, can be the casual dismissal of differences in experience and political vision as "false consciousness." In response to this danger, then, one must be careful to assert that, while ideology is partial and politically charged, it is no different in this regard from all knowledge or forms of truth. A reductive notion of ideology as merely and uniquely falsehood can be avoided if we recognize that ideologies have real, material effects in constituting daily life, particularly for the less powerful in society. Ideologies are inseparable from material interests in the sense that they are "a constituent of the unconscious in which social relations are lived."[82] An ideology's

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79 See F.E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harv. L. Rev. 1497.

80 "Colour of Law", *supra* note 28 at 468.

81 See S. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can. J. Fam. L. 79 at 93-102 [hereinafter "Postmodernist Challenges"], and C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 88-89.

82 A. Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" (1985) 19 L. & Soc. Rev. 11 at 16.

intractability and power is partially explained by the fact that it accurately captures some of what individuals understand to be important in their lives. Thus, ideologies both distort and reflect life as individuals experience it.

The concept of 'discourse' is useful here as a complementary theoretical tool to aid in preventing the misunderstanding of ideology as a belief system singularly opposed to truth or reality. Discourse theory refocuses the analysis on the role of language in constructing the truth and knowledge of a society. Individual experience is seen as inseparable from and constructed through language, or discourse. There is, in other words, no one experience or subject existing outside the historical context of a society. Rather, everything is a reflection at some point of individual subjectivity and all subjectivity is the product of the society and culture in which the individual lives. Subjectivity is never fixed or stable within the individual; it is continually reconstituted through discourse.[83]

The relationship between ideology and discourse is also the subject of much academic musing. Ideology can be thought of as one of the forces operating within discourse to construct our knowledge and experience of the world. Relying on work by Stuart Hall, Kline writes, "ideology is related to discourse in the sense that discourse is the 'arena or medium in which ideology functions'"[84] and is given expressive existence. Law in general, and tax law in particular, are discursive fields in which ideologies have their effect, and through which dominant ideologies are reinforced, or occasionally challenged. So discourse theory usefully captures the fluidity and local, dispersed nature of power relations. The concept of ideology remains important, however, as it recognizes the effect of a set of larger structures of power that, to an important extent, is historically continuous and often depressingly determinative and coherent.

It is vital to emphasize that although dominant ideologies may not completely describe either the lived realities or the aspirations of many individuals, such ways of envisioning the world nevertheless have power in

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83 C. Weedon, *Feminist Practice & Poststructuralist Theory* (Oxford: Blackwell, 1987) at 32-33.

84 "Colour of Law", *supra* note 28 at 453. See also, B. Cossman, "Family Inside/Out" (1994) 44 U.T.L.J. 1; and "Postmodernist Challenges", *supra* note 81.

constituting the parameters of daily life for everyone in our society. This is, perhaps, especially true for those who do not conform to dominant ideological visions. We take Shelley Gavigan's point that the struggles of people who can never fit the ideal "illuminate, rather than negate,"[85] the oppressive potential of an ideology's stipulation of the norm.

A number of specific ideologies are relevant to our discussion of Hugessen J.A.'s judgment in *Thibaudeau*. For the remainder of this first part of the paper, the focus of which is sex equality issues, we examine particular ideological understandings of sex difference and of group identity generally. The second part of the paper, which examines the section 1 arguments put forward in defence of the *ITA*'s inclusion/deduction provisions, will focus on familial ideology.

It is possible to identify a dominant understanding of sex difference which, because it operates at such an inchoate yet powerful level in shaping how society generally views gender identity, origin and relations, deserves standing as ideology. This dominant understanding postulates a fundamental opposition between the sexes that has its origin in immutable biological factors. Sex and its associated behaviours are seen as biologically determined. Scientific proof of sexed natures is sought through appeal to such things as "anthropomorphic studies of other mammals, to instincts, hormones or to the physical processes of reproduction."[86] Social differences between actual men and women are justified by reference to a "fixed and unchanging natural order."[87] The essential nature and meaning of having a male or a female body are assumed to be the product of simple biological truths; thus, sex differences that are observable are justifiable with reference to standards of natural femininity and masculinity.[88] And, the consequences of such an understanding of sex have significant implications for social ordering and political structures. In particular, this set of beliefs about sex identity forms a major structural support of patriarchy: it legitimates the sexual division of labour, current

85 "Paradise Lost", *supra* note 13 at 606.

86 Weedon, *supra* note 83 at 128.

87 *Ibid.*

88 And, tautologically, observations of social differences also stand as evidence of the inevitability of sex difference.

forms of femininity, and women's subordinate position in society as a whole.[89]

Hugessen J.A.'s judgment illustrates this dominant ideological understanding of sex identity. To begin with, his judgment imputes the origin of sex difference to determinate and oppositionally ordered differences. He states that sex as a ground of discrimination differs significantly from other enumerated grounds in two ways. First, it lends itself to identification of only two groups. Unlike race, Hugessen J.A. offers by way of illustration, which can identify any number of subsets, sex can identify only two subgroups: women and men. Moreover, and this is Hugessen J.A.'s second point, these two subgroups can only properly be described as opposites: "One excludes the other. A male is always the opposite of a female and *vice versa*."[90] Any characteristic that is female is matched by an opposite characteristic of maleness. This means that any adverse effect that is to be linked to sex discrimination can't affect both men and women, even if in so doing it still disproportionately affects one sex. Sex based characteristics can by definition only be associated with one of the sexes. Therefore, because Thibaudeau's situation as a separated parent receiving child support is not unique to women, the state's action of taxing support payments cannot be seen as sex-linked.[91] Characteristics which identify members of both sexes cannot be sex-based, as anything that identifies one sex is the opposite of that which identifies another sex. Hugessen J.A. holds this to be a simple question of logic.[92]

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89 Weedon, *supra* note 83 at 126.

90 Hugessen J.A. states that: "[t]here is an almost infinite number of religions, nationalities, etc. and no two subsets within any of those categories could properly be described as opposites. There are only two sexes" (*Thibaudeau*, *supra* note 2 at 271).

91 With respect to Thibaudeau's claim, Hugessen J.A. thus states:

> I ... have no doubt that s. 56(1)(b) impacts adversely on more women than men. That is because mothers are far more likely to be custodial single parents than fathers. Since, however, the legislation must also impact in exactly the same way on custodial fathers, although in very much smaller numbers, I do not see how it can be said to differentiate or to discriminate on the basis of sex (*ibid.* at 272).

92 *Ibid.* at 271.

Hugessen J.A. suffers from what has been called "categoricalism:" unexamined assumption of simple, dichotomous sex categories as one's analytical framework.[93] His picture of sex difference is too simple. It appears that he cannot break free of a model of sex identity that relies solely on general biological distinctions between the sexes. Thus, to illustrate his point about adverse effect discrimination, Hugessen J.A. names a physical test as the sort of means of distinguishing between men and women that would have a qualitatively different effect on each sex: "The test would be qualitatively different even for those women who succeeded."[94] This is an odd statement. Physical ability is inexactly distributed between the sexes. Some women will be stronger than many men. Some men will be weaker than many women. In fact, the amount of variation among men and among women is greater than the variation that exists between the sexes. "[N]o two differently sexed individuals can be assumed, sight unseen, to have different heights, shapes, or strengths."[95] So one would think that in relation to tests of physical strength there would be precisely the sort of overlap in effect between the sexes that concerns Hugessen J.A. Yet, he doesn't hesitate to classify such a test as discrimination on the grounds of sex. This example confirms one's suspicion that Hugessen J.A.'s sense of gender difference is quite rigidly and narrowly confined to physical distinctions and thus has little relevance to a more meaningful picture of the social consequences and distribution of sex differentiation. Because of this dichotomous sense of the differences between the sexes, Hugessen J.A. cannot allow that something which is formally a characteristic of one sex can also describe members of the other sex. Thus, he never even gets to the more important inquiry into whether what looks like identical situations across the two sexes is substantially so.

In fact, biological characterization of the sexes, let alone the social manifestation of that biological state, is not simply a question of logic, even at its most basic level. Researchers into the biology of sex have long had

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93 R.W. Connell, "Theorising Gender" (1985) 19 Sociology 260, as referred to in B. Thorne, "Children and Gender: Constructions of Difference" in D.L. Rhode, ed., *Theoretical Perspectives on Sexual Difference* (New Haven: Yale University Press, 1990) at 105.

94 *Thibaudeau, supra* note 2 at 272.

95 A. Fausto-Sterling, *Myths of Gender: Biological Theories About Men and Women* (New York: Basic Books, 1985) at 218.

difficulty clearly grouping all individuals into one or other of the sexes. Intersexuality — the mixture of male and female biological characteristics — complicates the tidy cultural assumption of straight-forwardly sexed individuals. Hermaphrodites and male and female pseudohermaphrodites all demonstrate the enormous variation of the distribution of sex characteristics. Indeed, it seems much more "logical," at the biological level, to treat sex as a "vast, infinitely malleable continuum that defies the constraints of ... categories."[96] There is no essential and fixed set of biological facts from which to construct our social/sexed selves.

Even if the biological determination of sex was more certain and cleanly aligned with the two categories of male and female than it actually is, the social consequences or the meaning of such biological facts would still remain open. Facts acquire significance and gain meaning only when wrapped with specific cultural import by such things as laws, customs, beliefs, emotion, and imagination.[97] That is, facts gain their meaning through a range of discourses:[98] "[T]he language of biology participates in other kinds of languages and reproduces that cultural sedimentation in the objects it purports to discover and neutrally describe."[99] Our construction of two sexes — both biologically and behaviourally — lies at the cultural level and falsely claims biological derivation in its assertion of authority.[100] The capture of social possibilities by dominant understandings of appropriate gender behaviour is

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96 Fausto-Sterling, *supra* note 24 at 21.

97 T. Laqueur, "The Facts of Fatherhood" in M. Hirsch and E. Fox Keller, eds., *Conflicts in Feminism* (New York: Routledge, 1990) at 208.

98 Weedon, *supra* note 83 at 127.

99 Butler, *supra* note 24 at 109.

100 Gayle Rubin makes the argument that the creation of the two groups of female and male is a product of culture, not biology:

> "Gender is a socially imposed division of the sexes ... Men and women are, of course, different. But they are not as different as day and night, earth and sky, yin and yang, life and death. In fact, from the standpoint of nature, men and women are closer to each other than either is to anything else — for instance, mountains, kangaroos, or coconut palms ... But the ideal that men and women are two mutually exclusive categories must arise out of something other than a nonexistent 'natural' opposition."

See "The Traffic in Women: Notes on the 'Political Economy' of Sex" in R.R. Reiter, ed., *Towards an Anthropology of Women* (New York: Monthly Review Press, 1975) at 179-80.

never complete. What may be true generally of men and women loses any predictive value at the individual level, in terms of both biological and social characteristics.

The consequence of this is that Hugessen J.A.'s notion of sex difference works at the level of individual behaviour for, at best, only a few characteristics we associate with sex. Pregnancy is the most obvious[101] and — apart from other aspects of women's reproductive physiology, perhaps breast feeding — may be the only gender dimension along which discrimination occurs that fits with Hugessen J.A.'s analysis.[102] That is, it is among the *very* few sexed characteristics that do not occur in both male and female populations. All other characteristics that one associates with one sex or the other point, potentially, to at least some members of the 'opposite' sex. What Hugessen J.A. fails to realize — and what our brief discussion above illustrates — is that categorization (how we demarcate the female and the male) is only a theoretical device; its relationship with the real world is necessarily a complicated one. As theorists note, while it is true that our culture identifies only two sex categories and while everyone is more or less permanently assigned to one or the other, it also is true that the meanings of gender as individuals experience them are much more complicated, ambiguous, and contradictory.[103] Thus sex difference is no different from other differences. Like race, class, ability, or family status differences, sex differences are loosely and only in a very general sense reliably grouped.

The previous discussion points to the complexity and untidiness of sex identity categories — an argument that illustrates more general observations about the multidimensionality and fuzziness of the line one must draw between groups whenever a definite list of certain group-linked characteristics

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101 Hugessen J.A. finds it so obvious a sex indicator that pregnancy is paradigmatic of his understanding of sex differences. He treats any piece of legislation using pregnancy as a basis to distinguish individuals as a colourable stratagem, implying that such legislation therefore could not even be considered facially neutral (*Thibaudeau*, *supra* note 2 at 268-69).

102 There may be aspects of male reproductive physiology — like prostate problems — that are similarly extremely sex-specific. However, these male characteristics do not seem to be major components of any pattern of special discriminatory treatment of men.

103 See, for example, the discussion in Thorne, *supra* note 93.

is attempted. The ideology of sex difference has thus obscured the actual multidimensionality of biological and social sex traits by its employment of a common sense account of a fixed, binary, and biological sexed order. It is worth adding to this discussion the reminder that, despite this inexactitude, assignment of identities based on these characteristics has important social, political, and economic consequences for individuals.[104] This is, after all, simply a more specific instance of the general point we made earlier about ideologies: that they have material consequences both for those who conform to them and for those who do not. With respect to sex discrimination, this means that one has both to acknowledge that gender has "ubiquitous relevance" and to question the assumption that the male and female sexes have essential and naturally gendered natures ordered oppositionally to each other.[105]

Hugessen J.A. is not alone in his incorporation of an inadequate understanding of sex difference into his analysis of sex discrimination. The Supreme Court, itself, has exhibited similar ideological misrenderings of the difference sex makes. In *Hess* and *Weatherall*, both sex discrimination cases, the Supreme Court defaulted on correctly applying the test it mapped out in *Andrews* and in *Turpin*. Both of these cases purported to follow the *Andrews* test but, in effect, involved judicial discussion of whether men and women are similarly situated with respect to the treatment in question. This occured, in both cases, at the point when the Court became concerned with the reasonableness or reliability of the gender distinction drawn by the state action at issue.

One convincing way of explaining the doctrinal irregularities of these cases is by reference to the ideological pull which biological renderings of sex difference have for individuals in our society. The judges appeared unable to disassociate the idea of natural distinction from discussion of sex difference. In *Hess* this meant that Wilson J., as part of her section 15 analysis, justified the different treatment of men and women with respect to statutory rape in terms of a natural sex difference between "penetrators" and the "penetrated." In *Weatherall*, the Court, although admittedly not engaging in a detailed section 15 analysis, invoked biological difference in assessing the significance

[104] Weedon, *supra* note 83 at 125-26.

[105] Thorne, *supra* note 93 at 112.

of chest frisking for men and women as part of the reasons justifying the different treatment to which male and female prisoners are potentially treated.

These manifestations of a biological or natural understanding of sex inevitably fold the section 15 analysis back into the similarly situated test. Somehow eclipsed is earlier jurisprudential insistence that section 15 is not the place for considerations of reasonableness or attempts at justification. Conceptions of sex differentiation as invoking possibly natural and therefore legitimate distinctions foil attempts to move beyond the similarly situated test. This slippage serves as a strong reminder of the dangers the similarly situated test represents to the progression of equality law. Such eagerness to locate natural differences facilitates the unchallenged assertion of traditional notions of sex difference in precisely the context — equality law — where such notions are most appropriately reexamined. Here too, it appears, sex has yet to shed its ideological naturalistic heritage.

Categorization and Adverse Effect Doctrine: The Indistinctiveness of Group Identification

As we have shown, the gender ideology that underpins Hugessen J.A.'s reliance on a deterministic biological understanding of sex difference results in a particular doctrinal statement: that adverse effect discrimination cannot be found where the treatment in question affects members of both sexes. We have discussed this in terms of locating a difference in treatment, in locating a differential adverse effect. We now turn to illustrating how the general lesson of the inexactitude of category definition has already been recognized elsewhere in anti-discrimination law. We argue that Hugessen J.A.'s understanding of discrimination, informed as it is by a mistaken picture of sex categories, is at odds with the general evolution of anti-discrimination doctrine. The development of equality law has had two important stages, both of which are consistent with precisely that same understanding of the complicated and inexact nature of identification of group characteristics we claim Hugessen J.A.'s judgment lacks. The importance of this discussion is that not only is Hugessen J.A.'s notion of sex difference faulty from an analytical perspective, but it also is inconsistent with how equality doctrine generally has treated the boundaries between categories used in equality law. The message of this observation is simply, once again, that the picture of sex difference Hugessen J.A. employs is a hindrance rather than an aid to a proper

treatment of sex discrimination.

The first identifiable stage in the development of discrimination law involves a recognition of adverse impact discrimination, something this paper has already discussed. To repeat, legal differentiation that is *on its face* neutral as it does not explicitly single out a certain group for special treatment has been held still to discriminate if its *effects* are such. In *Ontario Human Rights Commission and O'Malley* v. *Simpson Sears Ltd.*[106] the Supreme Court of Canada described adverse effect discrimination (here in the context of employment) as follows:[107]

> It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or a group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

This is a critical acknowledgment about the 'mechanics' of discrimination. Absent such a recognition of adverse effect, equality doctrine simply would be unable to address substantial amounts of very effective discrimination. This is because any single group identity has significant and multiple consequences for a wide variety of social behaviours and circumstances: for example, one's gender affects a wide range of occupational, familial, and social choices. The link between these group identifications and certain observable social phenomena is tight enough on a general, statistical level, that any one of these indicators can usually operate to distinguish the majority of one group from the majority of those not associated with that group, despite the formal neutrality of the distinction it draws. In fact, the tightness of the linkage provides gender ideology with its appearance of 'truth.' For example, think of the social characteristic of primary responsibility for child rearing or the physical characteristic of strength. Neither of these characteristics is necessarily attached to an individual of one or the other sex. Some men provide primary child care and some women are stronger than most men. These characteristics could be considered formally sex-neutral. Yet both are clearly associated with the general population of one of the sexes and as such can be seen to be sex-associated descriptors. To use the example cited by

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[106] *Supra* note 57.

[107] *O'Malley*, *supra* note 57 at 551.

Hugessen J.A., if one were to select for a certain job eligibility on the basis of great physical strength, chances are that most (but not all) successful applicants would be male. So one can quite effectively discriminate on the basis of sex by use of such formally neutral characteristics. This functional division of traits between the sexes forces recognition of adverse impact discrimination.

Moreover, we are not always conscious of the ways in which the distinctions we draw, say in law, will implicate group identities and single out specific groups for distinctive treatment. This is because the constellations of factors or characteristics that go into the construction of identities often masquerade as unconnected, purely individual traits, behaviours, choices, or situations. Yet, in social reality they may be tightly linked to one group or another. So the law has had to recognize that state action may be discriminatory even though on its face and in terms of the intentions informing it there is no obvious evidence that such discrimination is occurring.[108] Discrimination can be merely the unintended "by-product of innocently motivated practices or systems."[109] The doctrine of adverse effect discrimination recognizes this.

A second evolution in equality doctrine has also been mandated by how differences that matter in terms of group identification have to be understood. Not only do a range of characteristics attach to any significant group identity but these characteristics are themselves inexactly distributed within the group they describe. As already discussed in the specific context of sex identity, no one characteristic will necessarily be true of all members of a group. This again is simply a reflection of the imperfect distribution and nature of the characteristics we use to construct different identities. Discriminatory practices, therefore, will seldom be perfectly inclusive. This, for example, is the clear message of the Supreme Court of Canada's decision in *Brooks*[110]

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[108] Thus, *O'Malley* established that the issue with which anti-discrimination provisions are concerned is the impact or effect of the discriminatory act upon the person affected, not the motivations underpinning the discriminatory action (*supra* note 57).

[109] Canada, *Report of the Commission on Equality in Employment* (Ottawa: Supply and Services, 1984) (Chair R.S. Abella) as cited with approval in *C.N.R.* v. *Canada*, *supra* note 57 at 1138-39.

[110] *Supra* note 64.

and followed in *Janzen*.[111] Equality doctrine has had to recognize discrimination in cases where some individuals in the discriminated-against sex go unaffected and are in fact immune from ever being affected by the immediate discrimination in question.[112] Even potential to bear children — one of the most reliable sex descriptors — does not locate all women within the female sex. Many women — for either social or biological reasons — have no child-bearing potential. And we don't insist that they thereby technically cannot be considered women.[113] Equality doctrine has had to allow that such incomplete coverage is still consistent with a claim of sex-specificity.

What equality doctrine must also recognize is that the same logic that forces this second development also dictates that discrimination be recognized in cases where the prejudicial treatment has similar negative effects on some individuals of the non-targeted group. Thus, the flip side to the recognition that discrimination exists even where not all members of the targeted group are affected is the recognition that discrimination also exists where some members of the non-targeted, 'oppositional' group also are similarly affected. Both simply are unavoidable products of how group categorization must be understood.

The Supreme Court cases which deal with underinclusive group identification, *Brooks* and *Janzen*, do not explicitly make this argument. Yet, it is certainly possible to view them as consistent with it. At issue in these

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[111] *Supra* note 65. In this case the Court stated at 1288: "discrimination does not require uniform treatment of all members of a particular group."

[112] This statement is, of course, not meant to imply that discrimination has such a discrete and specific effect as to remain devoid of indirect consequences for those immediately unaffected members of the targeted group. For example, all women suffer from the implications for women's political status and power that devaluation of some women's child-bearing labour has. And discrimination against pregnant women can inhibit other women in similar circumstances from becoming pregnant. See the discussion in D. Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990-91) 4 C.J.W.L. 407 at 430. The point is, rather, that the discriminatory effects that are being complained about may not immediately touch all women and yet must still be seen as sex discrimination.

[113] Although, on a wider ideological level, our society may encourage these women to feel a sense of personal inadequacy or failure in terms of their gender role.

cases, as already mentioned, was the existence of sex discrimination even though the actions in question did not affect all women. What was important in each case was to establish a link to sex through the underinclusive action in question.[114] The Court did not hesitate to do this, but in doing so clearly was not speaking to the question of overinclusivity — the situation in *Thibaudeau*. In *Brooks*, the option of recognizing overinclusive discrimination appears to be explicitly left open by the Court when it states, in reference to the fact that the characteristic in question (pregnancy) pertains only to the targeted group (women), that "[m]any, if not most, claims of partial discrimination fit this pattern."[115] Thus, the Court acknowledges the possibility that at least some claims of partial discrimination will fit another pattern.

Again, because of the inexactitude with which group-identifying characteristics are distributed in the population — for both social and biological reasons — most characteristics, while they may describe many (but not all) members of one group will also point to some (but fewer) non-members.[116] This is, after all, simply reflective of the fact that much of our group-specific profile is a product of social forces, of social interpretation and manipulation of a rather small and indeterminate set of biological characteristics. So, to use race as an example, one must understand race as a socially and culturally created distinction. The divisions it draws lack any decisive biological basis; characteristics that generally identify only one

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[114] Thus, Dickson C.J. emphatically writes: "[H]ow could pregnancy discrimination be *anything other than* sex discrimination? ... Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant" (*Brooks*, *supra* note 64 at 1242: emphasis in the original).

[115] *Supra* note 64 at 1247. We would modify this statement somewhat by arguing that most cases will not fit the pattern of *Brooks*. Few sex-linked characteristics have the sex-specificity pregnancy does.

[116] This is not true for those characteristics that have strong biological aspects — such as child-bearing potential, something that clearly requires a certain physiology. No one categorized as male can (at least currently) bear children and the appearance of the ability in someone thought of as male would surely force rethinking of his (?) gender classification, as the necessity of the parenthetical "?" indicates. But it is certainly true for most other significant group-linked characteristics. This is still not to say, however, that biology is determinate of sex. Rather it illustrates the point that our culture is strongly influenced by a belief in the biological inevitability of sex.

racialized group's members also will usually apply to some non-members.

Moreover, to insist upon 'watertight' compartmentalization would render equality doctrine simply irrelevant to addressing discrimination as real individuals experience it. Think of the social and economic characteristics that we know are disproportionately associated with women — things like vulnerability to sexual harassment, primary responsibility for child care, economic hardship. Surely the fact that some men also exhibit such characteristics or share such experiences should not mean that we can not talk meaningfully about these as current sex-linked social and economic circumstances. This is particularly true of claims about sex discrimination, as the nature of the category of sex and the social consequences it distributes are such that with respect to many, if not most, sex-based characteristics there will be overlap between female and male populations.

To summarize this last discussion, the same reasons that moved equality theorists generally to acknowledge the importance of recognizing adverse impact discrimination and that convinced the court that an adverse impact doctrine would be meaningless unless it stipulated that not all members of the targeted group need be adversely affected, also point to the importance of not limiting the doctrine to those cases where only members of the targeted group are adversely affected in the manner under consideration. All of these developments are necessitated by the nature of group differences: their complexity, subtlety, and contingency. And nowhere is this more true than in relation to sex differences.

Intersectionality and Group Identification in Equality Law

We mentioned that Hugessen J.A.'s problem in articulating a sensible adverse effects doctrine stems from two problems with his understanding of categorization. The first of these — illustrated by his conceptualization of sex differences — we have just discussed. The second problem relates to the larger question of conceiving of identity categories at all; of associating individuals with discrete group memberships. Hugessen J.A.'s understanding of this question also shapes his analysis.

Categorization is an inevitable component of equality claims. An individual situates her or his complaint as one involving equality by claiming a larger

group identity that is, she or he asserts, the basis for the discriminatory action in question. Because equality is a comparative term, it is always necessary to locate any individual claimant within a larger relative context.[117] Equality is a relation that exists or does not exist between persons or groups. Someone or some group is always equal or unequal relative to some other individual or group. Whether one views such equality in purely formal terms or more substantively, the necessity of a comparator base remains. Were one simply to assess an individual's or a group's situation in isolation from the rest of society, one's consideration could look to certain concerns of well-being or liberty, say, but not to those of equality.

When we engage in this comparative exercise, we need to identify the groups between whom the comparison will take place. This is clearly true for the similarly situated test. So, for example, in *Bliss*, the relevant groups were pregnant and non-pregnant persons. And such group identification is also necessary, although perhaps less obviously, for the more substantive version of equality emerging from the recent section 15 cases. Even in the "analogous groups" test one has to categorize in order to set up the opposition that is essential to assessing whether differential benefits or burdens are distributed by the state. This simply is the first step of the test articulated in *Andrews*[118] — there the Court decided that the group identification to be attached to Andrews for the purpose of his claim was that of non-citizen. Thus the "categorization game," as one judge[119] has so aptly termed this process, is still on-going, despite the Supreme Court of Canada's rejection of the similarly situated test. It simply is not possible to avoid the assessment of relative circumstance for which the similarly situated test was criticized and rejected.[120]

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117 McIntyre J. thus describes equality in *Andrews* as: "a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises." See *Andrews*, *supra* note 23 at 164 and Hogg, *supra* note 41 at 1160-61.

118 *Supra* note 23.

119 Kerans J.A., in *Mahé* v. *Alta (Gov't)* (1987), 54 Alta. L.R. (2d) 212, as referred to by McIntyre J. in *Andrews*, *supra* note 23 at 168.

120 For similar arguments, see D. Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990) c.3; M. Gold, "Comment: *Andrews* v. *Law Society of British Columbia*" (1989) 34 McGill L.J. 1063.

The contingent and complicated nature of group identification, as it affects this categorization process, raises two specific problems for equality doctrine generally. First, it provides a site for easy insertion of judicial prejudices or biases into equality analyses, thus countering the claim that the 'politics' have been removed from section 15 analysis. Second, it renders the equality analysis judges are forced to employ somewhat artificial, at best, and meaningless, at worst. We will discuss each of these problems in turn.

The first problem simply reflects the fact that, because individuals belong to multiple, overlapping groups, there will be a range of choice in the selection of the group membership that best represents the distribution of the harm involved. In any case there is no "natural joint" at which to carve up the legally relevant universe.[121] Yet, group selection is critical. Identification of the groups at issue will often determine the success of the section 15 claim. It mattered in *Bliss*, for instance, that the Court saw the relevant distinction as between pregnant and non-pregnant persons and not between men and women. So too it mattered in *Weatherall* — a post-*Andrews* case — that the appellant was identified as a member of the general group of men. Had he been considered representative of the group of male *prisoners*, the result might well have been different; it is at least arguable that male prisoners suffer the kind of historical disadvantagement and stereotyping that identify discrete and insular minorities. And, of course, group identification mattered in *Symes*. Characterizing the group to which Beth Symes belonged simply as "women" rather than as "married women who are entrepreneurs" would change the equality issue at stake in the case.[122]

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121 Tussman and Tenbroek, *supra* note 26 at 346.

122 *Symes*, *supra* note 7 at 765. Audrey Macklin captures the role categorization plays in influencing the nature of the issue at stake when she writes that as between the trial judge and appeal judges in the *Symes* case, the simplest way to understand their divergent views is to:

> imagine the judges peering at Beth Symes through different pairs of glasses. When the trial judge looked at her, he saw a business woman standing next to a business man. When the judges of the Court of Appeal looked at her, they saw a self-employed professional woman standing next to a salaried women.

See "*Symes* v. *M.N.R.*: Where Sex Meets Class" (1992) 5 C.J.W.L. 498 at 508. Both these images are, of course, part of the total picture *Symes* represents. But in its partial depiction of the case, each determines opposite readings of the equality issue:

But because group identity is such an indeterminate question, the judges' own assumptions will be very powerful in shaping the choices that are made. What kinds of distinctions invoke what sorts of group membership is very much a question that lies at the heart of equality law. The problem is that the sort of assumptions that may very well inform the judge's opinion at this point are precisely the assumptions that an effective equality rights provision should be challenging: judicial assumptions about the 'rationality' or legitimacy of the distinction at stake. After all, discrimination more often than not is unconscious, a by-product of traditional and systemic understandings of the world. It would be naive, and probably unfair, to expect judges to be immune from these aspects of dominant culture, at least with respect to every possible dimension along which discrimination occurs. A judge may not perceive that one kind of distinction invokes an enumerated or analogous ground of discrimination as she or he may not be immune from dominant social understandings that view such a distinction as involving only personal or individual characteristics and, therefore, not problematically replicated at the legislative level.[123] Yet, the progressive potential of equality theory is strongly tied to its ability to link particular social characteristics and legally

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one presents Beth Symes as disadvantaged and the other as privileged. See also, N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179.

[123] This problem of uncritical judicial acceptance of "commonsensical" distinctions is most starkly illustrated by the following statement made by Dickson J. in *C.N.R.* v. *Canada*, *supra* note 57 at 1139 and echoed by McIntyre J. in *Andrews*, *supra* note 23 at 174-75:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.
>
> By drawing a distinction between group based characteristics and individual attributes, the Court creates wide judicial latitude in the classification of the ground of distinction at stake. If it is merely an individual attribute the legislation invokes, not a group characteristic, then discrimination will not be found. Yet it is precisely this distinction between individual attribute and group characteristic that equality doctrine should force us to question. To assume the distinction unproblematically allows for judicial obfuscation of the kind of examination equality theory demands we do. It ignores the social construction of difference and the fact that differences that manifest themselves at the level of the individual have their origin in large systems and structures of social differentiation.

relevant group identities traditionally assumed to be unconnected. In such a manner, for example, has sexual harassment become associated with sex discrimination[124] and literacy or scholastic requirements with race discrimination.[125]

Ironically, because of this need to combat judicial blindness to the current pattern of stereotyping or discriminatory disadvantagement, it may often be easier for groups attempting more radical equality challenges to do so on the basis of an analogous ground. To use an enumerated ground to push equality theory ahead requires convincing a judge that characteristics not traditionally seen as, for example, gendered or racially specific are in fact so. The enumerated grounds comprise those grounds of discrimination that are generally accepted as at least formally suspect and that often have well-worn pictures of what they represent associated with them. Because we are all familiar with these bases of discrimination many of us have quite fixed, and therefore probably somewhat facile, notions of what such grounds involve. *Thibaudeau* illustrates this irony. Hugessen J.A. is unwilling to expand his ideas about sex identity so as to permit a linkage between separated custodial parenthood and gender. The appellant in *Thibaudeau* has better luck using the non-enumerated ground of family status.

The second problem for equality doctrine occasioned by the contingent and complicated nature of group identity — artificiality of analysis — is an inevitable weakness of any equality discussion. Naming the dimension along which inequality occurs will necessarily oversimplify the experiences of the involved individuals. Any attempt to abstract from individual experience and speak more generally of larger social, collective phenomena — like racism or sexism — runs the risk of reducing a complex experience to a unidimensional one. Individuals do not fall neatly into the subdivisions of human experience equality law identifies. Instead, they inhabit the intersections of many categories or types, their range of social possibilities formed by how these different social divisions and their consequences "abrade, inflame, amplify, twist, dampen, and complicate each other."[126] What gets treated as

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[124] *Janzen*, *supra* note 65.

[125] *Griggs*, *supra* note 72.

[126] R.W. Connell *et al.*, *Making the Difference: Schools, Families, and Social Division* (Boston: Allen & Unwin, 1982) at 182 as quoted in Thorne, *supra* note 93 at 108.

analytically tidy is in reality as wonderfully complex as any given individual. Even to pick gender as the ground of discrimination in *Thibaudeau*, ignores the possible relevance of poverty, of family status, and of age in shaping any particular woman's experiences of discrimination. This reality of compound discrimination likely will be present in many equality cases. It is, after all, not coincidental that different indicia of disadvantagement occur in tandem with each other and tend to augment each other's effects.

A consequence of ignoring this pattern of disadvantagement is that discrimination that is compound will fail to be recognized. Such discrimination falls neatly into none of the single dimensions which together construct its character. Thus for women of colour, their disadvantagement is neither in terms solely of their race nor of their gender. It is a complex function of both dimensions that cannot be understood by its disaggregation into the different single grounds our legal and political tradition identifies. If we insist that such separation occur, the discrimination at stake becomes invisible. It gets "characterized away."[127] This is another aspect of the categorization game discussed earlier.[128] Individuals get conceptually shuffled from group to group until the desired discrimination or absence of discrimination is located.[129] Recognition of only a singular ground of discrimination poorly captures the reality of the harm and character of discrimination for many who suffer from it. It is simply another instance of disregard for any reality that fails to conform to that of the dominant groups: another form of discrimination, this time perpetrated by discrimination law

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127 J. Freeman, "Defining Family in *Mossop* v. *DSS*: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation" (1994) 44 U.T.L.J. 41.

128 *Ibid.*

129 As an example of this, Duclos chronicles how failure to recognize interactive discrimination in human rights law can render invisible the unique disadvantagement of women of colour. N. Duclos, "Disappearing Women: Racial Minorities in Human Rights Cases" (1993) 6 C.J.W.L. 25. Duclos describes the process whereby discrimination is "disappeared" through the law's inability to recognize more than "one-step" divergence from the norm, that is, possession of more than a single characteristic on the basis of which discrimination occurs. In *Thibaudeau*, the appellant was lucky. At least, the Court accepted one of the grounds of discrimination offered to locate her treatment within s. 15. And perhaps it was easier to do this in relation to family status as such discrimination was intentional on the face of the legislation.

itself. The failure to acknowledge the interactive nature of much discrimination is a particularly unjust irony; individuals so treated are likely to be among those most in need of protection. Individuals whose disadvantage-ment is recognized are often the most privileged members of discriminated-against groups as their claims will come closest to unidimensional claims.[130]

Recent writings on discrimination theory have recognized this and emphasize the limited nature and shallowness of an approach to discrimination that attempts to describe individuals in terms of single, isolatable traits, characteristics, or group memberships.[131] As a corrective, theorists argue for notions of interactive discrimination, multiple discrimination, or intersectionality; all of which signal that much discrimination cannot be identified by reference to only one prohibited ground.[132] Discrimination thus is seen as a function of treatment that is shaped by the complexity, variety of an individual's intersecting group identities and inseparability.[133]

This does not mean that decision makers should shy from group identification — it is an unavoidable part of any equality analysis. Absent

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130 These individuals fall within the "but-for" category. But for one aspect of disadvantagement, they resemble dominant, privileged groups. White, middle-class, straight, able-bodied women would be examples of such individuals: but for their gender they bear the same equality profile as the most privileged group that sets the social norm. For a discussion of this argument, see K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Theory, Feminist Theory and Antiracist Politics" (1989) Univ. of Chicago Legal Forum 139.

131 Crenshaw, *ibid.*; Duclos, *supra* note 129; Iyer, *supra* note 122.

132 Ryder uses this model in his discussion of *Mossop* to illustrate the problematic character of analyses that fail to recognize interactive grounds of discrimination. In that case, it is the Supreme Court's separation of sexual orientation from family status that is so unconvincing and unreal. See B. Ryder, "Family Status, Sexuality and 'The Province of the Judiciary': The Implications of *Mossop* v. *A.G. Canada*" (1993) 13 Windsor Y.B. Access Just. 3. See, also, Freeman, *supra* note 127; Crenshaw, *supra* note 130; Iyer, *supra* note 122; Report of the Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity, and Accountability* (Ottawa: The Canadian Bar Association, 1993) at 15-16.

133 Freeman, *supra* note 127 at 74.

some sort of abstraction of individual experience, it is impossible to speak of discrimination as a systemic phenomenon, to understand how it works and what its harm is. Categorization therefore is necessary. But it does mean that judges should be hesitant about the lines they draw — this is the first part of our argument about the *Thibaudeau* decision — and they should be prepared to recognize multiple, interactive grounds of discrimination — this is the second part of our argument. Judges must be willing to grant the contingency of group characteristics and to expose to close examination their own assumptions about group identities and traits. Part of doing this demands that decision-makers must always consider the groups at issue in context. If recent equality theory and doctrine tells us anything, it is that group identification or characterization makes sense in terms of real individuals' experiences only if it is drawn up to reflect the world as real individuals experience it, and as they describe it.[134] Without such contextualization, to use Wilson J.'s language in *Turpin*, "the section 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation."[135]

The Federal Court of Appeal's judgment in *Thibaudeau* is a good illustration of a failure to contextualize and admit the contingent and interactive nature of the group identification process of equality doctrine. By isolating family status from sex, Hugessen J.A.'s analysis describes only an imaginary world. To regard treatment of separated custodial parents receiving child support as not implicating larger cultural assumptions about gender is to disable any meaningful discussion of disadvantagement the group might face. To regard treatment of cultural assumptions about its gender is to disable any meaningful discussion of disadvantagement the group might face. This is merely to say that the fact that the majority of custodial parents are female is not simple coincidence. Yet Hugessen J.A. seems determined to treat it as such. Even his recollection of a number of traditional expressions or stereotypes that invoke different varieties of family status — "happily married man," "old maid," "gay bachelor," "merry widow," and "married woman"[136]

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[134] Freeman makes this latter point when she argues that characterization of the discrimination should be informed by the view of those affected by it (*supra* note 127 at 79).

[135] *Supra* note 34 at 1332.

[136] *Thibaudeau*, *supra* note 2 at 276.

— ignores the fact that all of the examples he cites are gendered.[137] Hugessen J.A. fails to see that much of what is compelling about seeing family status as an analogous ground, in this case, has to do with the gender of those singled out.[138]

Perhaps, *Thibaudeau* is not the best case to argue for recognition of interactive discrimination. It is arguable that sex discrimination alone captures most of what is compelling about the discrimination women in Suzanne Thibaudeau's situation face. Assumptions about child care work, financial dependency on one's male partner, reduced career marketability — all indicia of the disadvantagement separated, custodial parents face — are facets of the more general ideological complexes that order dominant understandings of gendered behaviour. After all, acceptance of the often complicated and interactive nature of discrimination does not rule out identification of single focus discrimination in cases where it is appropriate. But why would one want to do this here? The more dimensions one acknowledges, the better one captures what the harm is. What is clear about Hugessen J.A.'s treatment of Thibaudeau's claim is that the separation he draws between gender and familial status is an artificial one. If both are to be recognized under section 15, then in Thibaudeau's case, to recognize familial status and not gender is unsupportable. Construing family status as distinct from gender for a woman in Thibaudeau's situation really does fail to capture the full situation.

Thinking about equality is analytically difficult, particularly when 'common sense' or ideological assumptions about such things as gender, race, or class identity are in tension with our equality aspirations. The exercise is

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[137] What these phrases also illustrate and what has also gone unnoted in other cases — including the Supreme Court in *Canada* v. *Mossop*, [1993] 1 S.C.R. 554 — is the heterosexual dimmension to family status. These phrases demonstrate that to think of family status abstracted from sexual orientation is also absurd. The dimensions of sex, sexual orientation, and family status all cross cut each other, rarely occurring around issues of family ordering in isolation from each other.

[138] The link between family status and gender that is operative in Suzanne Thibaudeau's case is not always true of other forms of discrimination in which family status is relevant. For instance, in cases where availability of benefits, say, is denied on the basis of failure to conform to heterosexual norms of intimate relationships, resulting disadvantagement is a result of interactive discrimination on the basis of family status and sexual orientation.

particularly difficult in relation to sex discrimination because of the complicated nature of sex difference and the intimacy and immediacy of sex identity to us all. At a minimum, the Supreme Court needs to issue clear and simple guidelines to aid lower courts in their equality analyses and to remind lower courts of the kind of caution and judicial hesitancy that must be exhibited: that is, to acknowledge explicitly both the necessity and the political contingency of categorization in any equality analysis. Absent such a structure, one can only expect to see more confused and troubling statements about when equality rights are or are not implicated.

Part II. The Privatization of Women and Children's Welfare: Section 1 of the *Charter* and the Government's Justifications for Taxing Child Maintenance Payments

In this Part we examine the arguments put forward by the government to justify any initial equality problems section 56(1)(b) might present. This discussion will take us deeper into the principles of taxation law. As in Part I, however, our analysis necessarily takes place at both doctrinal and theoretical levels.

Hugessen J.A. rejected the government's argument that infringement of Suzanne Thibaudeau's equality rights could be excused under section 1 of the *Charter*. His judgment focused on the lack of fit between the mechanics of the legislation and the government's purported desire to assist custodial families. We argue that while this analysis was useful and the Court arrived at the right conclusion on section 1, it missed many of the most troublesome aspects of the legislation. A number of glaring errors and inconsistencies in the government's tax policy argument went unchallenged. Moreover, the Court failed to make a vital connection between the mechanical flaws of the inclusion/deduction system, and familial ideology which constructs women and children's welfare as the private responsibility of husbands and fathers. It is important to go beyond Hugessen J.A.'s section 1 analysis to illuminate this connection, because of what it reveals about the subtle and complicated forms that gender bias can take in income tax law, and because it redoubles the case in favour of abolishing the current regime for taxing child support.

Ironically, what our critique also reveals is the limited scope which the Supreme Court of Canada has to redress the very social inequalities which

have made this case so politically interesting and controversial. While striking down section 56(1)(b) is desirable because it would alleviate immediate hardships for many divorced women and their children, it would do remarkably little to break down the larger hegemony of a privatized model of support and dependency in which women's labour in the home and the market remains unpaid or underpaid. Thus, our critique ultimately serves to highlight the need for further political strategies to grapple with this complex social problem.

Hugessen J.A.'s section 1 analysis followed the familiar course laid out in *R.* v. *Oakes*.[139] He found that while the governmental objective of providing a "tax subsidy" to separated families was sufficiently important to warrant a *Charter* breach, the provision failed to meet the last two stages of the test, what Hugessen J.A. calls the "minimum impairment and proportionality" requirements.[140] Central to this finding was the empirical evidence reviewed by the Court as to the actual effects of the income tax scheme on separated parents. The theory behind the deduction/inclusion mechanism is that taxing support payments in the recipient's hands will leave more after-tax income to support the children, since her tax rate will be lower than the payer's. However Hugessen J.A. quoted extensively from studies submitted by the parties, exposing the multiple reasons why custodial parents and children often do not derive any benefit from such income splitting.[141] Since even the government's own empirical evidence did not significantly improve this

[139] [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

[140] *Thibaudeau, supra* note 2 at 282.

[141] *Thibaudeau, supra* note 2 at 285. The reasons why the "tax subsidy" objective is not realized include the following: under the current rate schedule payers of child support are in a higher tax bracket than recipients in only slightly more than 50% of cases; payers are under no legal obligation to share any tax saving with the custodial parent and in many cases are resistant to doing so; many support arrangements are negotiated in private without legal or tax advice; not all lawyers or judges consider tax implications and those that do often rely on rough estimates; even where tax implications are raised the argument for a higher award may be foreclosed by the "glass ceiling" which slides in to limit the amount of support to what is considered normal or reasonable; and even a support award which does make adequate provision for tax implications may soon be overtaken by a myriad of changes in the parties' tax positions.

picture, he concluded that:[142]

> ... far from being a measured, proportionate response to a perceived problem, the inclusion/deduction system frequently fails to give any benefit at all to those whom it is allegedly designed to assist, almost always benefits those who do not need assistance, and contains no corrective or control mechanisms designed to remedy the problem.

The majority in *Thibaudeau* is to be commended for carefully analyzing the concrete effects of the tax regime on individuals, thereby correcting a major error in the Court below. As we discussed at the outset of Part I, the trial judge rejected Thibaudeau's claim outright, holding that any problems lay not with the *ITA* but with the family courts' or the parties' own failure to make adequate provision for taxes. This convenient deflection of Thibaudeau's complaint onto some other department of law was rather disingenuous. In practice, different aspects of the legal regulation of family breakdown are not so easily disentangled. The trial judgment minimized the pervasiveness and intractibility of the problems facing women in the family law process, suggesting they amount to nothing more than large scale sloppiness. Contrary to what the trial judge implied, reforming the family law system is not simply a matter of beefing up continuing education programs for lawyers and judges. The failures of the system are related to deeply entrenched power imbalances between women and men which affect negotiating outcomes, access to legal services, the distribution of market opportunities, and judicial attitudes and presumptions. It will take a very long time to change all of this. In the meantime, we cannot fairly ask Suzanne Thibaudeau and others like her to wait patiently for the total transformation of society.

Hugessen J.A.'s willingness to recognize the effects of the tax system within family law processes is thus a welcome improvement upon the trial judgment. While this was enough to dispose of the section 1 issue, however, it barely scratched the surface of the government's argument. The Court considered the state action problematic only in relation to its method of

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[142] *Ibid.* It is unclear to us why Hugessen J.A. did not center his analysis around the "rational connection" requirement in *Oakes*, in particular the need for laws to be carefully designed to achieve their objectives. The flaws he identifies with the legislation would have fit very neatly into this part of the s. 1 analysis. Ultimately, however, it may not matter which route Hugessen J.A. chose to get to his conclusion on s. 1.

implementation — it accepted at face value the policy rationales put forth to justify the legislation. In this part of the paper, we go beyond Hugessen J.A.'s analysis to challenge the governmental objectives themselves. In addition to the "tax subsidy" goal, which Hugessen J.A. regarded as "clearly the most important,"[143] there are several other rationales offered by the federal government to justify the inclusion/deduction system. An inter-governmental study, quoted by Hugessen J.A., refers to three other justifications:[144]

> First, it is a principle of taxation that, where a deduction has been claimed by a payer in respect of a payment, the recipient of that payment should pay income tax on it. Second, by requiring support recipients to include the amount of child support within their income, the system recognizes the basic principle of fairness that tax payers with the same incomes from different sources should pay the same amount of tax. Third, the tax assistance offered by the deduction may provide an incentive for the payer to make regular and complete payments.

Finally, the federal government is arguing elsewhere, in a similar case pending before the courts, that the deduction/inclusion provisions serve the further objective of helping to support the payer's new family, if he has remarried or entered a new common law relationship.[145]

On their face, these are not outrageous or unusual justifications, and like much that seems commonsensical they appear not to require close evaluation. However, there are a number of stark contradictions in the government's section 1 argument as well as several misstatements and distortions of income tax law and policy. At the very least these problems, even if seen as mere technical errors in design or argumentation, severely undermine the government's case. At worst, however, the justifications exhibit a more fundamental problem in their implicit reliance upon certain assumptions about the nature of families. Indeed, what the government's argument exposes is how closely the deduction/inclusion mechanism depends upon our society's

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143 *Thibaudeau*, *supra* note 2 at 281.

144 Canada, Report of the Federal/Provincial/Territorial Family Law Committee, *The Financial Implications of Child Support Guidelines Research Report* (Ottawa: The Committee, 1992) at 84-85, quoted by Hugesson J.A. at 281.

145 See the Justice Department's Memorandum in response to the Intervenors in *Schaff* v. *The Queen* (para. 48), filed in the Federal Court of Appeal (Ct. File No. A-523-93). The hearing of the *Schaff* appeal has been adjourned pending the Supreme Court of Canada's decision in *Thibaudeau*.

dominant familial ideology — how thoroughly it takes for granted that "the family" is (among other things) heterosexual, altruistic, and organized around a gendered division of economic and reproductive responsibilities. This, in our view, is what lies at the heart of the section 1 issues in *Thibaudeau*.

The next section will elaborate briefly on the content of this dominant familial ideology, and how it affects the construction and regulation of family relationships within law, and particularly within tax law. With this framework in mind, we will turn to examine in some detail each of the government's policy rationales for the deduction/inclusion system. Our analysis leads to the conclusion that the state should stop taxing custodial parents on child support payments, but also points out that much more than this immediate result is needed to ensure greater economic security for all single parent mothers and their children.

Familial Ideologies in Taxation Discourse

Feminist scholars across disciplines have produced a substantial body of literature on issues surrounding the family — a fact which should surprise no one given the historical (and continuing) importance of the domestic realm in women's lives. While this literature has celebrated positive aspects of motherhood and family life, it also has drawn connections between familial ideology and oppression based on gender, sexuality, race, and class. There are many unresolved debates within this scholarship, but there are two major themes we want to draw out. First, empirical research indicates that family forms and relationships in Canada are remarkably diverse and probably have never conformed widely to a single 'traditional' model.[146] Second, and in tension with this first point, is the fact that one particular construction of the 'family' nonetheless has achieved dominance in the current era as the norm or standard against which people's lives are measured and compared, and

[146] On the increasing diversity of family forms in Canada see M. Eichler, *Families in Canada Today: Recent Changes and Their Policy Consequences* (Toronto: Gage, 1988); M.J. Mossman and M. MacLean, "Family Law and Social Welfare: Toward a New Equality" (1986) 5 Can. J. Fam. L. 79; and Statistics Canada, *Families: Social and Economic Characteristics* Cat. No. 93-320 (Ottawa: Supply and Services, 1993).

through which they are regulated.[147] This image is one component of a dominant familial ideology which operates powerfully within tax law, as well as within other legal and extra-legal discourses.[148]

The dominant ideology of 'family' in our society conceives of the ideal social unit as middle class, white, and heterosexual, comprised of a male breadwinner, a female dependent, and children. Within this ideology the family is governed by a 'natural' and gendered division of roles and by norms of altruism, its 'economic' needs met by men and its 'care' and social maintenance provided by women. Inequality between men and women is assumed and constituted as natural and private.[149]

According to this picture, women's work in the home is not economically relevant but is something they just do out of non-material and natural motivations. Men are believed to earn their market incomes through their own individual effort and, thus, are entitled and best equipped to control how those earnings are distributed within the family. The result is that women's economic lives are privatized, their economic needs assumed to be met, and their unpaid labour recognized through private transfers of income and wealth from men.[150] Women's individual economic welfare thus is equated and

147 See Gavigan, "Paradise Lost," *supra* note 13 at 605.

148 As discussed in Part I of the paper (see notes 76-85 and associated text), we are painfully aware that the meanings of "ideology" and "discourse," and the relationship between them, are heavily contested. We have found the following works to be particularly helpful on ideologies and/or discourses surrounding the family: M. Barrett, *Women's Oppression Today: The Marxist/Feminist Encounter*, revised ed. (Great Britain: Verso, 1988); "Postmodernist Challenges," *supra* note 81; "Family Inside/Out," *supra* note 84; S.A.M. Gavigan, "Law, Gender and Ideology" in A. Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printing & Publishing, 1988); "Paradise Lost," *supra* note 13; M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nations Women" (1993) Queens L.J. 306 [hereinafter "Complicating Motherhood"]; "The Colour of Law," *supra* note 28; "The Family and the Market," *supra* note 79; and Weedon, *supra* note 83.

149 See C. Pateman, "Feminist Critiques of the Public/Private Dichotomy" in *The Disorder of Women* (Stanford, CA.: Stanford University Press, 1989) at 118.

150 See S. Boyd, "(Re)Placing the State: Family, Law and Oppression" (1994) 9 Can. J. Law Soc. 39 [hereinafter "(Re)Placing the State"]; J. Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent *Charter* Cases" (1989) C.J.W.L. 246;

assumed to be coterminous with the welfare of the family, which in fact refers to the economic power of its male breadwinner.[151] In this manner, the economic status of women in heterosexual relationships is simply folded into that of their male partners. Moreover the *actual* distribution of household incomes and wealth is shielded from political scrutiny by the ideology of family privacy.[152]

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and "Private Troubles, Private Solutions," *supra* note 14 at 83-84.

[151] For further discussion of the ideologies surrounding intra-familial economic relations see M.G. Cohen, "The Problem of Studying Economic Man" in A. Miles and G. Finn, ed., *Feminism in Canada: From Pressure to Politics* (Montreal: Black Rose Books, 1982); P. England, "The Separative Self: Androcentric Bias in Neoclassical Assumptions" in M. Ferber and J. Nelson, ed., *Beyond Economic Man: Feminist Theory and Economics* (Chicago: University of Chicago Press, 1993) at 37; N. Folbre and H. Hartmann, "The Rhetoric of Self-Interest: Ideology and Gender in Economic Theory" in A. Klamer, D. McCloskey and R. Solow, ed., *The Consequences of Economic Rhetoric* (Cambridge: Cambridge University Press, 1988) at 184; and N. Folbre, *Who Pays for the Kids? Gender and the Structures of Constraint* (London & N.Y.: Routledge, 1994) at 15-29. It should be noted that in economic theory the sexual segmentation of marketplace and family labour is sometimes explained as a product of rational decisions within families that the most efficient division of labour occurs when women specialize in caregiving and other domestic work. Although such theories accord more economic *relevance* to women's unpaid work, they presume in the same manner as the dominant cultural ideology that women have a particular set of pre-given abilities and preferences which make them ideally suited to housework, childcare, etc. That is, economic analysis tends to naturalize women's domestic roles in the same manner as the more general family ideology discussed in the text. On the importance of gendered ideas about family economy in tax discourse specifically, see A.M. Cassin, "Equitable and Fair: Widening the Circle" in A.M. Maslove, ed., *Fairness in Taxation* (Toronto: University of Toronto Press, 1993); J. Grbich, "The Tax Unit Debate Revisited: Notes on the Critical Resources of a Feminist Revenue Law Scholarship" (1990-91) C.J.W.L. 512; K. Lahey, "The Tax Unit in Income Tax Theory" in E.D. Pask, K.F. Mahoney and C.A. Brown, ed., *Women, The Law and The Economy* (Toronto: Butterworths, 1985) 277; and J. Nelson, "Tax Reform and Feminist Theory in the United States: Incorporating Human Connection" (1991) 18 J. Economic Studies 11.

[152] We agree with Nicola Lacey's comment that: "the ideology of the public/private dichotomy allows government to clean its hands of any *responsibility* for the state of the 'private' world and *depoliticizes* the disadvantages which inevitably spill over the alleged divide by affecting the postion of the 'privately' disadvantaged in the 'public' world" (see her "Theory into Practice? Pornography and the Public/Private Dichotomy" (1992) J. Law & Society 93 at 97). One way the concept of 'family

Obviously we do not suggest that this image of the nuclear family describes the lived realities or the aspirations of all, or even very many, people. As mentioned earlier,[153] ideologies need not map exactly onto how all individuals experience their lives. In fact much of ideologies' normative power lies in their implicit judgment and condemnation of alternate ways of ordering. We return to Gavigan's point here that "[t]he struggles of people who can never fit into the ideal of the nuclear family illuminate, rather than negate, what some feminists identify as the oppressive *implications* of the idealization and *romanticization* of the nuclear family...."[154] So, for instance, the dominant familial ideology does not capture the experiences of women in working class and low income families, who have always had to take on paid work as well as household labour to ensure their families' survival. Nor does it incorporate the denial of familial privacy to women and men on public assistance. And, it very clearly does not comprehend the intimate relationships of gay men or lesbians. Equally, as Hazel Carby has written, the image of female domesticity and dependency does not fit with many black women's experiences as heads of households, as breadwinners in an economic system characterized by high levels of black male unemployment, and as paid domestic workers in white households.[155] The racial specificity of nuclear family ideology also has been exposed in the context of child welfare regulation, where state workers and courts have often devalued childrearing norms within First Nations cultures, and discounted the importance of community and family connections

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privacy' works as an *ideology* is to obscure the extent to which the state is active in defining the boundaries of the so-called private realm, and in helping to maintain certain behavioural norms within it. The ideology also suppresses the racialized nature of the public/private divide, for example the extent to which privacy is denied to First Nations and black families subject to active and violent state intervention through child welfare regulation, law enforcement practices, and other means: see P. Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) C.J.W.L. 1; and R. Williams, "Race, Deconstruction and Feminist Legal Theory" in *Beyond Economic Man, ibid.* 144 at 151-2.

153 See text associated with *supra* notes 80-81.

154 "Paradise Lost," *supra* note 13 at 606, citing Douglas Hay [emphasis in original].

155 "White woman listen! Black feminism and the boundaries of sisterhood" in *The Empire Strikes Back: Race and Racism in 70s Britain* (London: Hutchinson, 1982) 212. See also P.H. Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (New York; London: Routledge, 1991) esp. c.3 and 4; and E. Thornhill, "Focus on Black Women!" in J. Vorst *et. al.*, *Race, Class, Gender: Bonds and Barriers*, 2nd rev. ed. (Toronto: Garamond Press, 1991) 27 at 33.

to the survival of First Nations people in a racist society.[156] These different cultural, class, and racial traditions of family life may rely upon values and beliefs that in many ways challenge the dominant conception.[157]

The need to take this diversity of experience into account in analyzing the effects of familial ideology is clear. For us, they tend to confirm the discursive power of the dominant family norm, which continues to have tremendous currency in our general political culture and in specific areas of legal regulation *despite* its lack of fit with the experiences of many people. The difficulties facing lesbian mothers in custody litigation may be partly explained in these terms,[158] for example, as can the negative way in which courts have sometimes perceived First Nations mothers whose children receive care from a wider network of extended family.[159] By delegitimizing the mothering practices or abilities of certain women and labelling their families deviant, the dominant familial ideology normalizes the law's denial of custody to these women.[160] To paraphrase our earlier definition of ideology, it presents the power relations of our society as natural and uncontestable.

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156 See "Complicating Motherhood," *supra* note 148; and Monture, *supra* note 152.

157 Resistance to familial ideology emanates from numerous sources. Indeed, the Supreme Court of Canada has problematized some aspects of the ideology in recent family law decisions, by rejecting the dominant construction of women's work in the home as economically irrelevant: see *Moge* v. *Moge*, [1992] 3 S.C.R. 813; and *Peter* v. *Beblow* (1993), 44 R.F.L. (3d) 329. For a commentary on how the *Moge* decision challenges the traditional construction of husbands and wives see A. Diduck and H. Orton, "Equality and Support for Spouses" *infra* note 178.

158 See "(Re)placing the State," *supra* note 150; and "Paradise Lost," *supra* note 13. For more detailed discussions of how lesbians are constructed as "bad mothers," particularly if they are open and politicized about their sexuality, see K. Arnup, " 'Mothers Just Like Others': Lesbians, Divorce, and Child Custody in Canada" (1989) C.J.W.L. 18 at 23-32; D. Day, "Lesbian/Mother" in S.D. Stone, ed., *Lesbians In Canada* (Toronto: Between the Lines, 1990); and R. Robson, *Lesbian (Out)Law: Survival Under the Rule of Law* (New York: Firebrand Books, 1992) c.11.

159 See "Complicating Motherhood," *supra* note 148.

160 *Ibid.*

Similar effects can be observed within tax law. The *ITA*, like many statutes, adopts an explicitly heterosexual definition of spousal relationships.[161] But beyond this, various provisions of the *ITA* are more subtly designed around the set of assumptions we have described about the nature of economic relations within the family. Provisions such as the marital credit[162] and the deductions for alimony and maintenance,[163] for example, tend to give men control over the distribution of tax benefits among members or former members of the heterosexual family and to presume they will share those benefits with dependent women and children, in the spirit of altruism which is assumed to characterize all family relations. Likewise, eligibility for child tax benefits and refundable sales tax credits is determined on the basis of aggregate spousal income, not the income of individual taxpayers.[164] Once this aggregate exceeds a certain threshold, the refundable credits are reduced or entirely lost. Where all or most of the income is received by a male breadwinner, the *ITA* assumes it is used to improve the welfare of all family members. According to the 'common sense' of the legislation, we can expect the needs of women and children to be met privately by male breadwinners in these circumstances.[165] When these assumptions do not match up with everyday realities, women are impacted in unexpected and potentially harmful ways. Furthermore there is a danger of this harmful impact being overlooked or denied, or being accepted as natural or inevitable, because of the power the dominant ideology has in constructing truth and knowledge within law and other discourses. Though they may be benevolently motivated, taxation policies which react to women's lack of economic power by simply leaving space for support to be provided to them privately, by men, may do nothing more than legitimate women's and children's continuing poverty.

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161 See s. 252(4). The presence (or absence) of a "spousal" relationship affects the operation of over 150 provisions of the *ITA*: see D.M. Sherman, "Till Tax Do Us Part: The New Definition of 'Spouse'" in *Report of Proceedings of the Forty-fourth Tax Conference* (Toronto: Canadian Tax Foundation, 1993) 20:1-31. For an analysis of the impact of the definition on gay men and lesbians see C.F.L. Young, "Taxing Times for Lesbians and Gay Men: Equality at What Cost?" (1994) 17 Dalhousie L.J. 534.

162 Section 118(1)(a).

163 *Supra* note 17.

164 Sections 122.6-122.64 and 122.5.

165 See E. Zweibel, "Child Support Policy and Child Support Guidelines" *infra* note 209 at 389-90.

We return to the inclusion/deduction system specifically, to examine more closely the policy rationales put forward by the government in its section 1 argument in light of this model of familial ideology. The government's case is plagued by inconsistencies, misstatements of tax law and policy, and dubious assumptions about how the quantum of child support is set in practice. All of these problems indicate that the deduction/inclusion system is badly designed to implement even the most coherent of the government's stated objectives. More fundamentally, however, they reveal the shortcomings of the objectives *themselves*. The government's policy argument draws upon familial ideology in a way that defeats the very purpose the government ostensibly cares about — providing adequate levels of support to single parent women and their children.

Demonstrably Justified? The Government's Argument

1. The First Justification: *The inclusion/deduction system provides a tax subsidy that benefits custodial families by enabling higher support awards.*

On its face, this is a valid and important objective. It is true that the *aggregate* resources of two ex-spouses will be maximized if the tax burden on child support is borne by the parent in the lower tax bracket. Indeed, the federal government reports that it collected some $330 million less in income tax revenues in 1991 as a result of allowing separated couples to split income in this manner.[166] This means that tax savings were in fact realized by some separated couples where the person paying maintenance was subject to a higher tax rate than the person receiving it and paying tax on it. But as the Federal Court of Appeal found, this rate differential only occurs in just over half of all cases. More importantly, even where it does occur, the tax saving is realized *not* by the parent with custody of the children, but by the *non*-custodial parent who gets the tax deduction. The government's tax subsidy

[166] "Judges skeptical over child-support" *Globe and Mail* (5 October 1994) A1. It should be kept in mind that this figure includes revenues collected on behalf of the provinces. The cost to the federal government alone in 1991 was $205 million: see Canada, Department of Finance, *Government of Canada: Personal and Corporate Income Tax Expenditures* (Ottawa: Department of Finance, December 1993) at 17.

rationale works only if one assumes that fathers who deduct child support payments will share the benefit of their tax savings with the mother. For the reasons cited by Hugessen J.A., this assumption is extremely dubious.[167]

Let us be clear about just what would be required for this tax subsidy objective to be achieved. It is often assumed that what is needed in these cases is simply to 'gross-up' the support award by an amount sufficient to cover the associated tax liability, or to set the quantum high enough to leave a sufficient net payment in the custodial parent's hands after she pays her taxes. This approach aims at "transferring the recipient's tax burden to the payer spouse."[168] But all this achieves is to preserve the level of pre-tax child support; to prevent it from actually being *eroded* by the inclusion/deduction system. It does not in any way *increase* the after-tax resources going to the children. The "tax subsidy," meaning the difference between the amount of the payer's tax savings and the amount of the recipient's tax liability, is still retained in full by the non-custodial father. The courts, the parties' professional advisors, or the parties themselves would need to compute this differential and translate it (or at least some portion of it) into a higher support award. In other words, the support payments would have to be increased by more than the amount of the mother's tax cost.[169] The chances

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167 *Thibaudeau*, *supra* note 2 at 282-85. See also note 143. For further analyses of why women often fare poorly in private negotiations with male partners or ex-partners, even when both are fully aware of their formal legal rights, see M. Neave, "Resolving The Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994) 44 U.T.L.J. 97 at 110-130; and C.M. Rose, "Women and Property: Gaining and Losing Ground" (1992) 78 Virginia L.R. 421.

168 J.W. Durnford and S.J. Toope, "Spousal Support in Family Law and Alimony in the Law of Taxation" (1994) 42 Can. Tax J. 1 at 28.

169 Other commentators who (surprisingly) seem to accept the simple 'gross-up' approach as sufficient include E.D. Pask, "Gender Bias and Child Support: Sharing the Poverty?" (1993-94) C.F.L.Q. 33 at 92-93; and L. Vandervoort, "Equal Liability for Child Maintenance: The Income Tax Implications" (1983) 30 R.F.L. (2d) 315 at 317. Even E. Zweibel and R. Shillington, whose work the Court cited in *Thibaudeau*, are sometimes unclear about the difference between 'grossing up' to compensate for the *recipient's tax liability*, and increasing the payments to include all or a part of the *payer's tax subsidy*: see *Child Support Policy: Income Tax Treatment of Child Support and Child Support Guidelines* (Toronto: The Policy Research Centre on Children, Youth and Families, undated) at 12, 15. In more recent work Zweibel clarifies this point and calls specifically for a sharing of the payer's tax subsidy: see

of this being worked out correctly, of the non-custodial parent being willing to concede it, or of courts being prepared to order it consistently, seem extremely slim.[170]

The recent Alberta Court of Appeal decision in *Levesque* v. *Levesque*[171] illustrates this danger all too well. Attempting to lay out some badly-needed guidelines regarding the quantum of child support, the Court referred to *Thibaudeau* and stressed the importance of factoring tax implications into every award.[172] But the Court focused exclusively on grossing up the amount to compensate for the custodial parent's tax liability, and made no remarks at all about sharing the tax saving realized by the payer. While this certainly is better than ignoring tax consequences altogether, it does nothing to advance the "tax subsidy" objective which, supposedly, is the most important rationale for the deduction/inclusion system.

The failure to account adequately for the tax implications of support is not simply a logistical problem, or one that could be solved by better educating taxpayers or legal system personnel in the arcana of tax law, although lack of technical knowledge is certainly a contributing factor. The roots of the problem lie in the power imbalance between men and women, and the way familial ideology tends to naturalize this gender inequality and place it beyond the bounds of state responsibility.

The inclusion/deduction scheme is a perfect example of a tax policy which is informed by the dominant image of the family discussed earlier. The

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"*Thibaudeau* v. *R.*: Constitutional Challenge to the Taxation of Child Support Payments" [1994] 4 N.J.C.L. 305 at 337.

170 It should be noted that the sheer complexity of the *ITA* is a significant barrier to any but the most rough and ready attempts to address tax consequences. Although computer software is now available in some provinces to assist in these calculations, it is disturbing to think that many lawyers and judges do not have the tax expertise to make a critical assessment of the assumptions and choices made by the designers of such software programs. See Pask, *ibid.* at 91-96 and Appendix 2. See also K. Douglas, *Child Support: Quantum, Enforcement and Taxation*, Background Paper (Ottawa: Research Branch, Library of Parliament, November 1993) at 7, 8; and Durnford and Toope, *supra* note 168 at 28, 29.

171 [1994] 8 W.W.R. 589.

172 *Ibid.* at 606-7.

government says that its objective is to enhance the level of financial support available for custodial families. At one level this acknowledges the need for a public response to women and children's post-divorce poverty. Rather than providing a deduction or credit directly to the household in need, however, the method chosen for delivering this subsidy is to leave more after-tax resources in the hands of the payer, almost always the man. Increasing men's welfare is somehow conflated with assisting women. While a few women may muster the finances and psychic strength to litigate over support, the vast majority will be left to obtain whatever they can of this public subsidy from men through private negotiation. Research has shown that even *during* marriage it is wrong to assume that men willingly share their incomes equally with their wives.[173] If the assumption of economic integration and solidarity is problematic during the subsistence of a marriage, it is much more so following divorce. The evidence which now exists about post-separation economic disparities between men and women overwhelmingly confirms that co-operation and equal sharing most often are not the operative values in a divorce settlement.[174] Indeed the inclusion/deduction system may even add

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[173] See Ontario Fair Tax Commission, *Fair Taxation in a Changing World: Report of the Ontario Fair Tax Commission* (Toronto: University of Toronto Press, 1993) at 262-263. See also M. Edwards, *Financial Arrangements Within Families* (Australia: National Council of Women, 1980); M. Edwards, "Individual Equity and Social Policy" in J. Goodnow and C. Pateman, ed., *Women, Social Science and Public Policy* (Sydney: George Allen & Unwin, 1985) 95; G. Wilson, "Money: Patterns of Responsibility and Irresponsibility in Marriage" in J. Brannen and G. Wilson, eds., *Give and Take In Families: Studies In Resource Distribution* (London & Boston: Allen & Unwin, 1987); J. Pahl, *Money and Marriage* (Great Britain: MacMillan Educations Ltd., 1989); R.L. Blumberg, "The 'Triple Overlap' of Gender Stratification, Economy and the Family" in R.L. Blumberg, ed., *Gender, Family and Economy: The Triple Overlap* (California: Sage Publications Inc., 1991) at 7; R.L. Blumberg, "Income Under Female Versus Male Control: Hypotheses from a Theory of Gender Stratification and Data from the Third World" *ibid.* at 97; and V.A. Zelizer, "The Social Meaning of Money: 'Special Monies'" (1989) 95 Am. J. Soc. 342.

[174] See R. Finnie, "Women, Men and The Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data" [1993] 30 C.R.S.A. 205; E.D. Pask and M.L. McCall, eds., *How Much and Why? Economic Implications of Marriage Breakdown: Spousal and Child Support* (University of Calgary: Canadian Research Institute for Law and the Family, 1989); and D. Stewart and L. McFadgen, "Women and the Economic Consequences of Divorce in Manitoba: An Empirical Study" (1992) Manitoba L.J. 80. See also *Moge, supra* note 157 at 854-857.

to the conflict. In the words of one commentator, "apart from the personal strife which may have led to the breakdown of the marriage, the tax system essentially puts the parties in an adversary system with regard to the financial arrangements."[175]

What all this suggests is that the inclusion/deduction system is an ineffective and misguided strategy for getting more resources into the hands of divorced mothers and their children. Its flaws cannot be adequately remedied by educating lawyers, judges or anyone about how to compute the tax implications of support. No amount of technical expertise will alter the underlying problems involved in treating a divorced couple as a family unit and providing a subsidy to the payer of support instead of to the custodial household. The system assumes a level of marital and ex-marital economic cooperation that does not jibe with the real world, and which reinforces women's dependency on the private resources and fair-mindedness of individual men. Thus, at the same time as the government claims to be intervening on behalf of single parent women, the design of the tax provisions effectively reprivatizes the gendered inequalities associated with divorce, rendering invisible the extent to which men actually are sharing the public subsidization of their child support obligations with women.

We do not wish to suggest that private support should be entirely abandoned or rejected as a source of financial relief for low income women. Many women *are* financially dependent, at least to some extent, upon male partners or ex-partners. Gender bias in the labour market is still a reality, as is the gendered division of domestic labour. The law must continue to recognize and enforce these support obligations, in order to protect women and children from the immediate harms of poverty.[176] However even this

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[175] A.B.C. Drache, ed., *Canada Tax Planning Service* (Don Mills, Ont.: Richard De Boo Ltd., 1993) at 44-46.

[176] See A. Diduck and H. Orton, "Equality and Support for Spouses" (1994) 57 Modern L. Rev. 681, for an excellent discussion of the social changes and improvements in women's economic position which must precede any move to abolish private maintenance. This is part of a larger dilemma familiar to equality rights theorists — the problem that members of historically oppressed groups can be harmed both by recognizing and by ignoring their social differences: see M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 20-21. For a thoughtful discussion of the potential problems with ignoring

argument cannot justify the inclusion/deduction system, as it does not in itself deliver any additional support to single parent families. It does not compel any transfer of tax savings from the payer to the recipient of support, or increase women's leverage in the negotiation or enforcement of divorce settlements. Women's only access to the tax subsidy is private, through their ex-husbands, unless they can obtain a Court order entirely outside the tax system taking proper account of tax implications in setting support levels. In fact the *ITA* can actually worsen the financial situation of the custodial parent, if she agrees to a particular level of maintenance without being aware that she will be liable for income tax on this amount. The inclusion/deduction system thus does more to reinforce and even enhance men's economic power over women than it does to protect women from poverty. This criticism is particularly cogent when one considers that there are far more effective means by which the government could advance its declared purpose, if it really wanted to. A tax credit provided directly to *all* single parents (not just those leaving a heterosexual marriage) would be one method.[177] Another would be to use the revenue recouped through a repeal of the deduction/inclusion regime to fund a significant public child care initiative.[178]

These proposals bring us face to face with the institutional limits of the judicial process as a vehicle for waging equality struggles. At most, the

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women's economic dependency in the tax context see F. Bennett, R. Heys and R. Coward, "The Limits to 'Financial and Legal Independence': A Socialist Feminist Perspective on Taxation and Social Security" in *Politics and Power*, vol. 1 (London: Routledge & Kegan Paul Ltd., 1980) at 185-202.

177 Zweibel and Shillington, *supra* note 169 at 26-29 and 49, evaluated a number of tax reform options, and concluded that the best one would utilize a combination of direct transfers and refundable tax credits to deliver anti-poverty benefits to custodial households, and would treat child support payments as tax-neutral intra-family transfers.

178 The present Liberal government proposed in its campaign 'Red Book,' as well as in its first budget, to devote $120 million in 1995-96 and $240 million in 1996-97 to the creation of subsidized child care spaces, provided real economic growth exceeds 3%: see Canada, Department of Finance, *The Budget Plan* (February 1994) at 17, Table 3, and 18. Repealing the deduction/inclusion system would add around $200 million to federal coffers annually, to help meet this commitment: see *supra* note 166 and associated text. However, the most recent budget tabled in February 1995 was noticeably silent on this issue, suggesting the government plans to renege on its promise.

Supreme Court of Canada may strike down the tax provision being challenged by Suzanne Thibaudeau. Even if the Court declared the entire deduction/inclusion scheme to be unconstitutional, its abolition would simply leave women at square one — dependent upon a notoriously unreliable system of private child support. What really is needed is to replace this system, and the deduction/inclusion mechanism, with a more public form of support provided directly to single parent families in need. But the courts cannot design or implement such social programs. Thus, a judicial decision to strike down legislation under section 15 of the *Charter* should create no illusions that the inequality complained of has been adequately addressed.[179] Instead, we should regard such decisions as indicators that further state action is likely required to begin redressing a serious social problem that the court has flagged for us. We revisit this point in our conclusion.

To return to the government's section 1 argument in *Thibaudeau,* the "tax subsidy" objective is at first glance the most compelling rationale provided for the inclusion/deduction system.[180] However we have argued that this policy goal is flawed because it presumes that heterosexual family relationships naturally involve a gendered division of labour and a fair distribution of market incomes by male breadwinners. In any event, the gap between the "tax subsidy" objective and the design and operation of the provisions is so vast that this cannot be accepted as a sound policy argument for their retention, let alone meet the standard necessary to justify violation of a *Charter* right. A careful assessment of the other four justifications offered by the government exposes similar problems, which in each case also are linked to the dominant familial ideology.

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[179] Susan Boyd warns that this is one of the pitfalls of litigation strategies, and shows how apparently progressive judgments may also legitimate state policies which aim to privatize economic responsibility for dependent individuals within the family: see "(Re)placing the State," *supra* note 150 at 65-73.

[180] Interestingly, it appears this may not have been the driving motivation behind the provisions when they were first introduced: see the discussion below in relation to the government's fifth justification.

2. The Second Justification: *To provide an incentive for non-custodial parents to pay their child support.*

As Durnford and Toope note, it is difficult to prove or disprove whether deductibility affects compliance behaviour, as there are a variety of factors which may be involved in any individual's decision to pay or not pay his child support.[181] In any case, others have pointed out that if the deduction has any incentive effect it must be minimal given the notoriously high rates of default on child support payments.[182] Apart from this, it seems curious that the government should offer financial incentives to any citizen to induce him to comply with what are his legal and moral obligations pursuant to a private agreement or a court order. The state normally responds to other instances of non-compliance with enforcement and penalty measures. What makes the difference here? It is our argument that the choice of the carrot over the stick in this case reflects, at least in part, underlying beliefs about the nature of fatherhood.

Within the ideological picture of the nuclear family described earlier, men are presumed not to be primarily responsible for, interested in, or skilled at caring for children. This leads to a tendency to regard any involvement by a father with his children as praiseworthy, somehow exceptional, 'above and beyond the call of duty'.[183] Such involvement is seen as something to be encouraged and rewarded, rather than demanded and expected. Perhaps, then, this in part explains the attraction of tax breaks as a response to pervasive paternal non-payment. The incentive argument reinforces the idea that fathers who take care of their children should be lauded for their generosity, or that such support calls for special, non-punitive encouragement.[184]

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181 *Supra* note 168 at 12-13, 37.

182 See, for example, Ontario Fair Tax Commission, *supra* note 173 at 273-275; and Zweibel and Shillington, *supra* note 169 at 18.

183 See S. Boyd, "Child Custody, Ideologies, and Employment" (1989/90) C.J.W.L. 111 at 125; and S. Boyd's forthcoming paper, "Looking Beyond Tyabji: Employed Mothers and Child Custody Law" at 15-6 (on file with the authors). See also J. Drakich, "In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood" (1989) C.J.W.L. 69 at 83.

184 It is true that in recent years some provinces have grown impatient with the high incidence of child support default and have instituted more aggressive enforcement systems. However the central political motivation for such measures often appears

Proponents of the deduction/inclusion system sometimes have put a slightly different spin on the incentive objective, arguing that the government is really addressing the problem that many non-custodial parents just don't have the ability to pay child support out of their after-tax incomes, particularly if they are also supporting a new family. We agree that for many lower income families there is not enough to go around in the event of a separation. But granting a tax deduction to all payers of child support is a very ill-tailored response to this problem. Since there is no 'means test' the deduction is available even to those with the highest incomes and, in fact, it provides greater tax savings to them than to low income payers.[185] Tax deductions are well known to be one of the worst possible instruments for delivering income

to be the reduction of budgetary spending on social assistance, rather than a revision of social attitudes about the nature of paternal responsibility. See the *Family Maintenance Enforcement Act*, S.B.C. 1988, c.3, as am. by S.B.C. 1994, c.36; the *Family Support Plan Act*, S.O. 1991, vol.2, c.5; and the *Enforcement of Maintenance Orders Act*, S.S. 1984-85-86, c.E-9.2, as amended by S.S. 1992, c.5. For a review of some of these initiatives see Douglas, *supra* note 170 at 12-3. Quebec recently has announced a similar program, and in the wake of *Thibaudeau* the federal government has declared its intention to create a national enforcement system. Justice Minister Allan Rock is promoting the plan on the basis that it could reduce federal expenditures on social assistance by $1.5 billion: See "Crackdown on 'deadbeat dads' discussed:" *Globe and Mail* (4 August 1994) A1; and "Nation-wide enforcement of child support planned" *Globe and Mail* (25 November 1994) A1.

185 See M. Maloney, "Women and the Income Tax Act: Marriage, Motherhood, and Divorce" (1989) C.J.W.L. 182 at 209; Durnford and Toope, *supra* note 168 at 37-39; and R. Krever, "Support Payments and the Personal Income Tax" (1983) Osgoode Hall L.J. 636 at 694-697. These authors all recommend that some form of limit be placed on the deduction, to reduce if not eliminate this bias in favour of higher income payers of child support.

assistance because of this upside down effect.[186] There are many more effective options within and beyond the tax system for alleviating poverty.[187]

Finally, the arguments about incentive to pay and ability to pay really beg the specific question raised by *Thibaudeau*, which relates to the fairness of the *inclusion* side of the tax regime. Whatever the fate of section 56(1)(b), the government could still leave the section 60(b) deduction in place, if it is considered desirable as an incentive to grant a form of financial assistance to people paying child support. This, of course, raises the third governmental

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[186] See for example R.W. Boadway and H.M. Kitchen, 2d ed., *Canadian Tax Policy* Canadian Tax Paper No.76 (Toronto: Canadian Tax Foundation, 1984) at 62, 63. Indeed in its 1987 tax reform proposals the federal government cited this upside down subsidy problem as its reason for converting a host of personal deductions to tax credits:

> The conversion of exemptions to credits is a key element in achieving a fairer income tax system. A tax credit deducted from an individual's tax liability is the clearest and most direct form of tax relief, since all taxpayers who qualify receive the same tax reduction regardless of their income. In contrast, a tax exemption or deduction is subtracted from the income on which taxes are calculated. Its value therefore depends on a taxpayer's marginal rate of tax and is greater for those in higher-income brackets.

See Department of Finance, *Income Tax Reform* (18 June 1987) reproduced in Stikeman's *Canada Tax Service*, "Special Release on Tax Reform '87" at 7-19. This issue has attracted a significant amount of commentary recently in connection with the *Symes* case and the tax treatment of child care expenses. The upside down subsidy effect of deductions is raised as a criticism in virtually every study. Indeed in *Symes* itself, L'Heureux-Dubé J., in her dissenting judgment, pointed out that "tax deductions benefit only those who have a taxable income and, as such, are a form of upside down subsidy which allows a person with more income to spend more on child care and consequently, to receive a greater portion of the government tax expenditure program in return and the deduction does not help families who cannot afford child care in the first place" (*supra* note 7 at 823). See also C.F.L. Young, "Child Care — A Taxing Issue?" (1994) 39 McGill L. J. 539; C.F.L. Young, "Child Care and the Charter: Privileging the Privileged" (1994) 2 Review Const. Studies 20; A. Macklin, "*Symes* v. *M.N.R.*: Where Sex Meets Class," *supra* note 122 at 509; F. Woodman, "A Child Care Expenses Deduction, Tax Reform and the *Charter*: Some Modest Proposals" [1990] Can. J. Fam. L. 371 at 383; and National Council of Welfare, *The 1992 Budget and Child Benefits* (Ottawa: The Council, 1992) at 18-22.

[187] See, for example, Ontario Fair Tax Commission, *Report of the Working Group on Low Income Tax Relief* (Toronto: Ontario Fair Tax Commission, 1992); and C.F.L. Young, "Child Care — A Taxing Issue?" *ibid.* at 27-33.

objective, to which our discussion now turns.

3. The Third Justification: *To recognize the principle of reciprocity in the tax system, that a payment which is deducted by the payer should be taxed in the hands of the payee.*

It is perhaps sufficient to note that the statement of this objective is entirely circular as a rationale for the deduction/inclusion system. Even on its own terms, it suggests only that if the inclusion of child support payments in income is found to be unconstitutional, the government should also repeal the deduction. And, portraying the *ITA* in this rigid, ledger-like manner fails to acknowledge its role as a vehicle for delivering subsidies and effecting social policy. In this sense, the third objective conflicts with the first two rationales considered above — to provide a subsidy to separated families and an incentive to pay child support.

Apart from concerns of inconsistency, it simply is wrong to suggest that reciprocity has been a governing principle in the interpretation or application of our tax laws. The basic unit of taxation under the *ITA* is the individual.[188] The criteria for claiming deductions thus are specific to individual taxpayers and the nature and purposes of their outlays or expenses. As a general rule, the *ITA* does not make the right to a deduction contingent upon the payment being taxed to someone else, or vice versa. The treatment of other taxpayers, even if they are parties to the same transaction, simply is not relevant to an individual's tax position.

The lack of any general reciprocity principle in the *ITA* was confirmed recently by the Supreme Court of Canada in *Antosko* v. *The Queen*,[189] a case involving the sale of a debt instrument and the deduction and inclusion of accrued interest by the parties. Revenue Canada argued that the transferee should be prohibited from deducting interest accrued prior to the transfer, because the transferor was tax exempt and had not included such interest in

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[188] See ss. 2(1) and 248(1) ("individual," "person"). While the term "individual" refers to a natural person in the *ITA*, a corporation also is treated as a "person" and subject to tax in its own right.

[189] 94 D.T.C. 6314. See s. 20(14) of the *ITA*.

income. The Court rejected this argument, finding nothing in the wording of the relevant section to make the deduction expressly contingent upon an inclusion by the other party. Rather, the provision simply set out a number of preconditions for claiming the deduction, which the taxpayer had met. In similar fashion, sections 56(1)(b) and 60(b) use parallel criteria to require inclusion or permit deduction of child support payments, but they do not cross-reference one another or link the tax liability of ex-spouses in any way. Indeed the case for reciprocity is even weaker than in *Antosko*, where the deduction and inclusion provisions were at least consolidated in a single section. The *Antosko* decision indicates that if such reciprocity is desired it must be stated explicitly. As the Court noted, a number of provisions are in fact structured this way.[190]

It is true that in the case of maintenance and alimony, Revenue Canada attempts to impose a rule that a recipient *must* include maintenance in income whenever the payer is entitled under the terms of the *ITA* to claim a deduction.[191] This, however, is not dictated by the legislation itself. Rather it is an administrative policy that needs to be read in light of the Department's mandate to enforce the *ITA* and collect revenue. Indeed, it has been reported that Revenue Canada does not always adhere to its own policy of strict reciprocity. The Department has been known to take contrary positions on the meaning of these provisions in different cases, depending on whether they are contesting a deduction or arguing in favour of inclusion.[192] In any event, the courts have stated clearly that Revenue Canada's administrative policies do not have the force of law.[193]

It may be that in designing the overall tax system, it is seen as advantageous from a revenue perspective to draft different provisions so that there is generally parallel treatment for expenses and receipts. Even at this level, however, there is no absolute rule to this effect, and there are statutory

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[190] *Ibid.* at 6332. An example the Court did not mention is the provision enacted in 1988 as part of the new general anti-avoidance rule, to ensure that if one party to a transaction is reassessed on anti-avoidance grounds, another party can apply for a corresponding adjustment of tax liability: see s. 245(6).

[191] Interpretation Bulletin IT-118R3, para. 1.

[192] See Durnford and Toope, *supra* note 168 at 43.

[193] See *Nowegijick* v. *The Queen* 83 D.T.C. 5041 at 5044 (S.C.C.).

provisions which clearly contemplate the possibility that taxpayers on different sides of a transaction will not receive parallel treatment.[194]

The assertion of this (highly unusual) reciprocity requirement may say more about how the separated couple is being constructed as a social and economic unit than about the principles of tax law. After all, despite the formal autonomy which inheres in the individual unit of taxation, as feminist scholars have pointed out, there are many tax provisions which tend to subsume women into their husbands' tax profiles.[195] The government's reciprocity rationale suggests that separated spouses can be treated as an integrated unit, given the continuing economic dependency implied by the presence of a support obligation. It also assumes they will have access to information about one another's tax returns. This image of the former couple as a unit may also explain the government's reluctance to let go of the fantasy that divorcing spouses are generally likely to get together and cooperate to share the benefits of the income splitting which the inclusion/ deduction system makes possible.[196]

4. The Fourth Justification: *To recognize the basic principle of fairness that taxpayers with incomes from different sources should pay the same amount of tax.*

Though it does not use the words, the government is plainly referring to the tax policy principle known as 'horizontal equity.' What the government appears to be saying is that child support received by single mothers is no different from other economic receipts such as wages, dividends, or interest, and that it would be unfair to other taxpayers to insulate one form of receipt from taxation.

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[194] See, for example, sub-sections 69(1)(b) and (c), providing for non-reciprocal treatment where capital property is transferred between non-arm's length parties for proceeds less than its fair market value.

[195] For a catalogue and critical analysis of tax provisions which deviate from individual taxation to take into account marital and other personal relationships, see M. Maloney, "What is the Appropriate Tax Unit for the 1990's and Beyond?" in A.M. Maslove, ed., *Issues in the Taxation of Individuals* (Toronto: University of Toronto Press, 1994) 116.

[196] See text associated with *supra* notes 173-175.

There are a number of problems with this rationale. First, it assumes that child support meets the definition of "income from a source" in our tax law. The weight of opinion suggests this is not a correct assumption. Our tax system is based upon a "source concept" of income, which means that no amount is taxable unless it flows from an identifiable source, or, alternatively, is brought into the tax base by a specific legislative provision. The *ITA* lists three main sources from which income can flow — employment, business and property — and leaves open the question of what other sources might exist.[197] Our courts have been extremely reluctant, however, to identify any other sources beyond those three named by the Act. As such, gifts, inheritances, lottery winnings, and strike pay, among other things, are typically regarded as non-taxable "windfalls."[198]

Section 56 of the *ITA* expressly brings into the tax base a number of items which may not otherwise be taxable because it is not clear they arise from a source, as understood in tax law. Besides alimony and maintenance, these include prizes, scholarships, research grants, severance payments and retiring allowances. Hugessen J.A. may have been alluding to this phenomenon when he stated that "[i]f it were not for [section 56(1)(b)] such alimony would not otherwise be taxable in the hands of the recipient under the general charging sections of the Act."[199] As the Ontario Fair Tax Commission has concluded, it is likely more appropriate to describe child support payments as "the reimbursement of costs borne by the custodial parent which both parents are obliged to share."[200] It seems particularly inappropriate to treat such payments as income to the custodial parent given that they are not received

197 Section 3(a).

198 See, for example, *The Queen* v. *Fries*, 90 D.T.C. 6662 (S.C.C.) (strike pay); *The Queen* v. *Pollock*, 84 D.T.C. 6370 (F.C.A.) (wrongful dismissal damages); *Balanko* v. *M.N.R.*, 81 D.T.C. 887 (Tax Rev. Bd.) (gambling profits); *Federal Farms Limited* v. *M.N.R.*, 59 D.T.C. 1050 (Exch. Ct.) (payment from disaster relief fund); cf. *The Queen* v. *Rumack*, 92 D.T.C. 6142 (F.C.A.) (lottery prize awarded as annuity was taxable to the extent of the income component of each payment).

199 *Supra* note 2 at 266.

200 *Report of the Ontario Fair Tax Commission*, *supra* note 173 at 273. See also Durnford and Toope, *supra* note 168 at 34, 35.

for her own personal use but for the benefit of the children.[201]

Aside from the technical argument of whether child support constitutes income from a source, however, the government's argument overstates the historical importance of horizontal equity in the design of the tax system. There have always been a range of other public policy objectives and political pressures competing with horizontal equity. This is reflected in the panoply of incentives and tax concessions in the *ITA* for particular types of investments or income.[202] Furthermore, the government appears to misunderstand the tax policy principle of horizontal equity. That principle does not draw a simple mathematical equation between "incomes from different sources," as the government's argument suggests. Horizontal equity is normally stated more broadly to require that people in 'similar circumstances', or with 'similar abilities to pay', or with 'the same level of well-being' be treated similarly.[203] On its face this is a simple and obvious proposition. The problem lies in reaching agreement about what characteristics are relevant in determining whether people are similarly circumstanced.[204]

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201 See Maloney, "Women and the Income Tax Act," *supra* note 185 at 208. Neil Brooks has made the point (in a slightly different context) that we should tax people only on amounts they control, not amounts they merely benefit from: see comment on J.B. Davies, "The Tax Treatment of the Family" in R.M. Bird and J.M. Mintz, eds., *Taxation to 2000 and Beyond*, Canadian Tax Paper No. 93 (Toronto: Canadian Tax Foundation, 1992) at 206-7.

202 See I.H. Asper, "A Personal View of the Royal Commission Philosophy" in *The Benson Iceberg* (Toronto: Clarke, Irwin & Co., 1970) at 35-37, reproduced in Arnold, Edgar and Li, eds., *Materials on Canadian Income Tax*, 10th ed. (Toronto: Carswell, 1993) at 21.

203 See, for example, Boadway and Kitchen, *supra* note 186 at 7-9; and Davies, "The Tax Treatment of the Family," *supra* note 201 at 168. In *Symes*, Iacobucci J. adopted the following definition: "[h]orizontal equity merely requires that 'equals' be treated equally, with the term 'equals' referring to equality of ability to pay," *supra* note 7 at 738, quoting from V. Krishna, "Perspectives on Tax Policy" in B.G. Hansen, V. Krishna, J.A. Rendall, eds., *Essays on Canadian Taxation* (Toronto: Richard DeBoo, 1978). See also the dissenting judgment of L'Heureux-Dubé J. in *Symes* at 815, where she states that horizontal equity "requires that we tax individuals in similar circumstances the same."

204 See L. Osberg, "What's Fair: The Problem of Equity in Taxation" in *Fairness in Taxation*, *supra* note 151 at 63-86; L. Green, "Concepts of Equity in Taxation" *ibid.* at 87-103; and R. Musgrave, "Tax Reform or Tax Deform?" in W.R. Thirsk and J. Whalley, eds., *Tax Policy Options in the 1980s*, Canadian Tax Paper No. 66

Among tax policy analysts there are many different takes on how people's economic positions should be measured for horizontal equity purposes, but it is widely recognized that a straight comparison of financial receipts would be inadequate. Some account must be taken of other factors such as the nature of the receipts, the kind of economic power they represent, the relative non-discretionary expenses of taxpayers with different needs or responsibilities to dependents, and the relative costs of living for people in different circumstances. Some argue that non-financial aspects of economic welfare must also be factored in, such as the value of leisure time, and the imputed income arising from property ownership or unpaid household labour.[205] Others take the position that we should not be comparing taxpayers' incomes at all but, rather, their levels of consumption.[206] Thus, the government's bald assertion that "taxpayers with incomes from different sources should pay the same amount of tax" really just begs the question.

In order to be at all meaningful, a horizontal equity argument would have to address the nature of the economic benefit conferred by child support as compared to other types of receipts, as well as the particular circumstances of persons receiving child support as compared to other taxpayers. We suggest that this type of analysis would not support the inclusion of child maintenance in income. Compared to other groups in our society, single mothers bear a heavy load of non-discretionary financial responsibilities and suffer extraordinary costs and disadvantages in terms of both the financial recognition given to their child caring work and their access to market opportunities.[207] Indeed this group is disadvantaged even in relation to single parent fathers, who are less likely to encounter labour market discrimination and more likely to have credentials or assets which provide income earning opportunities. To equate a single mother's child support with the wages or

(Toronto: Canadian Tax Foundation, 1982) 19 at 20-23.

205 Davies examines in detail from an economics perspective the difficulty of determining what constitutes horizontal equity as between different family types, such as couples with children and single parent households: see "The Tax Treatment of the Family," *supra* note 201.

206 For a discussion and critique of this position see Neil Brooks, "The Changing Structure of the Canadian Tax System: Accommodating the Rich" (1993) Osgoode Hall L.J. 137 at 181-184; and Musgrave, *supra* note 204.

207 See Pask, *supra* note 169 at 82-86; and Zweibel, "Child Support Policy and Child Support Guidelines" (1993) 6 C.J.W.L. 371 at 392-396.

business profits earned by any other person is absurd. It ignores the special circumstances of single mothers, and the special non-discretionary expenses which child support payments must be used to defray.

The concept of 'horizontal equity' is one of the best illustrations of how traditional tax policy analysis can sometimes construct an artificial world which conveniently leaves out important differences and similarities which people experience in real life. Even the more sophisticated and nuanced accounts of horizontal equity often tend to reduce people to their financial accounts and income tax returns, and to overlook things like the lack of economic recognition for women's child care work.[208] That such omissions go unremarked upon in much mainstream tax policy analysis reflects the power of dominant ideologies of family life which naturalize women's care giving activities.

The prevailing view of the tax system as morally and ideologically neutral works to shield these underlying beliefs from political scrutiny. This is one of the reasons why it is critical that tax legislation be fully open to review under the *Charter*. The constricted notions of 'equity' which have governed the design and interpretation of our tax laws have not been sufficiently flexible to address the profound biases against women in the tax system. These concepts need to evolve toward the more three-dimensional vision of equality which the *Charter* permits and even requires, according to the Supreme Court of Canada. While *Charter* litigation alone cannot deliver social justice in its broadest sense, in the tax area we believe equality rights analysis could at least help to open up tax discourse to such considerations. It would be ironic if the government's skewed version of horizontal equity in the *Thibaudeau* case was allowed to displace the contextualized and substantive understanding of equality upon which the Court has increasingly insisted in its section 15 jurisprudence.

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[208] The Ontario Fair Tax Commission's *Working Group Report on Women and Taxation* (1992) identified this as a shortcoming of the current income tax system and made recommendations as to how women's unpaid work as caregivers could be better reflected in the design of tax provisions.

5. The Fifth Justification: *To help support the payer's new family, where the payer has remarried or is living common-law.*

Like the incentive argument, this really is a justification for the *deduction* side of the system, and does not directly address the challenge raised by Ms. Thibaudeau to the *inclusion* side. If this policy objective is sufficiently compelling, there is no reason why the deduction in section 60(b) could not be left in place, even if section 56(1)(b) is struck down. Even if one accepts, however, that the fate of the two provisions is linked, we find this fifth justification for the current system thoroughly unconvincing.

State support for new dependents of the payer is undoubtedly needed in many cases where divorce creates financial hardships for all concerned. However the tax deduction for child support is a very poorly targeted and troublesome response to this concern. It delivers assistance to the non-custodial parent regardless of whether he has formed such relationships, and contains no means test to exclude high income payers who don't face the problem. Not only does this create an upsidedown subsidy problem, since the value of the deduction increases with income, but it delivers the subsidy even to a taxpayer who could not possibly warrant it because he has not entered a new relationship, or has a new partner who supports herself and possibly him as well.

Indeed, this fifth rationale is heavily laden with familial ideology in its unreflective characterization of the new partner as a dependent. First, it assumes that in his future relationships the payer will take on the breadwinner role. The implication, of course, is that his new (female) partner normally will be without her own source of market income. While this may still describe the life experiences of some men and women, it should not be adopted wholesale as a universal presumption or goal of our tax system. At least with respect to the taxation of child maintenance, our view is that it does not serve women's interests well to treat the traditional gender hierarchy within families as a norm to which we aspire and around which we should construct our public policies. Secondly, this fifth rationale suffers from the same dubious assumption which plagues the 'tax subsidy' argument — that men will universally share such tax benefits with their families, even in the absence of any legal requirement to do so. Again, if the government's objective is to ensure adequate incomes for women and children, policies which leave them

reliant upon the private largesse of men clearly are not the best way to achieve this.

Perhaps most tellingly, the government's fifth objective is in direct tension with its first one, of enabling higher support awards to be made for the benefit of the children from the previous relationship. If the tax savings are devoted to supporting the new family, how can they also be used to increase the level of child support?[209]

It is interesting to note that in the brief Parliamentary debates surrounding the enactment of the first tax provisions regarding alimony in 1942, this concern about the husband's new family figured very prominently, overshadowing all of the other rationales now offered for the inclusion/deduction system. Without attaching too much significance to the views of a few Members of Parliament, it is worth repeating the legislators' discussion as it illustrates some of the points we have made in this article about the familial ideologies which shape both the law and the government's arguments in *Thibaudeau*.

> Mr. HANSON: Do you allow that alimony payment as a deduction?
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> Mr. ILSLEY: No.
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> Mr. HANSON: Such a man who has married again is in a very tight spot. I think he ought to have a little consideration; that should be allowed as a deduction.
>
> Mr. BENCE: I was going to say a word on that point. It seems to me most unfair that when a man is divorced and is supporting his ex-wife by order of the court, he should not be allowed to deduct, for income tax purposes, the amount paid in alimony. If that were done, the ex-wife could be required to file an income tax return as a single woman, as she should, and she would have to acknowledge receipt of that income in making up that return. In many cases the man has married again, but still he must pay a very high tax on the $60, $70 or $80 a month he must pay his former wife. I am not thinking of it so much from the point of view of the husband, though I believe he is in a very bad spot. In the cases with which I have become acquainted, the husband has defaulted in his payments because he has not been able to make them, and in those cases it is the former wife who suffers, and accordingly I believe she should be given as much consideration as the husband.

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[209] We owe thanks to Barbara Flewelling, a Taxation Law student in the spring of 1994, for bringing this point to our attention.

> Mr. ILSLEY: I agree that there is a great deal of injustice to the husband, and perhaps indirectly to the wife, under the law as it stands now, and much consideration has been given to some method by which the law might be changed ...
>
> [This was followed by some discussion of the taxation of alimony in Great Britain and the United States]
>
> Mr. GREEN: I really think it is an impossible situation, with the tax so greatly increased as it has been this year. After all, our law recognizes divorce, and once the parties are divorced they are entitled to marry again. In some cases that have been brought to my attention the husband has remarried and had children by the second wife, but is forced to pay income tax on the alimony that he pays the first wife, and I suggest that the position is absolutely unfair.
>
> Mr. ILSLEY: I agree that it is, in a great many cases.[210]

The debate then went on to other matters. In this short exchange can be detected many of the assumptions and views referred to earlier about the economic relationship between women and men in marriage. Sympathy is accorded to defaulting husbands, who are perceived as deserving assistance and encouragement to meet their support obligations. There is no trace of outrage about their non-compliance with the law, nor is there any mention of enforcement or penalties. Moreover it is assumed that women will fare better if their ex-husband's tax burden is reduced, even though their own will be increased. This is typical of the way women's economic lives are conflated with their male partners', even after divorce. The entire discussion is structured by a world view in which private relations of support and dependency between men and women are seen as uncontroversial and natural. Perhaps this would have been consistent with many people's everyday experiences in 1942. In any event, the excerpt is devoid of any other idea about how women's welfare might be assured. Even when proposing a new form of public assistance to divorced families, the legislators saw that assistance as being properly delivered to the (ex-)husband, who would control its distribution and use it to support his former wife and/or his new family.

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[210] Canada, House of Commons, *Debates* (17 July 1942) at 4360-4361. The full legislative history of the inclusion/deduction system is discussed in Krever, *supra* note 185 at 661-664.

Like the government's first four arguments, then, this fifth one provides a very weak justification for the taxation of custodial parents on their child support. The argument at best justifies maintaining the deduction for payers. Even then, there is an extremely poor fit between the ostensible objective and the tax deduction mechanism, and both aspects of the argument rest upon an archaic and oppressive view of low income women as the private responsibility of individual men.

Conclusion

No section 15 commentary seems complete these days without some discussion of the strategic merits, from a larger political perspective, of pursuing social justice concerns through *Charter* litigation. This issue was starkly raised by the *Symes* case and occasioned tremendous debate within feminist communities. Granting tax deductions to those few women earning business income does nothing to help employed women (easily the vast majority of women who work outside of the home), who equally face a conflict between marketplace opportunities and child care responsibilities.[211] So, as between Beth Symes and other women, most of whom probably cannot use the deduction even were it available, the unfairness of locating more resources in Symes' hands seems overwhelming. Equally persuasive is the argument that tax deductions of any sort are unfair because they most benefit those with large incomes and in so doing simply decrease the degree to which the tax system is progressive and redistributive.[212] But this larger, and definitely more compelling, economic justice concern was not formally at issue in *Symes* (despite Iacobucci J.'s invocation of it to justify his rejection of the claim). L'Heureux-Dubé J. was right when she stated in the dissenting judgment in *Symes*, that this equality relation was not the focus of the section 15 inquiry. Rather, the issue was the more narrow one of the equality relation

[211] Employees are far more limited than business persons in terms of the deductions they may claim in computing income. Symes sought to deduct the full amount of her nanny's salary under the broad general authority granted to self-employed persons to deduct all expenses incurred for the purpose of earning their business income [ss. 9 and 18(1)(a)]. Taxpayers earning employment income may claim only those items expressly permitted under the *ITA* [s. 8(2)]. Had the Supreme Court ruled in favour of Symes, employees would still be entitled only to the limited deduction for child care expenses allowed under s. 63.

[212] *Supra* note 186.

between business men and business women. If the state is going to grant certain deductions, it has to at least not do so in ways discriminatory to those women analytically equivalent to the men for whom the deductions are allowed. Section 15, after all, only has a limited purview and is not intended or analytically able to address all inequalities in any one case. So in *Symes*, L'Heureux-Dubé J.'s dissent is probably the better analysis of the issues and section 15 doctrine, even though the result of her judgment, had it carried the Court, would have been regressive from a larger social justice perspective.

What does this say about section 15 litigation? It says that at least in some instances successful equality arguments under the *Charter* can be politically undesirable; that *Charter* litigation often is unable to comprehend the larger, more nuanced, and compelling political picture.[213] The privileged as well as the oppressed will attempt to make equality claims and one of the characteristics of legal argument is narrowness of focus. So, challenges to inequities within the tax system are not necessarily about fixing the overall injustice of a system insufficiently progressive but often are, at least functionally, about enhancing and securing the elite economic status certain groups already have. This is particularly true of equality litigation that simply 'fine-tunes' rather than attempts a major re-structuring, given that our tax system is already one that favours the wealthy and maintains an unequal distribution of economic power.[214]

Thibaudeau fortunately presents less urgently these larger political dilemmas. Here the claimant belongs not to a group already relatively privileged but to a group whose economic and social status clearly marks it as disadvantaged. As previously mentioned,[215] poverty statistics and social profiles of custodial separated parents show that these individuals are disproportionately female and poor. Of course, to jettison section 56(1)(b) would not alone solve the economic problems of such families. But any

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213 For a discussion of these problems in relation to the first equality cases under the *Charter*, see Brodsky and Day, *supra* note 26.

214 For a thoughtful discussion of these concerns in the context of considering how a successful result in *Symes* would have played into an already unjust distribution of child care resources, derailing calls for affordable, accessible, and quality child care at the same time, see Young, "Child Care and the Charter," *supra* note 186.

215 *Supra* note 3.

improvement in the personal economic situation of Suzanne Thibaudeau and others like her would seem like progress, however minute, towards a more equitable society. At least on an individual scale, it might put more money in the hands of families who really need it. However we hasten to qualify this optimistic view by mentioning two possible pitfalls to be avoided should the challenge succeed.

The first potential pitfall is that some non-custodial parents would likely move to *reduce* their child support payments in the immediate aftermath of the decision. We are assuming that if the Supreme Court of Canada strikes down section 56(1)(b), the federal government will act quickly to repeal the counterpart deduction in section 60(b) as well. Payers would argue that since the custodial parent is no longer liable for tax on the payments, and since the payer's after-tax cost may be higher without a deduction, a lower quantum of support is called for. The concern, of course, is that many support orders or agreements were never adequately adjusted for tax consequences in the first place, so that a downward adjustment following *Thibaudeau* would simply reinstate the discriminatory effect of the tax regime.

Thus, in any court application or private proposal to reduce child maintenance as a result of *Thibaudeau*, there should be a heavy burden on the payer to show that tax consequences were factored into the original agreement or award, how they were factored in, and what effect they had on the quantum of support. This burden will be difficult to discharge in many cases. Durnford and Toope report that "judges frequently fail to provide a precise financial breakdown in the support order that would reveal the extent to which the impact of taxation has been taken into consideration."[216] However, it should not simply be assumed that tax implications were taken into account originally. In addition, the payer should be required to show a diminished ability to pay based on his tax position and overall financial status *at the time of the proposed variation*. Losing the deduction may have little financial significance, for example, to a payer who can shelter his income from taxation through the use of capital gains exemptions, dividend tax credits, depreciation, limited partnership losses, or other avenues of tax relief. Moreover the payer

[216] *Supra* note 168 at 28.

may have greater resources than he did when support was originally set, and a greater capacity to pay even after taking into account an increased tax burden.

Indeed, if lawyers and courts are going to entertain proposals for downward variation on income tax grounds, they should also be examining other changes in circumstance which might call for a *larger* support payment. If the (ex-)husband's income has increased, for example, or if the costs of caring for the children have turned out to be greater than originally estimated, these factors should mitigate against the payer's case for a reduction in support, and perhaps lead to a higher level of support being awarded. This type of approach was recently endorsed in *Willick* v. *Willick*,[217] where the Supreme Court of Canada offered some guidelines with respect to variation of child support orders. In her concurring minority reasons, L'Heureux-Dubé J. stressed the importance of looking beyond the specific change which prompts an application to vary support, to the parties' overall financial situation.[218] Moreover, where circumstances have changed "so as to render the original order irrelevant or inappropriate," the court should look broadly at the parties' *present* means and needs in considering the application.[219] As examples of the factors courts may consider, L'Heureux-Dubé J. cited inflation, the increased costs associated with children as they grow older, and the assumption of responsibilities associated with a new family.[220]

We acknowledge that even after all these factors are taken into account, downward variations might still be warranted in some cases if the deduction is abolished. In our view, however, child maintenance should not in any case be reduced below the net after-tax amount the custodial parent was previously clearing. The needs of the children should be paramount in all this, and we note the following cautionary words of L'Heureux-Dubé J. in *Willick*:[221]

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217 [1995] 119 D.L.R. (4th) 405 (S.C.C.). The majority decision was written by Sopinka J. (concurred in by Justices LaForest, Cory and Iacobucci). L'Heureux-Dubé J. concurred in the result but gave separate reasons (with Justices Gonthier and McLachlin).

218 *Ibid.* at 442-43.

219 *Ibid.* at 445.

220 *Ibid.* at 447. Sopinka J.'s majority reasons are ambiguous as to the range of factors open to consideration in an application to vary child support: at 15-6.

221 *Ibid.* at 441.

> ... one cannot ignore, in dealing with variation orders, that the consequences suffered by children of a decrease in support may be markedly more dramatic than the benefits realized by a payer who successfully varies a support obligation downward following an adverse change in circumstances.

Lawyers and courts asked to handle such variations should take the utmost care to ensure that childrens' needs are not sacrificed in order to maintain a mathematically precise division of financial responsibilities between their parents.

There is also a second pitfall which may be associated with *Thibaudeau*, in terms of the case's effect on the larger political project of reducing women and children's economic suffering. We are mindful of Susan Boyd's recent warning that progressive decisions by judges may create the impression that the social injustice brought to light in court has been remedied, obviating the need for further action.[222] Victory on a highly specific legal issue, no matter how immediately positive, will almost necessarily fall short of addressing the systemic inequalities which form the backdrop to the litigation. This would certainly be true of the *Thibaudeau* case. To add to the concern, Boyd shows how decisions that favour women's immediate interests may actually reinforce the trend towards privatizing economic responsibility for dependent individuals, and replicate prevailing ideologies about women's proper role in the family. For example, family law decisions which increase women's entitlements to matrimonial assets or income upon divorce may symbolically be important and may provide tangible benefits to many women, but they also ironically legitimate the notion that women's poverty is best redressed by improving their access to men's private property. The *Thibaudeau* case promises to raise just such a dilemma. A favourable ruling would do no more than protect women's private claims on their former husbands' incomes from incursion by the state through taxation. It would not begin to address the deeper causes and more serious effects of gender inequality. As a society we should learn to see judicial decisions under section 15 of the *Charter* as beginnings rather than ends. They can highlight sites of inequality which need our attention, but they cannot substitute for positive social action to eliminate the systemic economic disadvantages faced by women and children.

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[222] "(Re)Placing the State," *supra* note 150.

The Puzzle of Constitutional Asymmetry: Recent Canadian and European Debates

Robert Harmsen*

The author examines the use made of the European Community as a political model in recent Canadian constitutional debate. It is argued that both the 'decentralist' reading of the Community prevalent in Quebec and the opposed 'federalist' reading dominant in English Canada have neglected the increasing importance of a logic of 'variable geometry' within the process of European integration.

The acceptance of this logic of variability is highlighted through a detailed examination of key aspects of the Maastricht Treaty. Both the 'three-pillared structure' of the European union and the principle of subsidiarity are seen as reinforcing a pre-existing 'structural variability' at the core of the EC. The Treaty provisions concerning the establishment of an Economic and Monetary Union, as well as various 'opt-outs' accorded to Denmark and the United Kingdom, are conversely shown to constitute more innovative forms of 'jurisdictional variability'.

The final section of the article explicitly compares European debates over the question of 'variable geometry' with Canadian debates concerning the notion of 'asymmetrical federalism'. Parallel questions of communitarian legitimacy, institutional design, and policy capacity are shown to arise.

L'auteur examine la façon dont la Communauté européenne a été récemment employée comme un modèle politique dans le débat constitutionnel canadien. La lecture 'décentralisatrice' de la CE qui a prédominé au Québec, aussi bien que la lecture 'fédéraliste' qui avait la faveur des commentateurs au Canada anglais, sont critiquées pour avoir négligé l'importance croissante d'une logique de 'géométrie variable' au sein du processus de l'intégration européenne.

L'auteur fait ressortir l'acceptation de cette logique de variabilité par un examen approfondi de certains aspects clefs du Traité de Maastricht. Il démontre que la structure à 'trois piliers' de l'Union européenne et le principe de subsidiarité ont tous deux renforcé une 'variabilité structurelle' depuis longtemps au coeur de la CE. Par contre, les dispositions du Traité concernant l'établissement de l'Union économique et monetaire, de même que les diverses dérogations accordées au Royaume-Uni et au Danemark, apparaissent comme des formes plus innovatrices de 'variabilité juridictionnelle'.

La dernière partie de l'article fait explicitement une comparaison entre les débats européens sur la question de géométrie variable et les débats canadiens axés sur le concept de fédéralisme asymétrique. L'existence des questions parallèles traitant de la légitimité communautaire, de la structuration des institutions et de la capacité des pouvoirs publics en ressortent.

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Introduction

The European Community has been the focus of considerable Canadianattention in recent years. To some extent, this interest reflects the perception that European developments are indicative of broader trends in the evolution of the global system. 'Europe 1992,' in particular, was carefully scrutinised as a possible harbinger of the emergence of large, protectionist regional trading blocs. The EC, however, has also been the subject of more focused academic study, with a number of commentators looking systematically at the possible relevance of the EC political model for the reform of the Canadian federation.[1] Here, depending on the position of the analyst, European experience has been taken as pointing towards either a more flexible form of federalism or a highly developed framework for co-operation between sovereign states.

Yet, despite this substantial attention, this paper contends that a significant trend in the evolution of the Community has been almost completely overlooked by Canadian commentators. Specifically, it will be argued that the Maastricht Treaty marked a decisive step towards the creation of a community of 'variable geometry.'[2] This implies that the EC has become increasingly characterised by variegated or differentiated political structures, in part defined by the differential participation of member states in selected policy areas. As

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1 These studies include: G.B. Doern, *Europe Uniting: The EC Model and Canada's Constitutional Debate* (Toronto: C.D. Howe Institute, 1991); P.M. Leslie, *The European Community: A Political Model for Canada?* (Ottawa: Minister of Supply and Services Canada, 1991); P. Monahan, *Political and Economic Integration: The European Experience and Lessons for Canada* (North York, Ont.: York University Centre for Public Law and Public Policy, 1992); A. Raynauld, "L'Intégration européenne: Leçons pour le Canada" (1993) 14 *Policy Options/Options politiques* 43; G. Ross, "The European Community as Model" in D. Cameron and M. Smith, eds., *Constitutional Politics* (Toronto: Lorimer, 1992) 105; and D. Soberman, "European Integration: Are There Lessons for Canada?" in R.L. Walls and D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991) 191. See also, in a somewhat different vein, A. Legaré, *La Souveraineté est-elle dépassée?: Entretiens avec des parlementaires et intellectuels français autour de l'Europe actuelle* (Montréal: Boréal, 1992).

2 The concept of 'variable geometry' is usefully surveyed in M. Maclay, *Multi-speed Europe?: The Community Beyond Maastricht* (London: Royal Institute of International Affairs, 1992).

such, the Community offers an interesting — and thus far neglected — case study for those who wish to explore further the possibilities and limitations of 'asymmetrical federalism' in the Canadian context.[3]

Developing this parallel, the paper is divided into three parts. The first section surveys Canadian analyses of the EC political model. It looks at both the decentralist and the federalist cases which have been made on the basis of European experience, before putting forward an asymmetrical alternative. The second part of the paper examines both the 'structural' and the 'jurisdictional' forms of variability encompassed by the Maastricht Treaty. Finally, explicit parallels between Canadian and European experiences are drawn. Similar questions of communitarian legitimacy, institutional design, and policy capacity are seen to be raised by the introduction of institutional variability in the two political systems.

I. The EC Model in Canadian Context

Canadian interpretations of the EC model may be broadly classified as supportive of either decentralist or federalist constitutional agendas. The decentralist interpretations have, as one might expect, predominated in Québecois political discourse. Here, the EC is seen as offering a model of politico-economic organisation in which a high degree of national autonomy has been reconciled with access to the benefits of a large common market. Federalist interpretations have, conversely, prevailed in English Canada. In this case, the dynamics of European integration are held to be those of a process of federalisation, with increasing economic integration producing strong pressures for the development of a comparable level of political integration. Finally, as an alternative to these two approaches, an asymmetrical

[3] The concept of 'asymmetrical federalism' is presently used to designate institutional arrangements which permit differential provincial jurisdiction. It is expected that Québec would be the primary, but not necessarily the exclusive, beneficiary of such arrangements. See, for example, D. Cameron, "The Asymmetrical Alternative" in Cameron and Smith, *supra* note 1 at 15-22; D. Gibson, "Fearful Symmetry" (1992) 3(3) *Constitutional Forum* at 54-56; D. Milne, "Equality or Asymmetry: Why Choose?" in Watts and Brown, *supra* note 1 at 285-307; and J. Woehrling, *La Constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours* (Edmonton: Centre for Constitutional Studies, 1993) at 144-150.

reading of European experience is presently forwarded. This asymmetrical reading accepts the federalist assertion of a necessary linkage between political and economic integration. Nevertheless, it argues that the political forms being assumed by the EC reflect the underlying national realities emphasised by the decentralist position.

A. Decentralist Interpretations

Perhaps the most prominent Québec advocate of the European Community model was former Premier Robert Bourassa, who repeatedly referred to the EC as a potential model for a new political superstructure encompassing Québec and the rest of Canada.[4] Bourassa was, however, only partially representative of the more general use made of the EC in Québécois political discourse. Even amidst the manifold ambiguities which characterised the Premier's approach to constitutional issues, it is clear that he perceived the adoption of an EC model as providing Québec with a greater degree of political autonomy. Consequently, Bourassa's position must be seen as falling within the decentralist mainstream. Contrary to most Québécois representations of the EC, however, Bourassa's understanding of the Community was premised on a basic linkage between political and economic sovereignty. The EC, if it could perhaps be read as allowing for new (and more creative) ways of structuring the political and economic aspects of sovereignty, was not invoked by the Premier as in any way demonstrating that the link between them could simply be broken.

Rather differently, the EC also was cited in support of more traditional sovereignty-association models. Following this line of argument, European experience is held to demonstrate that states can maintain integral political sovereignty, while enjoying the benefits of a common market. For example, in the submission made by the Parti Québécois to the Bélanger-Campeau Commission, one finds the assertion: "La CÉE sert véritablement d'exemple, par l'institution d'un marché commun le plus riche du monde, le plus peuplé aussi, tout en permettant la cohabitation de nations souveraines fort

[4] See, for example, M. Vastel, *Bourassa* (Montréal: Les Editions de l'Homme, 1991) at 96-98 ("L'école de Bruxelles").

disparates."[5] Later in the same submission, the argument is developed at somewhat greater length:[6]

> Le modèle européen nous enseigne qu'une association économique aussi élaborée, dotée d'institutions communes pour en assurer la gestion, n'implique pas que s'opère en son sein une intégration politique symétrique. Ainsi pouvons nous constater, 33 ans après la signature du Traité de Rome, que chacun des pays qui composent la Communauté européenne conserve sa pleine souveraineté en matière de politique étrangère ou de défense, deux des pays de l'Europe des Douze — la France et la Grande-Bretagne — disposant même toujours d'une force de frappe nucléaire à contrôle exclusif.

Here, then, European developments are seen as as pointing towards the possible divorce of political and economic union.

The EC also figured as a model in the 1991 Allaire Report, with the evolution of the Community cast in terms which backed the Report's radical decentralising thrust. More specifically, the general pattern of political and economic development in Western Europe was held up as an example of a more generalised trend. According to this analysis, the EC demonstrates that the globalisation of markets produces, as a frequent (and perhaps necessary) corollary, the localisation of political power structures. The lessons drawn from Community experience were set out as follows:[7]

> In Western Europe, the countries of the European Community are building a new model of concerted political action and are achieving economic integration without compromising their national political sovereignty. They are proving that economic frontiers literally transcend political borders.
>
> The separation of the political from the economic is relatively recent. It stems from the growing international move to free trade. This phenomenon makes possible the emergence of local sovereignties: On the one hand, new nations, regardless of their size, retain access to a vast market. On the other hand, the redrawn political borders give rise to more uniform entities more conducive to social cohesion and the management of public finances.

In sum, like more traditional advocates of sovereignty association, Allaire

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5 Reproduced in A.-G. Gagnon and D. Latouche, eds., *Allaire, Bélanger, Campeau et les autres* (Montréal: Québec Amérique, 1991) at 153.

6 *Ibid.* at 157.

7 *A Québec Free to Choose* (Montreal: Liberal Party of Québec, 1991) at 53, as cited in Doern, *supra* note 1 at 3.

cited the EC as a case in which the linkage between political and economic union had apparently been broken. Consistent with the general tone of the Report, however, this was cast in terms of a strong free trade discourse. The existence of separate political sovereignties within a single market is advocated as a means of maximizing competitive advantage and minimizing bureaucratic overlap.

Although analytically distinct, these three readings of the EC model all have the same political implications. Relative to the existing structures of the Canadian federation, they evidently imply a significant decentralisation. Perhaps more importantly, however, the interpretation of the EC presented in the Allaire Report joins with that presented by advocates of a more traditional sovereignty-association model. Both cite European experience to argue that the *espace politique* and the *espace économique* need not coincide. This latter reading of European developments prompted a significant body of federalist opinion offering an alternative interpretation of the Community system.

B. Federalist Interpretations

No doubt responding to the use made of the EC in Québécois political debate, key aspects of the federal government's 1991 constitutional proposals, *Shaping Canada's Future Together*, were presented in a manner suggestive of European developments. The federal government's proposals for strengthening the economic union, though reflecting a longstanding desire to increase the central government's powers of macroeconomic management, were cast unmistakably in terms intended to evoke the European Single Market. Most strikingly, the proposed constitutional amendments were presented as ensuring that "people, goods, capital and services can move freely within Canada."[8] In other words, the 'four freedoms' of the European common market would also apply within the Canadian common market. Relatedly, Ottawa also proposed the establishment of a Council of the Federation, intended to facilitate federal and provincial co-operation in areas of joint responsibility.[9] While such a proposal may be seen as a natural outgrowth of the longer-term indigenous development of 'Executive

[8] *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 30.

[9] *Ibid.* at 41-42.

Federalism,' it also quite clearly drew inspiration from the EC's Council of Ministers. Indeed, as one commentator memorably phrased it, the proposed Council conjured up the rather daunting image of "a Brussels on the Ottawa."[10]

Beyond the federal government's use of the Community model, the academic studies of the EC model which appeared at this time also strongly (and uniformly) refuted the decentralist hypothesis put forward by Québécois commentators. Some of these studies simply argued that the European case was irrelevant for Canadian efforts at constitutional reform. Others, however, more directly contradicted the predominant Québécois interpretation, arguing that the dynamic of European integration has actually been a centralising or federalising one.

The strongest argument for simple irrelevance probably was that made by George Ross. For Ross, the problems of the Canadian federation were those of an existing nation-state and, as such, did not parallel the development of the European Community. Within this perspective, the Community is essentially understood as a form of international organisation, albeit one with certain more or less 'federal' aspects. In Ross's own words:[11]

> Canada is a long-standing nation state, organized as a federation, that is at present discussing a reconfiguration of different aspects of its constitution. Its problem is to find a new institutional mix which will allow the successful coexistence of different provinces, regions and cultures whose aspirations have changed over time. The European Community, in contrast, is not a nation at all, but rather an international organization founded to foster the integration of separate European societies.

The more common federalist position was, however, one which accepted that useful parallels could be drawn between the Canadian and European experience, but argued that such parallels pointed in precisely the opposite direction to that suggested by advocates of the decentralist hypothesis. For these commentators, European integration has shown that a movement towards economic integration, isolated from political integration, is not viable. On the one hand, the exigencies of economic integration themselves are seen to

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[10] P. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2d ed. (Toronto: University of Toronto Press, 1993) at 174.

[11] Ross, *supra* note 1 at 106.

require co-ordinated political decision-making. In making this assertion, proponents of a federalist reading of the EC could point to the increased recourse to qualified majority voting within the EC Council of Ministers, which accompanied the completion of the single market. On the other hand, more general considerations of system legitimacy may be viewed as dictating that common institutions not be reduced to only those required for the management of a common market. Here, the EC's often criticised 'democratic deficit' appears as symptomatic of such politico-bureaucratic (as well as politico-economic) imbalance. Peter Leslie's study of the Community model, commissioned by the Federal-Provincial Relations Office, forcefully makes this federalist case:[12]

> There is a clear lesson in EC experience for those Canadians who apparently believe the Community has demonstrated that states of diverse cultures can join together economically, while retaining their political sovereignty. This perception is based on a shallow or outdated perception of the EC. An examination of its recent history shows that there is a close relationship between the processes of economic and political integration: an integrated economy can *only* be built by creating a capacity for joint decision making. *In other words, economic integration cannot proceed far unless member states share quite a broad range of powers by allocating decision making authority to supranational institutions in which they may be outvoted from time to time, or unless — as in a federal system — decision making power in key economic areas is constitutionally vested in an order of government that encompasses the whole territory.*

The academic commentary on the Community model, while echoing the basic federal case that political and economic union must be linked, further examined certain aspects of the EC in much greater depth. Two themes in particular recur in the literature. First, moving beyond the federal government's rather modest proposal for a Council of the Federation, many commentators looked to Community practice as offering interesting ideas for the reform of the mechanisms of intergovernmental co-operation within the Canadian system. Second, reflecting a decidedly different agenda to that being pursued by the Mulroney government, much of the academic commentary balanced an interest in European economic integration with a concern for the development of EC social policy.

As regards intergovernmental relations, Canadian commentators devoted

[12] Leslie, *supra* note 1 at viii [emphasis in the original].

considerable attention to the prominence being assumed by the concept of subsidiarity within European constitutional debate.[13] The principle, stated in its simplest terms, holds that decisions should be taken at the lowest level of jurisdiction possible (or, more positively, by the competent level of government nearest the individual citizen). Yet, though demonstrating both interest and sympathy, most Canadian analysts (like many of their European counterparts) also belied a fundamental scepticism as to the concept's practical utility. Bruce Doern, for example, pointedly questioned whether subsidiarity was a "real constitutional concept" or "a sop that Eurocrats have offered to assuage fears of centralisation."[14]

Nevertheless, still more than the rekindled European interest in subsidiarity, it was the Community's more basic and longstanding pattern of intergovernmental relations which elicited the interest of Canadian commentators. Most particularly, considerable attention was focused on the absence of a clear division of powers within the Community system. Many commentators favourably contrasted this apparently flexible jurisdictional arrangement with the constrictive 'watertight compartments' that characterise the more traditional structures of Canadian federalism. The implication was clearly that a less rigid constitutional structure might, in practice, allow for more efficient, less acrimonious co-operation across increasingly irrelevant jurisdictional boundaries.[15]

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[13] See Doern, *supra* note 1 at 28-29; Leslie, *supra* note 1 at 45; and Soberman, *supra* note 1 at 204-205. European developments are discussed in Section II below.

[14] Doern, *ibid.* at 24.

[15] See particularly, Leslie, *supra* note 1 at 43-46. However, it might be noted that Canadian judicial interpretation of the use of concurrent powers is already significantly more flexible than its European counterpart. The Canadian Supreme Court, in *Multiple Access Ltd.* v. *McCutcheon* (1982), 138 D.L.R. (3d) 1, accepted that parallel federal and provincial regulatory regimes could be maintained in areas of concurrent jurisdiction to the extent that no direct conflict of laws was deemed to exist. By way of contrast, The Court of the Justice of the European Communities, in decisions such as Case 22/70, *Commission* v. *Council* ('ERTA'), [1971] E.C.R. 263 at 273, has adopted a somewhat more 'preemptive' logic. Thus, in areas where Community legislation exists, national legislation, even if not directly incompatible, may nonetheless still be invalid. See, on the basic concept of 'preemption,' J. Weiler, "The Community System: The Dual Character of Supranationalism" (1981) I Y.E.L. 267 at 277-279. More recent developments are surveyed by S. Weatherill, "Beyond Preemption? Shared Competence and Constitutional Change in the European

In a somewhat different vein, a number of the studies further looked at the gradual emergence of a Community-level social policy. The focus of these commentaries, as one would expect, was on the Community's 'Social Charter.'[16] This declaratory document, adopted by 11 of the 12 member states at the 1989 Strasbourg meeting of the European Council, sets out a basic list of worker's rights and a commitment to the adoption of both national and supranational legislation to ensure their respect. The Charter has since, in good part, been given more positive legal form by the 'Social Protocol' adopted as part of the Maastricht Treaty.[17] Canadian commentators saw these European developments as demonstrating the necessity, both symbolic and practical, of counterbalancing economic integration with a social welfare component. This case was most extensively developed by Patrick Monahan.[18] Specifically, Monahan criticised the absence of a concern for the social dimension of economic integration in much of both the decentralist and the federalist writing on the Community. As he argues:[19]

> The European *Social Charter* is important, therefore, because it challenges what has been until now a common assumption of many Canadian commentators. This assumption, shared by the *Allaire Report* as well as by its critics, is that it is possible to make a distinction between concerns about the economic union and non-economic, political, or social matters. The experiment with the European *Social Charter*, with its blending of the economic and social agendas, calls into direct question the validity of this assumption.

The 'Europe 1992' frequently invoked in Canadian political debate, it is contended, cannot be divorced from the emergence of a 'Social Europe.'

Overall, the body of academic commentary on the Community model both deepened and widened the federalist case beyond the federal government's proposals for constitutional reform. The initial governmental proposals were deepened, because much of the scholarship went beyond the limited 1991 proposals for institutional reform to examine the Community more deeply as a model of co-operative (con)federalism. The federal proposals were widened,

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Community" in D. O'Keefe and P. Twomey, eds., *Legal Issues of the Maastricht Treaty* (London: Chancery, 1994) at 13-33.

16 Formally, "The Community Charter of Fundamental Social Rights for Workers."

17 See Section II below.

18 But see also Doern, *supra* note 1 at 36-39.

19 Monahan, *supra* note 1 at 7.

to the extent that much of the commentary added an explicit social dimension to the Mulroney government's focus on economic liberalisation. Nevertheless, whether arguing for more supple intergovernmental coordinating mechanisms or a more developed social dimension, it must be underlined that this body of commentary remained resolutely federalist in the sense presently used. Without exception, the EC was portrayed in ways that made the case for a strong central authority within the Canadian federal structure. The stark interpretive dichotomy of Canadian debate on the EC, between a Québécois 'decentralist' model and an English Canadian 'federalist' model, emerges further reinforced.

C. An Asymmetrical Interpretation

Assessing the two positions, the federalist critique of the decentralist analysis has much to recommend itself. The federalists are correct in their assertion that political and economic integration have been inextricably linked in the case of the EC. At the most basic level, even 'negative integration,' the simple removal of trade barriers, requires an important governmental presence. Tellingly, the completion of the European single market has been accompanied by a striking growth in the quantity and range of Community legislation. Indeed, following the recommendations of the Cockfield White Paper, nearly 300 separate measures were necessary to complete the single market programme.[20] Beyond the political structures demanded even by a common market, European experience has further shown the interlinkage between positive and negative integration. Although it must be acknowledged that the redistributive impact of Community-level policies remains comparatively small (and certainly far less than that of central government policies in extant federal states),[21] moves are clearly taking place in the direction of establishing or enhancing Community-wide redistributive mechanisms. The Social Charter and the Social Protocol, as noted above, manifest the emergence of a more pronounced Community-level social solidarity. Moreover, both the structural and (since Maastricht) the cohesion funds serve to counteract the disadvantages suffered by peripheral regions

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[20] *Completing the Internal Market: White Paper from the Commission to the European Council*, Commission Document (85) 310.

[21] A point stressed by Leslie, *supra* note 1 at 39, who notes that federal public expenditure in Canada is proportionately 20 times that of the Community.

within the EC. Such political 'spill-overs,' it should be underlined, exist quite apart from the overarching political context in which the Community has been conceived from the outset. The integration project, from the early post-war years through Maastricht to the present, can summarily be described as one of 'peace and prosperity.' In other words, integration was seen as both securing economic advantage and creating stable continental political structures. If the process of integration in Western Europe has tended to be somewhat uneven, with the economic outdistancing the political, it must nonetheless be recognised that the two dimensions have been consistently and necessarily present. The decentralist reading of the Community, insofar as it posits a rigid compartmentalisation of political and economic integration, is quite simply wrong.

The distance between the decentralist interpretation of the EC and the reality of the Community system may be illustrated with reference to the nature and development of Community law. Both the Allaire Report and the PQ's more recent *Le Québec dans un monde nouveau* propose the creation of a Canada/Québec arbitration court.[22] Such a court, under either a radically decentralised political regime or a form of sovereignty-association, would presumably replace the existing federal Supreme Court as far as Québec is concerned. This new common court would function (one assumes) as an interstate dispute resolution tribunal, competent to hear only a quite limited range of cases. In striking contrast, the Court of Justice of the European Communities, which one might have reasonably expected to behave as an international court, has instead functioned much as a federal supreme court.[23] The Treaty of Rome, for example, has been defined by the Court as comparable to a "basic constitutional charter."[24] Moreover, within a few years of the establishment of the EEC, both the direct effect of Community norms within national legal orders and the supremacy of Community law over

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22 *A Québec Free to Choose*, *supra* note 7 at 42 and *Le Québec dans un monde nouveau* (Montréal: VLB Éditeur, 1993) at 84.

23 See H. Rasmussen's critical *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Dordrecht: Martinus Nijhoff, 1986). See also, in comparative context, A. Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review" (1993) 26 Can. J. Pol. Sci. 3.

24 In Case 294/83 *Les Verts* v. *European Parliament*, [1986] E.C.R. 1339. See also Case 1/91, *Re The Draft Treaty on a European Economic Area*, [1992] 1 C.M.L.R. 245.

national law were firmly established.[25] More recently, the pecuniary responsibility of national states for non-compliance with Community law has been strongly affirmed.[26] Examples of the Court's activist jurisprudence could be further multiplied, but the general federalising pattern should by now be apparent. While the decentralist constitutional project wishes to shift the footing of the Canada/Québec relationship from a 'federal' to an 'interstate' legal basis, the development of European Community law has moved decisively in the opposite direction.

The federalist reading of the Community must, however, be carefully qualified. If economic and political integration have unquestionably been interlinked, the political structures which thus far have emerged do not correspond to existing federal models. Reflecting the continuing importance of national states within the integration process, a more complex, 'decentralised' political model appears gradually to be taking shape.

In this regard, the pivotal role played by national governments within the Community system must be fully appreciated. First, national governments occupy a central place in the Community decision-making system. Even after the institutional reforms effected by the Maastricht Treaty, the Council of Ministers, composed of national ministers, remains the EC's most important legislative body.[27] Second, national states also act as the principal executors of Community decisions. It is national bureaucracies which implement Community legislation and national courts which enforce it. Finally, national governments, at least thus far, have retained a monopoly over the revision of the founding Treaties.[28] In sharp contrast to more traditional federal systems, the central level of government in the Community system is not accorded a central role in the 'constitutional' amendment process.[29] Indeed, neither the

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25 Case 26/62 *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1 and Case 6/64 *Costa* v. *ENEL*, [1964] E.C.R. 585.

26 Joined Cases 6/90 and 9/90 *Francovich and Others* v. *Italy*.

27 The EC legislative processes, as amended by the Treaty on European Union, are discussed in Section II below.

28 As set out in both Article 236 of the Treaty of Rome and its successor, Article N of the Maastricht Treaty.

29 The significance of this exclusive national control over fundamental system reform is emphasised in A.M. Sbragia, "Thinking About the European Future" in A. Sbragia, ed., *Euro-politics: Institutions and Policymaking in the 'New' European*

European Parliament nor the Commission are granted anything more than a consultative role in the Treaty revision process.[30] Thus, the supranational agenda, both in terms of day-to-day policy-making and longer term institutional evolution, remains strongly influenced by national concerns and priorities.

This strong national presence in the Community system reflects the deeper dynamics of the integration process. In effect, the creation of supranational institutions in Western Europe has been possible only because of national acts of self-limitation. It is, at a basic level, the existing national states which have accepted the limitation of their own powers so that the EC might be created. This use of existing national structures as building blocks has, unquestionably, been one of the great strengths of the integration process to date. It is also, of course, one of its most important limitations. Professor Vlad Constantinesco memorably describes this dynamic in the following terms:[31]

> L'Etat est donc à la fois objet d'un processus de destruction et instrument même de sa réalisation. Cette situation explique aussi l'intérêt et les limites inéluctables de la construction communautaire. La renonciation à la souveraineté conçue comme un ensemble de compétences exclusives et ultimes ne peut avoir pour réalisteur l'Etat souverain. Car les acteurs de ce processus en sont en même temps les principaux obstacles. Dépasser ces derniers revient alors à refuser l'Europe des Etats, quelle qu'en soit la forme. Là résident le défi et l'enjeu de la construction européenne.

More recently, as the integration process has accelerated, the continuing centrality of national states has produced an increasing differentiation within the Community system. Insofar as the integration process remains dependent on national states, of varying capacities and differing interests, any rapid move forward is apt to leave some of them behind. Thus, in recent years, the

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Community (Washington: Brookings Institution, 1992) 257 at 271-274.

30 The German government, during the Maastricht negotiations, unsuccessfully attempted to have the approval of the European Parliament included as an obligatory part of the Treaty revision process. In a similar vein, the recent enlargement negotiations have seen Chancellor Kohl (echoing the position assumed by the Belgian and Dutch governments) give the EP a written promise that it will be involved in the 1996 intergovernmental conference on Treaty revison. See D. Gardner, "Kohl seeks to smooth vote on Enlargement" *[London] Financial Times* (4 May 1994) at 2.

31 As cited in A.D. Pliakos, "La nature juridique de l'Union européenne" (1993) 29 R.T.D.E. 187 at 222, fn. 191.

Community has increasingly become one of 'varying speeds' or 'variable geometries.' Such a variegated structure, it need hardly be added, corresponds to neither the federalist nor the decentralist constitutional projects as they have been presented in the Canadian context. Rather, insofar as this Community model of 'variable geometry' may be seen to parallel a position within Canadian constitutional debate, it is that staked out by proponents of an 'asymmetrical federalism.'

II. The European Union after Maastricht[32]

The Maastricht Treaty saw a number of significant steps taken towards the acceptance of a European Union of variable geometry. As is detailed in the following sections, the Treaty on European Union (TEU) both reinforced pre-existing forms of 'structural variability' and introduced new forms of 'jurisdictional variability.'

Structural variability, as presently used, refers to the diversity of institutional forms and practices which have emerged from the integration process. On the one hand, the overall institutional architecture of the Union exhibits a striking degree of heterogeneity. In particular, the Maastricht Treaty strongly reaffirms the balance between supranational and intergovernmental decision-making processes which has long characterised the functioning of the Communities. On the other hand, the principle of subsidiarity, entrenched as a general principle of Community law by the TEU, is also likely to foster the development of an increasing degree of variability within the Union. Here, variability is equated with differentiation, or more precisely with the possibilities opened for an increasingly differentiated application of Community norms by individual member states.

Jurisdictional variability corresponds to the more common European usage of the term variable geometry. It refers to institutional arrangements which permit the differential participation of member states in certain policy areas. Two distinct forms of jurisdictional variability are found in the Maastricht Treaty. The 'two-speed' movement of states to full economic and monetary union coincides with a longstanding, federalist model of graduated integration.

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[32] This section draws on my "A European Union of Variable Geometry: Problems and Perspectives" (1994) 45 Northern Ireland Legal Q. at 109-133.

The 'opt-outs' accorded to the United Kingdom and Denmark, however, point in a very different direction as regards the Union's future institutional development.

A. Structural Variability

1. The Institutional Framework of the Union

The adoption of the term 'European Union' with the Maastricht Treaty is perhaps best understood as a bit of linguistic legerdemain.[33] The notion of 'Union,' as it had been previously employed in debates on the future evolution of the EC, was usually taken to imply a qualitative step forward in the integration process. Thus, in documents such as the Spinelli Draft Treaty on European Union (adopted by the European Parliament in 1984), the transition from 'Community' to 'Union' was presented as marking the inception of a new, more resolutely federal political entity.[34] However, the 'Union' created at Maastricht was a very different political construct than that intended by the federalist supporters of initiatives such as the Spinelli Treaty. Far from federalising the existing Community, the Treaty on European Union essentially formalises the compromise between supranational institution-building and looser forms of intergovernmental cooperation which has been at the heart of the integration process to date.[35]

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[33] The use made of the term 'Union' in this case parallels the equally misleading use of the term 'Confederation' in the Canadian context. See the discussion in G. Stevenson, *Unfulfilled Union*, rev. ed. (Toronto: Gage, 1982) at 6.

[34] See F. Capotorti et al., *The European Union Treaty: Commentary on the Draft adopted by the European Parliament on 14 February 1984* (Oxford: Clarendon Press, 1986).

[35] Useful article-length surveys of the Treaty include D. Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30 C.M.L. Rev 17; U. Everling, "Reflections on the Structure of the European Union" (1992) 29 C.M.L. Rev. 1053; T.C. Hartley, "Constitutional and Institutional Aspects of the Maastricht Agreement" (1993) 40 I.C.L.Q. 213; and A.D. Pliakos, *supra* note 31. Book-length treatments include R. Corbett, *The Treaty of Maastricht* (London: Longman, 1993); Y. Doutriaux, *Le Traité sur l'Union européenne* (Paris: Armand Colin, 1992); D. O'Keefe and P. Twomey, *supra* note 15; and J. Monar et al., eds., *The Maastricht Treaty on European Union: Legal Complexity and Political Dynamic* (Brussels: European Interuniversity Press, 1993).

More specifically, the structure of the Treaty on European Union represents a compromise between proponents of a single trunk Community and those who wished to define integration in terms of distinct 'pillars.' The 'single trunk,' on the one hand, implies the existence of a unified institutional framework, from which both the European Communities and parallel forms of intergovernmental cooperation stem as branches from a tree. The notion of distinct pillars, on the other hand, implies that a clear distinction is made between the spheres of competence accorded to the Communities and other areas in which the governments of the member states may choose to cooperate as sovereign entities. Reflecting the 'unitary' position, Article C of the Maastricht Treaty affirms the existence of a "single [Union] institutional framework." Article D, in turn, charges the European Council with providing the "necessary impetus" for the development of the Union and with the setting out of general policy guidelines. Yet, reflecting the contrary logic of 'pillarisation,' the two major areas of intergovernmental cooperation, the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA), are clearly set apart from the sphere of EC competence *per se*. Most centrally, under the terms of the Treaty's Article L, actions in these two areas are explicitly placed beyond the jurisdiction of the Court of Justice.

It would, however, be inaccurate to regard the compromise between supranational and intergovernmental dynamics as being reflected simply in a division between a Community 'core' and two looser, flanking areas of intergovernmental cooperation. A closer examination of the Treaty reveals a much more complex set of arrangements, in which both intergovernmental and supranational features are seen to characterise each of the three 'pillars' of the Union.[36]

Both of the intergovernmental pillars, though established outside of the Community, make significant concessions to the more supranational Community decision-making process. First, although the Commission evidently does not enjoy the same 'monopoly of initiative' in the intergovernmental sphere as it does within the EC, both intergovernmental

[36] This argument is strongly developed in J.-L. Quermonne, "Trois Lectures du Traité de Maastricht: Essai d'analyse comparative" (1992) 42 *Revue française de science politique* 802 and J. Weiler, "Neither Unity nor Three Pillars — The Trinity Structure of the Treaty on European Union" in Monar, *ibid.* at 49-62.

pillars explicitly provide that the Commission "shall be fully associated with the work carried out" in the relevant area.[37] Similarly, although the Parliament has not been able to extend its recent gains within the EC decision-making process to the other two pillars of the Union, it has been accorded the right to be kept "regularly informed" of developments in each of the two areas.[38] More significantly, both pillars also provide, albeit in a very hedged manner, for policy decisions to be taken on the basis of qualified majority voting in certain circumstances. Hence, though both the home affairs and the foreign policy pillars stand outside of the EC, limited aspects of Community structure and practice may be seen to mark these areas of intergovernmental cooperation.

Beyond the characteristics common to the two flanking pillars, the Justice and Home Affairs pillar further opens the door to its explicit 'Communitarisation' at a later time. Two sets of Treaty provisions stand out in this regard. First, the JHA section of the Treaty explicitly provides that the member states, having concluded a convention in the area, may give jurisdiction to the Court of Justice[39]. Second, Article 100c of the EC Treaty,[40] setting out the working of a common Community visa policy, creates the possibility for this mechanism to be extended to other related areas such as asylum policy or the rules governing border controls. Subject to the political will of the member states, '*passerelles*' have thus been built into the Maastricht Treaty which may facilitate the longer term amalgamation of much of the JHA pillar into the Community core.

While recognising that a '*communautaire*' imprint has marked the Treaty's intergovernmental pillars, it must equally be underlined that the Community itself remains very much a hybrid political form. The compromise between intergovernmentalism and supranationalism within the Community system can be readily illustrated with reference to the extraordinary diversity of decision-making processes which have emerged. Within the Council of Ministers, decisions are taken either under a unanimity rule or by qualified majority voting, depending on the subject under consideration. Coupled with this, the

37 Articles J.9 and K.4.2.
38 Articles J.7 and K.6.
39 Article K.3, para. 2c.
40 In conjunction with Article K.p in Title VI.

involvement of the European Parliament in the legislative process also varies according to subject area. In this regard, the Maastricht Treaty significantly added a 'co-decision' procedure (giving the Parliament a form of legislative veto) to the previously existing range of assent, cooperation, consultation, information, and specific budgetary mechanisms.[41] Cumulatively, accounting for the variations at both ministerial and parliamentary levels, there are now about a dozen different legislative procedures within the Community.[42] Each of these procedures, it need further be stressed, represents a particular point of equilibrium between supranational and intergovernmental decisional mechanisms.

It is certainly beyond the scope of this paper (and quite possibly the patience of the author) to deal systematically with the full spectrum of EC legislative processes. A single example might, however, be used to illuminate the dynamics which produce this exceptional procedural diversity. Article 128 of the Treaty on European Union recognises, for the first time, a Community competence in the area of cultural policy.[43] The inclusion of this article responds to quite strong integrative pressures. Other Community policies, dealing with, for example, the free movement of goods, increasingly 'spilled-over' into the cultural area. It thus appeared increasingly necessary for the Community to be able to deal in a structured way with the implications that other legislative activities have for the cultural sector. Nonetheless, any movement towards an EC cultural policy was apt to encounter strong national resistance. The area is evidently highly sensitive, dealing with the very

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41 Studies of the TEU provisions concerning the Parliament include C. Reich, "Le Traité sur l'Union européenne et le Parlement européen" (1992) 357 R.M.C. 287 and K. St Clair Bradley, " 'Better Rusty than Missin'?: Institutional Reforms of the Maastricht Treaty and the European Parliament" in O'Keefe and Twomey, *supra* note 15 at 193-212.

42 It might be noted that the Court of Justice had been quite critical, even prior to the Maastricht Treaty, of the lack of consistency in assigning powers to Community institutions across different jurisdictional areas. See generally Case 242/87, *Commission* v. *Council* ('Erasmus'), [1989] E.C.R. 1425 at 1453. The specific question of combining the cooperation procedure with the unanimity rule was addressed in Case 300/89, *Commission* v. *Council* ('Titanium Dioxide'), [1991] E.C.R 2867 at 2900.

43 The background and limits to Community involvement in the area are thoroughly analysed in M. Cornu, *Compétences culturelles en Europe et principe de subsidiarité* (Brussels: Bruylant, 1993).

definition of national or collective identities. In the specific German case, the development of an EC cultural policy also raised serious questions concerning the internal balance of the federation; the Länder feared the progressive loss of an important and hard-won area of responsibility. Reflecting these pronounced cross-pressures, a quite particular legislative process was ultimately adopted. On the one hand, the Parliament is recognised as a 'co-legislator,' in that Community actions here are subject to the co-decision procedure. Yet, though conceding a degree of legislative supranationalism, the relevant decisions still require unanimity in the Council of Ministers. A 'double veto' (held by both the EP and each member state) thus exists, reflecting the contradictory underlying dynamics of the integration process.[44]

In sum, the European Union, as defined by the Maastricht Treaty, is a singularly protean entity. Both between and within each of the three pillars of the Union, different balances between supranational and intergovernmental decision-making have been struck. As a result, differing political processes apply across different policy sectors. This, in itself, must be seen as an important form of institutional variability.

2. Subsidiarity

Both Canadian and European commentators, as noted above, have greeted the concept of subsidiarity with a mixture of genuine interest and deep scepticism.[45] As a political philosophy premised on the *rapprochement* of

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[44] The only other area subject to such a 'double veto' is Research and Technological Development, as set out in Article 130i (1) of the TEU.

[45] The most extensive analyses of subsidiarity available in English are M. Wilke and H. Wallace, *Subsidiarity: Approaches to Power-sharing in the European Community* (London: Royal Institute of International Affairs, 1990/RIIA Discussion Paper No. 27) and *Subsidiarity: The Challenge of Change* (Maastricht: European Institute of Public Administration, 1991/Proceedings of the Jacques Delors Colloquium). Article-length commentaries include A.G. Toth, "The Principle of Subsidiarity in the Maastricht Treaty" (1992) 29 C.M.L. Rev. 1079; D.Z. Cass, "The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community" (1992) 29 C.M.L. Rev. 1107; N. Emiliou, "Subsidiarity: An Effective Barrier Against the Enterprises of Ambition?" (1992) 17 European L. Rev. 383; K. Neunreither, "Subsidiarity as a Guiding Principle for European Community Activities" (1993) 28 Government and Opposition 206; J. Peterson, "Subsidiarity: A Definition To Suit Any Vision?" (1994) 47 Parliamentary Affairs 116; A.L.

state and citizen, the notion has been welcomed as a timely tonic for the body politic. Yet, as a legal or constitutional principle, subsidiarity seems much too vague to be of great practical value. Such 'all or nothing' (or more precisely, 'all and nothing') assessments must, however, be nuanced. Undeniably, the concept has definite limits both in the Community context and more generally. Nevertheless, within these limits, subsidiarity may prove to be of considerable importance for the future development of the Union. In particular, understood as a principle of permissible differentiation, it may emerge as a significant point of reference in both the EC decision-making process and the jurisprudence of the Court of Justice.

Three principal difficulties attach to the practical application of subsidiarity. The first and most general of these problems stems from the concept's origins. As now documented in innumerable studies, the doctrine derives from Catholic and Calvinist social thought.[46] In other words, subsidiarity was not initially conceived as a constitutional or legal concept at all, but rather as a broadly construed guideline for the construction of the 'just' or 'well-ordered' society. The more recent use of the term, which suggests that it may serve to regulate the formal division of powers between levels of government, entails the bridging of a considerable (and perhaps unmanageable) gap.

The second problem facing those who would wish to 'operationalise' subsidiarity in the Community context is the non-federal character of the EC itself. Here, it must be underlined that where the concept has been successfully 'secularised,' it has operated within the bounds of a traditional federal model. For example, subsidiarity has emerged as an operational

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Teasdale, "Subsidiarity in Post-Maastricht Europe" (1993) 64 The Political Quarterly 187; and A. Adonis, "Subsidiarity: Theory of a New Federalism" in P. King and A. Bosco, eds., *A Constitution for Europe* (London: Lothian, 1991) 63. The philosophical origins of the concept are extensively discussed in C. Millon-Delsol, *L'Etat subsidiaire* (Paris: PUF, 1992), while its societal (or 'horizontal') dimension is treated in, for example, R.G. Heinze, ed., *Neue Subsidiarität: Leitidee für eine zukünftige Sozialpolitik?* (Westdeutscher Verlag, 1986).

[46] The seminal statement of the principle in Catholic social thought is that found in the papal encyclical *Quadragesimo Anno* issued by Pius XI in 1931. The parallel notion of 'sphere sovereignty' in Calvinist thought is associated, amongst others, with the Nineteenth Century Dutch theorist Abraham Kuyper. See, for example, Wilke and Wallace, *ibid.* at 12-17.

principle of German federalism only relative to a clear, constitutionally demarcated division of powers.[47] Such a clear division, it need hardly be added, does not exist within the Community system. Indeed, it is particularly telling that while the subsidiarity provisions of the Maastricht Treaty have their operation confined to areas of concurrent national and Community jurisdiction, no definition of such areas may be found anywhere in the EC Treaties.[48]

Finally, problems also arise with the specific formulation given the subsidiarity principle in the Treaty on European Union. Most significantly, two potentially contradictory criteria would appear to have been incorporated into the Treaty's central subsidiarity provision. Under the terms of Article 3b of the amended EC Treaty, Community action is justified. "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." In effect, criteria of efficiency (which level of government can better achieve the task?) and scale (does the area have transborder dimensions?) are indiscriminately employed, and it is by no means clear that the two will coincide in any given area.[49]

Nevertheless, despite these considerable limitations, subsidiarity would appear to be assuming a place of some importance within the Community system. At the level of political decision-making, the December 1992 Edinburgh Summit saw an initial attempt to give a modicum of practical

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47 German usage is discussed in J. Schwarze, "Le Principe de subsidiarité dans la perspective du droit constitutionnel allemand" (1990) 370 R.M.C. 615. It should, however, be noted that the German Basic Law, until the inclusion of a new Article 23 as part of the Maastricht ratification process, contained no explicit reference to the concept of subsidiarity.

48 The anomaly is stressed in Toth, *supra* note 45 at 1087-1091.

49 The definition of subsidiarity included in the Treaty effectively compounds what the often cited Giscard d'Estaing Report (prepared for the European Parliament's Committee on Institutional Affairs) presented as two distinct approaches to the concept. The report clearly distinguished between a "decentralising" approach which assigns to the Community-level only those areas whose dimension or effects "extend beyond national boundaries" and a "centralising" approach which transfers to the EC "those tasks which are essential and which will be better accomplished at Community level than by states acting individually." European Parliament — Session Documents (4 July 1990) Series A3-163/90/Pt. B at 4-5.

effect to the principle.[50] At Edinburgh, both the Council and the Commission gave formal undertakings to incorporate a consideration of subsidiarity into the decision-making process. To this end, mechanisms have been put in place to assess every new legislative proposal, determining if and to what extent Community-level action is required. Moreover, the Commission is also in the process of re-examining existing legislation, with a view to modifying or repealing Community norms which run afoul of the subsidiarity principle.[51] Thus, prompted in good part by the anti-Maastricht ground swell given acute form by the first Danish referendum, both the Commission and the Council have appeared amenable to putting at least some meat on the bones of the Treaty structure.

The limitations and possibilities of the 'Edinburgh procedures' must, however, be more precisely demarcated. Legally, no separate 'subsidiarity procedure' exists within the Community system. The vetting of legislation against Article 3b forms only a part of the *normal* Community decision-making process; no particular criteria (lower blocking minorities, recourse to a special tribunal, etc.) are applicable. Similarly, as regards the substantive range of Community legislation, the door has not been opened (as the UK government asserts) to a wholesale renationalistion of major policy sectors. Rather, it is likely that the Commission review of existing legislation will usually result, where action is taken, in a change of the legal form of Community norms. Most particularly, one may reasonably expect an increasingly frequent recourse to broadly construed 'framework directives.' Such legal instruments, returning to the original Treaty-based distinction between 'directives' and 'regulations,' will leave member states a much greater scope as regards the manner in which they implement Community norms. Thus, though only a prescriptive (non-constraining) norm at the level of the Community legislator, subsidiarity may nonetheless permit a much greater degree of differentiation within the Community than has previously been accepted.

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50 The main Summit conclusions on subsidiarity are conveniently reproduced in Corbett, *supra* note 35 at 495-499. The mechanisms adopted are critically analysed in Teasdale, *supra* note 45 at 195-196.

51 A listing, under the heading "Subsidiarity: Examples of the Review of Pending Proposals and Existing Legislation," was included as Annex 2 to Part A of the Conclusions of the Presidency issued at the end of the Summit.

A similarly modest, but important use is likely to be made of the principle of subsidiarity in the jurisprudence of the Court of Justice. One may reasonably assume that the Court will be invited, over the next few years, to make some quite sweeping rulings on the basis of Article 3h. To take the most evident scenario, it is not difficult to imagine a national government, having lost a vote in the Council of Ministers, subsequently going before the Court to claim that the measure adopted over its opposition violates the Treaty's subsidiarity provisions. Nevertheless, it is improbable that the CJEC would give a sympathetic hearing to such a claim. Quite apart from the Court's rather pronounced federalist leanings, any such attempt to (re)define the distribution of powers within the Community system would involve determinations of a highly political character. It is unlikely that the Court would jeopardise its own institutional legitimacy by proceeding down so obviously perilous a path.[52]

A more limited jurisprudential use of the provision does, however, appear possible. Employing a logic of subsidiarity, the Court may allow national governments much greater leeway in the implementation of Community norms. In this regard, the Court's jurisprudence in the area of environmental law, uniquely subject to a subsidiarity provision under the Single European Act, is instructive.[53] The CJEC demonstrated a clear willingness to accept different (essentially higher) national environmental standards, even when these conflicted with basic common market principles such as the free movement of goods.[54] Within prescribed limits, national governments were

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[52] This marked prudence has been confirmed in the commentaries of both past and present members of the Court. See Lord Mackenzie-Stuart, "Subsidiarity — A Busted Flush?" in D. Curtin and D. O'Keefe, eds., *Constitutional Adjudication in European Community and National Law* (Dublin: Butterworth Ireland, 1992) 19 and P.J.C. Kapteyn, "Community Law and the Principle of Subsidiarity" (1991) 2 Revue des Affaires européennes 35.

[53] Article 130r, para. 4 of the EEC Treaty, as revised by the SEA, read "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member states." The provision was repealed by the Treaty on European Union.

[54] The landmark case in this area is the so-called "Danish Bottle Decision." Here, the Court of Justice accepted the essential elements of a national system mandating the use of returnable beer and soft drink containers, despite the *de facto* limits which this placed on the export of such products from other member states to Denmark. Case

thus allowed to privilege the goal of environmental protection over the unfettered functioning of the common market. More recently, in what has been hailed as the first post-Maastricht 'subsidiarity decision,' a similar philosophy has been applied more generally to national regulatory regimes. The *Keck* decision of 24 November 1993 saw the Court make a distinction between regulations pertaining to the nature of goods (size, weight, packaging, etc.) and rules governing the conditions in which they are marketed, finding the latter to be primarily a matter for national legislation.[55] Hence, in this case as in earlier environmental decisions, subsidiarity has been used to construct a jurisprudence of permissible differentiation.

In short, though unsurprisingly far from a panacea, subsidiarity emerges as a concept of some importance within the Community system. While it will not serve as the basis for a radical restructuring of the Community system, it may well foster a logic of permissible differentiation for both the framing and the interpretation of Community legislation. In this manner, subsidiarity will contribute to the emergence of still more variability within the Community system, as greater (if still necessarily limited) scope is given to national variations in the implementation of EC norms.[56]

302/86, *Commission of the European Communites* v. *Denmark*, [1988] E.C.R. 4607. This jurisprudence has been further developed in Case 2/90, *Commission* v. *Belgium*, not yet reported. In this later case, the Court, explicitly referring to Article 130r (4), upheld an absolute ban imposed by the Walloon Regional Government on the importation of certain toxic wastes. Summary in *The Proceedings of the Court of Justice*, no. 21/92 at 14-16.

55 Joined Cases 267/91 and 268-91(B. Keck and D. Mithouard), not yet reported. Summary in *The Proceedings of the Court of Justice*, no. 33/93 at 3-5. See N. Reich, "The 'November Revolution' of the European Court of Justice: *Keck*, *Meng* and *Audi* Revisited" (1994) 31 C.M.L. Rev. 459.

56 The representation of 'differentiation' as a form of 'variability' is suggested in C.-D. Ehlermann, "How Flexible is Community Law? An Unusual Approach to the Concept of 'Two Speeds'" (1984) 82 Mich. Law Rev. 1274.

B. Jurisdictional Variability

1. EMU[57]

The Economic and Monetary Union (EMU) provisions of the Maastricht Treaty are marked by a form of variability in the third and final stage of the process, the point at which a common currency is to be adopted. Only states meeting specified economic 'convergence criteria,' as determined by a qualified majority vote of the Council of Ministers "meeting in the composition of Heads of State or Government," will proceed to full economic and monetary union.[58] Before the end of 1996, the Council must determine if a majority of member states are prepared to enter the third stage of EMU and fix the date on which this stage is to begin. If, however, a majority of states have not so qualified and, in consequence, no date has been fixed by the end of 1997, the Treaty decrees that the third stage of EMU shall begin on 1 January 1999. In this case, the states which are judged to meet the convergence criteria, whether or not they constitute a majority, will move to full economic and monetary union. Whenever the passage to stage three takes place, those states not meeting the criteria are accorded the Treaty-defined status of "Member state with a derogation."[59] This status is to be reviewed at least every two years or at the request of the member state concerned.

The status of 'Member state with a derogation' implies both non-participation in the institutions of monetary union and an exemption from some of the constraints which it entails. As regards the former, states accorded a derogation evidently will not participate in the common currency. Their national currencies will continue to exist and to fluctuate against the 'ecu' as at present. Associated with this, these states will have only limited rights of participation as regards the operation of the European Central Bank (charged with the administration of the single currency). For example, non-participating

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[57] This section deals only with the general system of EMU derogations incorporated in the TEU. The specific 'opt-outs' accorded to the United Kingdom and Denmark are dealt with in the following section.

[58] The criteria are set out in Article 109j of the Treaty, as supplemented by the fifth and sixth protocols. The criteria used are price stability, government budget deficits, exchange rate stability, and interest rates.

[59] The implications of having a derogation are principally set out in Article 109k.

states will not have a say in the appointment of the Bank's Executive Board.[60] In a similar vein, the Governors of the national central banks of states having a derogation will sit only on the "General Council" and not on the "Governing Council" of the ECB. Finally, at the level of the Council of Ministers, national governments having a derogation lose their voting rights on a specified series of matters dealing directly with the operation of EMU — the arithmetic of the qualified majority voting system being adjusted accordingly.[61]

Conversely, however, non-participating states are also exempt from many of the constraints of the system. Most centrally, these states are not subject to the range of disciplinary measures which the Council may impose on full EMU members, in cases where "effective action" has not been taken to remedy "excessive government deficits."[62] Thus, though non-participating states are still expected to conduct economic and monetary policy in a manner consistent with Union objectives,[63] they will not face direct sanctions (including fines or obligatory deposits with the ECB) for a failure to do so.

The EMU provisions agreed at Maastricht clearly envisage the emergence of a "two-speed Europe." A core group of states, meeting certain 'objective' economic performance criteria, are permitted to move ahead at a faster pace than their partners. This variability of speeds corresponds to a conception of 'graduated integration' (*Abgestufte Integration*) which may be traced back to proposals made in the mid-1970s by both Willy Brandt and Leo Tindemans.[64] The underlying premise of this approach is that the integration process as a whole will benefit if states capable of further and faster economic

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60 The structures of the ECB are detailed in a separate "Protocol on the Statute of the European System of Central Banks of the European Central Bank"appended to the Treaty.

61 Article 109k (5).

62 Article 104c and the "Protocol on the Excessive Deficit Procedure."

63 Under the terms, most particularly of TEU articles 102a, 103, and 109m.

64 See E. Grabitz and B. Langeheine, "Legal Problems Related to a Proposed 'Two-Tier System' of Integration within the European Community" (1981) 18 C.M.L. Rev. 33 and B. Langeheine and U. Weinstock, "Graduated Integration: A Modest Path Towards Progress" (1984) 23 J.C.M.S. 185. The papers stem from an extensive research project on '*Abgestufte Integration*' based at the Institut für Integrationsforschung in Hamburg.

integration are permitted to proceed on their own. In this way, it is argued, the process will no longer be condemned to moving only at the pace allowed by the 'slowest' member of the group. The philosophy was succinctly stated in the following terms by the 1976 Tindemans Report:[65]

> It is impossible at the present time to submit a credible programme of action if it is deemed absolutely necessary that in every case all stages should be reached by all the States at the same time. The divergence of their economic and financial situations is such that, were we to insist on this progress would be impossible and Europe would continue to crumble away.

This model of integration, however, also relies on a significant corollary premise. It assumes that the only difference between member states is a temporary one of relative capacity. All member states are seen as having both the political will and the longer term capability to arrive at the same degree of integration initially attained by the lead group. Hence, for its proponents, graduated integration does not imply the longer term acceptance of a looser model of integration. Again citing the Tindemans Report, "This [graduated integration] does not mean '*Europe à la carte*': each country will be bound by the agreement of all as to the final objective to be achieved in common; it is only the timescales for achievement which vary."[66]

2. The British and Danish Opt-Outs

The United Kingdom won two major 'opt-outs' at Maastricht. The first is a relatively uncomplicated derogation from the third stage of Economic and Monetary Union. The second involves a much more complex set of arrangements whereby the UK has, in legal form, allowed the other eleven member states to pursue a more extensive common social policy.

The EMU opt-out essentially removes any obligation on the United Kingdom to accept the single currency.[67] In effect, the other member states (with the exception of Denmark, as detailed below) have all accepted in

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65 *European Union: Report by Mr. Leo Tindemans, Prime Minister of Belgium, to the European Council*, *Bulletin of the European Communities*, Supplement 1/76 at 20.

66 *Ibid.* at 21.

67 The 'opt-out' takes the legal form of a "Protocol on Certain Provisions relating to the United Kingdom of Great Britain and Northern Ireland."

principle that the transition to the single currency should take place. In consequence, their national currencies will or will not be replaced by a common currency strictly in function of their 'objectively' assessed economic performance. No further political determination need or can be made. In the case of the UK, however, it has been accepted that the fundamental political decision has not yet been taken. Thus, until Westminster decides otherwise, the UK cannot be compelled to merge the pound into a common currency. Should the British government wish to renounce this derogation at some future time, the 'convergence criteria' demanded of other states would, of course, be applicable.

The social policy opt-out takes the form of a Protocol and an Agreement attached to the Maastricht Treaty.[68] The "Protocol on Social Policy" is basically an accord between the UK and the other eleven member states. It allows the eleven "to have recourse to the institutions, procedures and mechanisms of the Treaty" for the development of a common social policy. The "Agreement on Social Policy," concluded only among the eleven, sets out the modalities of co-operation in the social policy field. It lists both the specific policy areas covered and the voting rules (unanimity or qualified majority) which are to be applicable in each of these areas. The UK, obviously, has no voting rights on any matters arising under the Protocol and, conversely, bears none of the costs for any such measures (apart from incidental administrative costs). The arrangement as a whole may be seen as a logical extension of Britain's refusal to accept the declaratory 1989 Social Charter. More specifically, within the context of the Maastricht negotiations, it also marked the recognition that any social policy accord acceptable to the British government would simply be too watered down for many of its Continental partners.[69]

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[68] Initial analyses of the Social Protocol include E. Szyszczak, "Social Policy: A Happy Ending or a Reworking of the Fairy Tale?" in O'Keefe and Twomey, *supra* note 15 at 313-327; P. Watson, "Social Policy after Maastricht" (1993) 30 C.M.L. Rev. 481; and E.A. Whiteford, "Social Policy after Maastricht" (1993) 18 European Law Rev. 202.

[69] From what we know of the negotiations, the Dutch Prime Minister, Ruud Lubbers, attempted to devise a social policy agreement that would have been acceptable to John Major. However, a French-led coalition refused to accept the terms proposed, finding that rather too much water had been put into the wine. The acceptance of an 'opt-out' consequently became the only apparent way in which a deadlock could be

The exact status of measures adopted by the eleven under the Protocol remains somewhat unclear. A number of legal scholars have suggested that the Protocol establishes only a form of intergovernmental co-operation, falling outside the ambit of the EC.[70] Legislation enacted by the eleven, following this logic, would consequently not be regarded as Community law *stricto sensu*. Nevertheless, whatever the precise status of such norms, it is indisputable that a situation has been created in which two parallel, evolving social policy regimes exist within the Community. On the one hand, the eleven may pursue a distinctive social policy agenda under the terms of the Protocol. On the other hand, and this must be underlined, social policy measures adopted under other EC Treaty provisions will continue to apply to all 12 member states, including the United Kingdom.[71] In particular, one may expect a continued frequent recourse by the Commission to EC Treaty Articles 100a (approximation of laws in areas affecting the establishment and functioning of the common market) and 118a (health and safety).[72] Both of these articles, it might further be noted, require only a qualified majority vote in the Council of Ministers for legislation to be adopted.

The opt-outs given to Denmark essentially were agreed to at the December 1992 Edinburgh Summit. They primarily were a response to the negative verdict on the Maastricht Treaty delivered by the Danish electorate six months earlier in a national referendum. The Danish exemptions, relative to those won by the UK, are of modest importance. In part, this modesty reflects the politico-juridical conundrum created by the negative referendum result. While the governments of the other member states ultimately proved willing to make some concessions to Denmark in order to secure a positive result in a second referendum, they were unwilling to countenance a revision of the actual text of the Maastricht Treaty. Any such revision would have restarted the whole

avoided. See, for example, Doutriaux, *supra* note 35 at 70.

70 The debate between the advocates of Community law and intergovernmentalist positions is summarised in Szyszczak, *supra* note 68 at 322-323; Watson, *supra* note 68 at 491-494; and Whiteford, *supra* note 68 at 211-217.

71 The likely future evolution of 'mainstream' EC social policy is interestingly discussed in J. Shaw, "Twin Track Social Europe — The Inside Track" in O'Keefe and Twomey, *supra* note 15 at 295-311.

72 For example, both Directive 92/85 on the Protection of Pregnant Women at Work and the Draft Directive on the Organisation of Working Time were introduced by the Commission on the basis of Article 118a, over strong British objections.

ratification process in every member state. A second limiting factor was also presented by the rather diffuse character of opposition to the TEU in Denmark. No single policy area or treaty provision could be singled out as having provoked the negative verdict of the Danish electorate.[73]

The package agreed at Edinburgh contains three distinct types of measures: a "Decision of the Heads of State and Government, meeting within the European Council"; two "Declarations of the European Council"; and three "Unilateral Declarations" made by the Danish government, of which the other governments "took cognisance."[74] For the most part, one finds a series of confirmations and affirmations, intended to appease the Danish electorate, but of no practical legal effect.[75] For example, the "Decision" confirms that the Union citizenship created by the TEU does not "in any way take the place of national citizenship." In a like manner, one of the Council "Declarations" affirms that the Maastricht Treaty "does not prevent any Member state from maintaining or introducing more stringent protection measures compatible with the EC Treaty" in the areas of social policy, consumer rights, or environmental protection. In effect, only two opt-outs, in the sense of actual jurisdictional exemptions, were agreed to at Edinburgh. First, the Council acknowledged that Denmark would take up the derogation from the third stage of EMU which had already been provided to it at Maastricht. Denmark will consequently have a status similar to that of the UK. It is under no obligation to accept the single currency, until national political consent (presumably by means of a referendum) has been given. Second, Denmark was also permitted to opt out of "the elaboration and implementation of decisions and actions of the Union which have defence implications." As a function of this opt-out, the Danes have agreed to renounce their right to exercise the Presidency of the Union when defence questions arise.[76]

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73 See K. Siune and P. Svensson, "The Danes and the Maastricht Treaty: The Danish EC Referendum of June 1992" (1993) 12 Electoral Studies 99.

74 Consolidated as "Denmark and the Treaty on European Union," Part B of the "Conclusions of the Presidency" Edinburgh (12 December 1992). The key provisions are extracted in Corbett, *supra* note 35 at 502-504.

75 A detailed analysis of the Danish 'opt-outs' may be found in D. Curtin and R. Van Ooik, "Denmark and the Edinburgh Summit: Maastricht Without Tears" in O'Keefe and Twomey, *supra* note 15 at 349-365. See also Hartley, *supra* note 35 at 234-237.

76 No similar provision, it might be noted, applies in the case of neutral Ireland.

Although of somewhat different scope, the British and Danish opt-outs do conform to a similar conception of the integration process. In both cases, it has been accepted that individual member states may choose not to participate in certain areas of common policy-making. Moreover, unlike the model of graduated integration seen to operate with EMU, this non-participation is in no way attached to objective criteria, nor is there any explicit indication that it should be temporally limited. In short, with Maastricht, there seems to be an acceptance that member states may differ not only as regards the speed of integration, but also over the basic direction of the process.

III. Canadian/European Parallels

Although the European Union would appear to have taken a decisive step towards the acceptance of institutional structures of variable geometry, this variability poses a number of significant problems. These difficulties, moreover, largely parallel those which have been suggested as attaching to the notion of asymmetrical federalism in the Canadian context. The parallel Canadian and European debates each broadly centre on questions of communitarian legitimacy, institutional design, and policy capacity.

It is clear that variable institutional structures, of the type adopted in Europe and proposed in Canada, raise fundamental problems as regards identification with the political community. When different constituent parts of the polity are treated differently, the overall sense of belonging to a community (Renan's celebrated *vouloir vivre ensemble*) risks being eroded. In both the Canadian and the European contexts, greater institutional complexity, if it is to succeed, must be accompanied by a redefinition of the sense of political community in a manner which encompasses such differentiation.

In the Canadian case, the problem of reconciling institutional asymmetry and communitarian legitimacy is a familiar one. Any suggestion of a different or 'special' status for Québec has invariably provoked an almost visceral reaction within English Canada. It is apparent that, for at least a significant segment of public opinion in the rest of Canada, any such differentiation violates a deeply held sense of nationhood. This conflict has been memorably encapsulated by Alan Cairns, who suggests the existence of three competing

equalities at the heart of Canadian constitutional debate.[77] Viewed within this framework, the problem of asymmetry is one of reconciling a vision of political community predicated on the 'equality of two founding peoples' with competing visions premised on either the equality of provinces or the Charter-defined equality of individuals. The problem may also be viewed relative to Charles Taylor's conception of "deep diversity."[78] Here, one may question whether the post-Charter English Canadian polity, with its emphasis on individual rights, can find an institutional *modus vivendi* with an alternative, more collectivist form of democratic governance.

In the European context, the problem of communitarian legitimacy has been most acutely raised by the British social policy opt-out. As already pointedly illustrated by the February 1992 'Hoover Affair,'[79] the United Kingdom's non-participation in central areas of Community social policy is seen by other member states as potentially giving the British an unfair competitive advantage. Part of this objection is, of course, strictly economic. It is alleged that the social policy opt-out destroys the level playing field necessary for the proper functioning of the single market. Nonetheless, at a deeper level, current arguments about the Social Protocol echo longstanding debates over the ultimate goal of the integration process. It is the nature of the European Union itself that is at issue; whether it is to be only a form of free trade area or if it is to assume a more comprehensive political identity. More precisely, relative to debates over variable geometry, the central problem is that of finding institutional structures which are capable of accommodating those states that wish to participate only in the economic dimension of the

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77 A.C. Cairns, "Constitutional Change and the Three Equalities" in Watts and Brown, *supra* note 1 at 77-100.

78 C. Taylor, "Shared and Divergent Values" in Watts and Brown, *supra* note 1 at 53-76. See also Taylor "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in A. Cairns and C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: U of T Press /Royal Commission on the Economic Union and Development Prospects for Canada, 1985) at 183-229.

79 The incident centred on the relocation of a Hoover factory from France to Scotland, essentially because of lower social charges in the United Kingdom. See, for example, the editorial comment "Are European Values Being Hoovered Away?" (1993) 30 C.M.L. Rev. 445.

integration project.[80]

The adoption of variable or asymmetrical structures also raises more 'nuts and bolts' problems of institutional design. If the application of law is in some way to be differentiated, it would stand to reason that the legislative process should reflect this differentiation. Practically, the problem is one of defining decision-making processes which equitably reflect the fact of differential jurisdiction, while still maintaining a reasonable degree of efficacy for the functioning of the political system as a whole.

Various proposals for asymmetrical institutional structures have been put forward over the years to accommodate Québécois demands for greater autonomy within the Canadian system.[81] These proposals have been of basically two types. On the one hand, some such projects rely only on differential voting within the existing institutions of the Federation. For instance, the present federal institutional framework would be maintained, with Québec parliamentarians not voting and Québec cabinet ministers not given portfolios in areas where the Québec government has assumed jurisdiction. On the other hand, proposals have also been mooted for more elaborate confederal structures, in which a new layer of government is created. In this scenario, two distinct political systems would co-exist, with the joint government limited to dealing with areas of shared jurisdiction.[82] Whichever

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[80] This question is directly addressed by the Agreement establishing the European Economic Area, between the EC and member states of the European Free Trade Association. The fact that three of the five fully participating EFTA states have now become full members of the EC would, however, seem to suggest that the formula arrived at in the EEA agreement was not a particularly satisfactory one. On the terms of the Agreement, see S. Norberg, "The Agreement on a European Economic Area" (1992) 29 C.M.L. Rev. 1171; A.T. Laredo, "The EEA Agreement: An Overall View" (1992) 29 C.M.L. Rev. 1199; C. Reymond, "Institutions, Decision-making Procedure and Settlement of Disputes in the European Economic Area" (1993) 30 C.M.L. Rev. 449; and G.-J. Frisch and C.-A. Meyer, "Le Traité sur l'Espace Economique Européen: Cadre juridique d'une 'Europe du deuxième cercle'" (1992) 360 R.M.C. 596.

[81] The various options are critically surveyed in G. Laxer, "Distinct Status for Québec: A Benefit for English Canada" (1992) 3 Constit. Forum 57.

[82] See G. Bergeron, "Pour un Commonwealth canadien" *Le Devoir* (28 June 1990) 13 and (29 June 1990) 7 (a text first published in February 1977) and, relatedly, P. Resnick, *Toward a Canada-Québec Union* (Montreal and Kingston: McGill-Queen's

variant is preferred, however, the underlying logic is the same. Jurisdictional opt-outs are invariably accompanied by non-participation in the relevant decision-making process.

The difficulties of asymmetrical institutional design have already been confronted in practice by the framers of the Treaty on European Union. As noted above, each Maastricht opt-out carries with it a loss of voting rights on the corresponding matters in the Council of Ministers. Thus, states that do not proceed to the third stage of EMU, will not have a vote on matters arising relative to the single currency. Similarly, Britain's non-participation in the new areas of common social policy has been accompanied by a loss of voting rights on these matters. Yet, though a clear precedent has been established at the level of the Council of Ministers, the European Parliament has not taken thus far a comparably firm stance on the implications of derogation. Most notably, in the case of the British social policy opt-out, a move to exclude British MEPs from debates and votes on social policy matters was rejected by the Parliament's Rules committee.[83] Nevertheless, faced with the likelihood of increasing variability, the Parliament's Institutional Affairs Committee has taken a much stronger line in its recently adopted "Draft Constitution of the European Union."[84] The Committee recommends that, where member states do not participate in particular policy areas, members of the Parliament, the Council, and the Commission from those states should abstain from the relevant deliberations.[85]

Finally, asymmetrical institutional arrangements also raise questions of 'policy capacity.'[86] It may be asked whether the adoption of variable state structures results in a fragmentation of public power, reducing overall state capacity. In both the Canadian and the European cases, relatively strong counterarguments may be made and must be assessed.

University Press, 1991).

83 European Parliament, Document 174.605 (17 January 1994) 1.

84 Published as an Annex to European Parliament, Document 179.622, "Resolution on the Constitution of the European Union" Plenary Session (10 February 1994).

85 Article 46(3) at 21.

86 The concept of 'policy capacity' as used here draws on G.B. Doern and B.W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart, 1991) especially at 245-270. See also Doern, *supra* note 1 at 31-33.

The case for constitutional asymmetry in the Canadian context has been strongly put by Philip Resnick in *Toward A Canada-Québec Union.*[87] Following Professor Resnick's argument, the establishment of a Canada-Québec confederal union may be seen as allowing for a strengthening of state capacity in both of the constituent parts of the reformed polity. It is contended that both Québec and English Canada, would, for the first time, have state structures which corresponded to their nationalist or nation-building aspirations. Yet, at the same time, the unity of Canada as an external actor on the continental and global stages would be maintained. Asymmetry, in this scenario, emerges as a means of maximizing state capacity in the face of contradictory internal and external pressures.

A similar case may be made for institutional variability in the European context. Essentially, it can be argued that only a Union of variable geometry will be capable of squaring the circle of simultaneous deepening and widening. The Union, at present, faces two major structural imperatives. The first, represented by deepening, is that of increasing the degree of integration among at least a limited number of 'core' states. The second, associated with widening, is that of developing a coherent response to the dramatic political changes of recent years in Central and Eastern Europe. This response will most probably have to provide for the gradual accession of a number of former COMECON states to some form of Union membership.[88] Following this line of argument, only through the acceptance of a 'variable' or 'multi-speed Europe' can the Union hope to address both of these central, competing demands.

Neither the Canadian nor the European cases for asymmetry presented above are beyond criticism. Nevertheless, the terms on which such arguments are made must be underlined. The question posed is no longer whether asymmetry is in itself permissible or desirable. Significantly, these arguments

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87 Resnick, *supra* note 82.

88 The so-called "Europe Agreements" may be seen as precursors of an 'associate member' status. These framework accords, which provide for economic, political, and cultural cooperation between the EC and the country concerned, have been signed with Hungary 1991), Poland (1991), the Czech and Slovak Republics (1991), Bulgaria (1992) and Romania (1992). A general overview may be found in M. Maresceau, "Les Accords européens: Analyse générale" (1993) 369 R.M.C. 507.

focus on the specific implications of particular forms of institutional asymmetry, relative to both internal and external pressures. It is this redefinition of the problem of asymmetry, removing much of its symbolic content,[89] that is perhaps the most important lesson which can be drawn from the comparative examination of Canadian and European experiences.

Conclusion

The present paper has demonstrated that the European Community after Maastricht does not fit either the decentralist or the federalist interpretations put forward in Canadian political debate. Rather, it emerges as an exceptionally complex political structure, characterised by an increasingly variable geometry. The problems posed by this variable geometry have, moreover, been seen to parallel those which attach to the notion of 'asymmetrical federalism' in the Canadian context. In each case, significant problems of communitarian legitimacy, institutional design, and policy capacity are raised by the actual or potential recourse to variable institutional structures.

Let there be no mistake — the existence of these parallels does not suggest there exists a 'European model for Canada' (or, indeed, of a Canadian model for the EC). Instead, this paper suggests that students of the two political systems may well learn a great deal from one another, to the extent that each system continues or embarks upon a journey through the relatively uncharted waters of 'variable' constitutional arrangements. More generally, the existence of such parallels may also be taken as pointing towards the existence of broader international trends. Faced with the competing pressures of 'globalisation' and 'localisation,' it is likely that differentiated constitutional arrangements of the type presently discussed will become increasingly frequent. Seen in this way, neither variable geometry in the case of the EC nor asymmetrical federalism in the Canadian case may be dismissed as simple anomalies — the product of successful 'special pleading' by the constituent units of a larger polity. Such developments should, on the contrary, be regarded as an integral part of the redefinition of the modern State.

[89] See Doern, *supra* note 1 at 33-35.

Opposition To Continental Integration: Sweden and Canada

Gordon Laxer*

While the shape of continental integration in Europe and North America differs in a number of important respects, they share a number of interesting characteristics which are explored in this paper. One is their foundation in a new free trade ideology, favouring corporate mobility rights and restrictions on democratic sovereignty. Another is the response of the citizens of two countries, Sweden and Canada, who in large numbers opposed entry into the European union and the U.S.-Canada Free Trade Agreement, respectively. The author analyzes those forces opposing and those favouring continental integration in Sweden and Canada, finding similarities and points of contact in the debates which raged in each country. As continental integration continues apace, the author concludes that the forces marshalled in their domestic debates likely will continue to play an important role in future debates about free trade ideology.

Bien que les modalités d'intègration continentale diffèrent à de nombreux ègards en Europe et en Amérique du Nord, elles partagent plusieurs caractèristiques intéressantes qui font l'objet du prèsent article. L'une d'elles est leur fondement sur une nouvelle idèologie de libre-èchange favorisant la liberté de circulation et d'établissement des entrepreneurs et limitant la souveraineté démocratique. Une autre est la réaction des citöyens de deux pays, la Suède et le Canada, qui se sont opposès nombreux à l'entrée dans l'Union europèenne et à l'Accord de libre-èchange nord-amèricain, respectivement. L'auteur analyse les forces opposées et favorables à l'intègration continentale dans les deux pays, et relève des similaritès et des points de contact dans les débats passionnès soulevès par la question. Tandis que l'intègration continentale se poursuit, conclut l'auteur, ces forces continueront probablement à jouer un rôle important dans les discussions relatives à l'idèologie de libre-èchange.

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If Europe were a country, it would not be allowed into the European Community because it is not democratic.

oft-repeated quote of opponents to the European Union in Sweden, 1993[1]

I happen to believe you have sold us out ... Once a country yields its economic levers, once a country yields its investment, once a country yields its energy ... then the political ability of this country to sustain the influence of the United States, to remain as an independent nation — that has gone forever.

Liberal leader John Turner during the 1988 'free trade' federal election[2]

How quickly conventional wisdom shifts about the direction of the inevitable march of history. Not long ago, big business and the political right were identified as predominantly protectionist, nationalistic and, in some cases, flirting with xenophobia or racism. The right was thought to be fighting a rear guard and, in the long-run, a futile battle against expanding (or creeping) socialism, the extension of citizenship, welfare rights and the growing size of the public sector.[3] History was on the side of the socialists, with their calls for international solidarity, equality, and non-market values.

The 1980s saw a sharp reversal in conventional wisdom about the inevitable direction of history. Several trends shifted the balance towards belief in the utility of the unrestricted capitalist marketplace and away from the efficacy of democratic politics and positive state action. The right seized the initiative and grabbed the internationalist mantle from the left. Transnational corporations used the information revolution to coordinate output increasingly on a global level and to transmit capital instantaneously across borders. They sought to diminish national social-economic barriers between the component parts of their companies located in different countries.[4]

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1 Interview with Rudolf Meidner (15 June 1993).

2 G. Fraser, *Playing for Keeps: The Making of a Prime Minister, 1988* (Toronto: McClelland and Stewart, 1989) at 290.

3 Examples of numerous writers in the 1950s and 1960s from the right and the left could be given. See, for example, the optimism that capitalism had been transformed in C.A.R. Crosland, *The Future of Socialism* (New York: Schocken Books, 1956).

4 P. Marchak, *The Integrated Circus: The New Right and the Restructuring of Global Markets* (Montreal: McGill-Queen's University Press, 1991).

The 'Thatcherite' revolution[5] of deregulation, privatization, downsizing the welfare state and weakening unions, aided the transnationals' cause of removing political barriers to markets. Monetarism returned business and government thinking to the traditional economic emphasis of reliance on market forces, currency stability and anti-inflation that had reigned before Keynesianism. Highly productive Asian capitalism penetrated and challenged the older versions in Europe and North America.[6] After these trends were under way for a decade or so, the Berlin Wall fell and communism was routed in Eastern Europe.

These changes altered the political landscape in Western countries and provided the impetus for forging formal economic integration agreements in North America and for deepening and broadening pre-existing integration agreements in Western Europe. Amongst all the other changes taking place, debates began on the northern periphery of each continent that questioned long-held independent policies that had resisted continental integration. It is these debates that I address in this paper.

Sweden and Canada share many characteristics and yet differ in many ways. North America is more liberal and less social democratic than Europe. But in relation to their respective continents, they are the most social democratic with greater welfare entitlements, taxation rates and the size of their public sectors. Both have been high-wage economies with recent currency devaluations and high government deficits. Unions in Sweden and Canada are much stronger than in the rest of Europe and North America, respectively. Both have experienced high unemployment and recent massive flights of capital to southern neighbours, where welfare levels and wages are lower. After resisting the trends of neo-liberalism and deregulation in the early 1980s, Canada and Sweden increasingly faced pressures to harmonize their

5 There are many excellent studies on Thatcherism. See D. King, *The New Right* (London: Macmillan, 1987) and C. Leys, *Politics in Britain* (Toronto: University of Toronto Press, 1983).

6 J. Morris, ed., *Japan and the Global Economy: Issues and Trends in the 1990's* (London: Routledge, 1991).

social and economic policies with those of the major powers on their respective continents.[7]

Continental integration poses major challenges. Some would say it threatens these societies and has sparked passionate debates about their future directions. Some of the issues and concerns in Canada and Sweden are very similar, some are very different. But each country is largely unaware of the other's debates because neither is a major power and little attention is given to them by the international media.

This paper is written in the belief that both countries can learn from a comparison of the similarities and differences in their contexts and debates. Much more can be written about these complicated issues than is possible in one short paper. I will concentrate on the political-economic contexts and the politics of opposition in each country.

New and Old Concepts of Free Trade

The term 'free trade' is confusing because its meaning recently has been turned on its head. Before the 1980s, free trade meant the unrestricted movement of goods[8] across international borders. The doctrine of free trade can be traced back to the writings of Adam Smith, David Ricardo, and John Stuart Mill and is based on the concept of 'comparative advantage.' It is assumed that each country is more efficient than others in producing some particular set of goods and services and that it is in these areas that it should specialise. According to the doctrine, each country should export goods and services where it is most efficient and import everything else that is needed. It is argued that, because of increased efficiencies, all trading partners benefit from free trade.

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7 Regarding Sweden, see G. Ahrne and W. Clement, "A New Regime? Class Representation within the Swedish State" (1992) 13 Economic and Industrial Democracy 455. For Canada, see S. Clarkson, *Canada and the Reagan Challenge*, rev. ed. (Toronto: Lorimer, 1985); S. McBride and J. Shields, *Dismantling a Nation: Canada and the New World Order* (Halifax: Fernwood Books, 1993).

8 Free trade also meant the unrestricted movement of services, but the latter was less important than the movement of goods before the information, communications and banking revolutions of the 1980s and 1990s.

The traditional concept of free trade had an egalitarian promise. The removal of tariffs and increased competition would benefit consumers and workers in each trading partner by lowering prices and increasing wages, the latter through productivity gains. On the other hand, large national businesses which thrived in the hothouse environment of state regulations, such as tariffs and quotas, would lose their monopoly protection. Ordinary citizens would gain and monopoly capitalists would lose.

The radical content of the early free traders is evident in the speeches of Richard Cobden, its most famous early champion and leader of the Anti-Corn Law League in England in the 1840s. He carried on a vigorous campaign for free trade in food and against state-created monopolies:[9]

> We advocate the abolition of the Corn-Law [tariffs on grain imports] because we believe it to be the foster-parent of all other monopolies ... the first and greatest count in my indictment against the Corn-Law is, that it is an injustice to the labourers of this and every other country.

This is a far cry from the pro-monopoly business perspectives of the main advocates of "free trade" in the 1990s.

When Britain, Ireland and Denmark broke away from the European Free Trade Area (EFTA) and joined the European Community (EC) in 1973, the remaining EFTA countries signed individual 'free trade' agreements with the EC. The trade pacts followed the traditional concept of free trade, where phased-in reductions led to the free movement of most industrial goods amongst EFTA and EC countries by 1984.[10] The EFTA countries which concluded free trade agreements with the EC (and the European Steel and Coal Community) in 1973 to 1974 were Sweden, Norway, Finland, Austria, Switzerland and Iceland.[11]

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9 "Free Trade VII, Manchester, October 19, 1843" in J. Bright and J.E. Thorold Rogers, eds., *Speeches by Richard Cobden M.P.* (London: Macmillan, 1870) at 12.

10 There were also agreements about rules of origin and restrictive business practices. See R.C. Hine, *The Political Economy of European Trade* (Sussex: Wheatsheaf, 1985) at 121; Commission of the European Communities, *The European Economic Area* (Luxembourg: Official Publications of the European Communities, 1992).

11 From information sheet supplied by the European Commission Library/Information Office in Ottawa.

While using much of the older rhetoric about greater competition, comparative advantage and cheaper consumer prices, the new concept of 'free trade' is more about corporate investment and control than it is about trade in the traditional sense. Greater profits can flow from corporate ownership and control than from exports. In 1990, U.S.-based corporations earned about $10 billion from the $96 billion of exports to the E.C., but they earned $32 billion in the same year from dividends, interest, royalties and fees on direct investments in Europe.[12] As Sylvia Ostry notes:[13]

> the present phase of accelerating world integration is dominated less by increasing trade linkages than by rapidly growing investment and technology flows ... The chief agents of interdependence in this phase are the global enterprises.

The new free trade agreements are centrally about providing giant transnational corporations with mobility rights and even monopoly conditions, some of them state-created. Richard Cobden would not have approved.

The new concept of free trade involves what are called the 'four freedoms': the free movement of capital, labour, goods, and services. Concentration on developing new rules on trade in services rather than on goods is tied to corporate investment and control. Since most services cannot be easily exported, their entry into a foreign market usually requires the corporate presence of the provider of the service. This means that to achieve more trade in services such as in banking, investment, and the hospitality industry, foreign ownership must be facilitated.

Under the terms 'national treatment' and 'right of establishment,' the new 'trade' agreements give transnational corporations citizen-like rights[14] to bring in all the paraphernalia of corporate power. These include corporate culture, know-how, trademarks, patents, research and development, and marketing techniques. Under the new 'trade' rules, the transnationals are exempt from 1) performance requirements, such as domestic sourcing of

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12 G.C. Hufbauer in C. Day and J. Kline, *EC 92 and Changing Global Investment Patterns* (Washington: The Center for Strategic and International Studies, 1992) at vii.

13 S. Ostry, *Governments and Corporations in a Shrinking World* (New York: Council on Foreign Relations Press, 1990) at 1.

14 This argument is elaborated in G. Laxer, "Social Solidarity, Democracy and Global Capitalism" (1995) 32 Canadian Rev. of Sociology and Anthropology (forthcoming).

goods and services; 2) the transference of shares of their proprietary technologies to host countries; and 3) domestic ownership and control requirements. The provision of citizen-like rights for global corporations thus requires reduced economic policy roles for host governments.

The recent extension of patent protection for transnational pharmaceutical companies operating in Canada illustrates the contrast between the old concept of free trade and the new one. In 1969, Canada broadened the 'compulsory licencing' of imported drugs which allowed generic companies, the largest of which were Canadian-owned, to copy drugs on payment of royalties to the patent holders, almost invariably transnational drug companies.[15] It was a way of reducing the cost of patented drugs for Canadian consumers, saving them $211 million in 1983[16] and greater amounts by the late 1980s.[17] In the U.S. for instance, a small amount of Valium cost $345.93, while its generic equivalent in Canada, Diazepam, cost a mere $2.31.[18] Once established, it was a popular program with Canadians, not to be tampered with lightly by politicians. While this system reduced the profits of the major pharmaceutical companies in Canada to levels below that which they earned in the U.S., from 1968 to 1982 their profits in Canada were still higher than for most industries.[19]

In the 1980s and 1990s, pharmaceutical transnationals were amongst the most active supporters of new international rules on services and intellectual property rights. The major American-based companies belong to a business lobby, the Intellectual Property Committee, which also includes the major companies in the information and computer industries. This lobby pushed hard

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15 L. McQuaig, *The Quick and the Dead: Brian Mulroney, Big Business and The Seduction of Canada* (Toronto: Viking, 1991) at 129-142; L. Diebel, "How Trade Deals Work for U.S. Corporations: The Case of Patents and Pharmaceutical Drugs" in D. Cameron and M. Watkins, eds., *Canada Under Free Trade* (Toronto: Lorimer, 1993) at 95.

16 Canada, *Report of The Commission of Inquiry on the Pharmaceutical Industry* (Ottawa: Supply and Services, 1985) at xviii.

17 Canadian Centre for Policy Alternatives, *Which Way for the Americas: Analysis of NAFTA Proposals and The Impact of Canada* (Ottawa: Canadian Centre for Policy Alternatives, 1992) at 41.

18 McQuaig, *supra* note 15 at 131.

19 *Supra* note 16 at xviii.

for inclusion of intellectual property rights in the new trade agreements. On February 26, 1992, the Intellectual Property Committee sent a letter to Carla Hills, the U.S. Trade Representative, and "insisted" that the North American Free Trade Agreement (NAFTA) extend pharmaceutical patents in Canada from December 20, 1991 onward.[20]

The pharmaceutical giants got their way in the free trade negotiations. But they were only able to do so in two stages, in what amounted to side agreements to, rather than in the texts of, the trade treaties. Extending drug patents in Canada was part of the original negotiations leading to the Canada-U.S. Free Trade Agreement (FTA). However, the U.S. negotiators, who championed the interests of the pharmaceutical transnationals, could not get the Canadian negotiators to grant as great an extension of patent monopoly as they wanted. Rather than get half a loaf, the U.S. withdrew the drug patent clause from the official agreement and settled for an unofficial side deal which extended the length of monopoly drug-patent protection in Canada to ten years. The wording of the side deal showed up in the U.S. version of the preliminary FTA on October 4, 1987, but not in the Canadian summary, issued the same day.[21] The clause was dropped from the final FTA text.

This, however, did not end the matter. At the same time that the Conservative government was ensuring the passage of the FTA, they also passed Bill C-22 which extended drug patent rights. Bill C-22 followed the guidelines laid out in the preliminary U.S. version of the FTA, indicating to some observers a "sleight of hand."[22] Bill Merkin, U.S. Deputy Chief Negotiator in the talks with Canada, explained that:[23]

> Ottawa didn't want it [intellectual property] to be in the free trade negotiations. They didn't want to appear to be negotiating that away as part of the free trade agreement. Whatever changes they were going to make, they wanted them to be viewed as, quote, "in Canada's interest."

The effect on consumers was immediate. Total spending on patented drugs in

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20 Diebel, *supra* note 15 at 94.

21 G.B. Doern and B.W. Tomlin, *Faith and Fear: The Free Trade Story* (Toronto: Stoddart, 1991) at 188-9.

22 *Ibid.*

23 McQuaig, *supra* note 15 at 136.

Canada increased 90 per cent between 1988 and 1991.[24]

Still, the U.S.-based pharmaceutical industry was dissatisfied with the Canadian legislation and received another opportunity to realize their full ambition with the NAFTA negotiations. The Mulroney government followed their precedent of using a side agreement and passed Bill C-91, in December 1992, extending monopoly drug-patent protection for a full twenty years. Again, it probably was not a coincidence that the Bill provided retroactive coverage to the exact date, December 20 1991, that the Intellectual Property Committee had specified in its letter the previous winter to Carla Hills regarding NAFTA.[25] Canada had gone further than other countries to satisfy the wishes of the pharmaceutical companies.[26] Although the 20-year Canadian monopoly protection is not part of the NAFTA text, Article 1709:10 of NAFTA protects the rights of patent holders and appears to hinder or prevent future Canadian governments from reversing the provisions of the 1992 drug bill.[27]

Instead of free trade leading to the dismantling of state-created monopolies — the aim of the early crusaders for free trade — the transnational drug companies benefited from and consumers paid for state-created 'free trade' monopolies. In important respects, the older concept of anti-monopoly free trade has been turned on its head.

What then does 'free trade' mean? In the new concept, free trade increasingly comprises the transfer of goods and services that are internal to a transnational corporation but that cross international borders. Three-quarters of Canada's exports and over 70 per cent of Canadian imports are produced by transnational companies for sale to other parts of the same companies located in other countries.[28] Over one-third of exports and imports between

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24 "Drug Patents Go Too Far" *Edmonton Journal* (25 January 1993) A8.

25 Diebel, *supra* note 15 at 95.

26 In the U.S., patent protection is for 17 years. McQuaig, *supra* note 15 at 131.

27 *North American Free Trade Agreement*, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) (entered into force Jan. 1, 1994) at 17-9, 17-10.

28 These export figures are cited in J. Anderson, *Trade, Technology and Unions: The Theory and Practice of Free Trade and its Implications for Unions* (Toronto: OFL Technology Adjustment Research Programme, June 1993) at 12. Regarding Canadian imports see J. Dunning, *Multinational Enterprises and the Global Economy*

Mexico and the United States are between branches of U.S. transnationals. John Dunning provides no comprehensive data on the extent to which intracorporate transfers comprise 'trade' amongst European Union members, but indicates that it has increased markedly.[29]

Intracorporate transfers violate the older concept of international free trade because they fail to meet the fundamentals of a free market. Free markets require two conditions: buyers and sellers must be independent of each other so that prices are set by supply and demand and not determined by powerful individual suppliers. As well, there must be sufficient numbers of buyers and sellers so that powerful monopolies cannot determine prices. In 'trade' across international borders between affiliates of the same company, neither condition applies. Prices are set arbitrarily in a process called 'transfer pricing.'

The new concept of free trade caters not to free markets but to global corporate interests. Furthermore, it undermines the ability of citizens to democratically direct their polities. In the new free trade agreements, many long-standing social arrangements worked out democratically and idiosyncratically in each country are considered 'trade barriers' because they may hinder internal corporate transfers. Eliminating these democratic arrangements is called 'harmonization.'

There are other instances where new trade agreements are protectionist in the older sense of free trade. The majority of Swedish farmers expressed support for entry into the European Union because they want to join in its agricultural protection. They feared that the Social Democratic and Liberal Parties, who, when combined, are supported by a majority of Swedish voters, would remove state supports for agriculture if Sweden remained outside the European Union.[30] The FTA allowed each country to use its definitions of countervail and anti-dumping to keep out the free movement of goods, such as Canadian pork, steel and lumber from the other country.[31] As regional

(Wokingham England: Addison-Wesley, 1993) at 387.

29 Dunning, *ibid.* at 386-7.

30 Interview with Birgitta Hambraeus (15 June 1993).

31 See A. Wilson, *Canada-U.S. Negotiations on a Free Trade Area* (Washington: Congressional Research Service, 1987). Regarding the preliminary agreement on the FTA, the author states that "each country's antidumping and countervailing duty laws

trading blocs, the European Union and NAFTA allow and even encourage trade protectionism against third parties, resulting in 'trade diversion.'[32]

In fact, the European policies on regional equalization depend on building walls against Third World imports and against Third World migrants. Protection against 'social dumping' also depends on those walls. Social dumping has been described as a 'race to the bottom' in which industry moves to areas in Europe where such things as wages, social benefits, unionization, and environmental protection are lowest.

The FTA and NAFTA embodied the new, rather than the old, concept of free trade. Thanks to successive rounds of the General Agreement on Tariffs and Trade (GATT), tariff barriers were already low between Canada and the U.S. Prior to the FTA in 1989, eighty per cent of Canadian goods entered the U.S. tariff-free and two-thirds of U.S. goods entered Canada without tariffs. Most observers agreed that the removal of tariffs was a minor part of the Agreement.[33]

The European Economic Space (EES) Agreement (sometimes called the European Economic Area Agreement) between EFTA countries and the European Community was implemented in January 1994. It embodied the new concept of free trade, as did the recent initiative that culminated in the European Union (EU). Norway, Sweden, Finland, and Austria, but not Switzerland,[34] were party to the EES. It covered much the same economic ground as did that of the European Union, upholding the four freedoms.

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and procedures would be unchanged, an important negotiating goal of the United States."

32 Regarding how regional economic integration can lead to "trade diversion," rather than trade creation, see J. Viner, "The Economics of Customs Union" in *The Customs Union Issue* (New York: Carnegie Endowment for International Peace, 1950) at 41-55.

33 For example, in April 1985, Simon Reisman, soon to become Canada's chief trade negotiator, argued that after successive GATT rounds, Canada faced the worst of both worlds. "Our tariffs are too low to protect the home market" and "our access to the US and world markets remains precarious." See "Trade Policy Options in Perspective" in *Canadian Trade at a Crossroads: Options for New International Agreements* (Toronto: Ontario Economic Council, 1985) at 389.

34 Swiss voters rejected the EES in a referendum in December 1992.

Before joining the EES, states had to remove most policies that promoted domestic ownership and control of industry and government procurement of domestic supplies.[35]

Nevertheless, belonging to the EES is not equivalent to joining the European Union. In the EES there are no common customs regarding third countries, nor are EFTA countries subject to the EC's highly protectionist common agricultural policy. Of course, the EES does not make EFTA countries part of the political integration and European identity that are central to the European Union.

NAFTA and the European Union

The world is said to be moving towards a global economy and at the same time towards regional economic integration. The evidence points both ways. In Western Europe, North America, and Southeast Asia, trade is increasing more rapidly between neighbouring countries than it is between more distant countries. Even in Eastern Europe there are moves toward economic reintegration after the initial fracturing of ties with the collapse of communism. On the other hand, corporate expansion is occurring more globally than regionally. Japanese corporations have more direct (ownership) investment in the United States and Europe than they do in Asia Pacific. American corporations have much greater commitments in Europe than in Canada and Mexico.[36]

Much of the intra-regional trade is within American and Japanese corporations. For example, in 1982, 69 per cent of EC-based exports to other EC countries by U.S. manufacturing affiliates were to their own affiliates. In 1978, Japanese subsidiaries operating in five Asian countries sent 79 per cent

35. OECD, *International Direct Investment Policies and Trends in the 1990s* (Paris: OECD, 1992) at 30-1; P. Poret, "Liberalising Capital Movements" (1992) 176 The OECD Observer.

36. N. Vanston, "What Price Regional Integration" (1993) 181 The OECD Observer 4.

of their exports to and received 84 per cent of their imports from other branches of the same corporation.[37]

Some observers see regional economic blocs as leading to greater trade and corporate-location liberalization while others see them moving towards regional fortresses that hinder economic intercourse on a global level. These contrasting positions figure prominently in the debates on continental economic-integration pacts, with supporters usually arguing the liberalisation case and opponents stressing the continental fortress features.

The European Union and NAFTA are the two most prominent regional blocs but others are in various stages of formation or transformation.[38] Regional blocs, however, are not all alike. NAFTA and the European Union have endorsed the new corporate concept of free trade. But they differ profoundly in other ways, not least in their origins and in their scope beyond economic integration.

The idea of European unity is as old as that of Christendom. But events often demonstrated more European disunity and conflict than unity, culminating in the two World Wars of the twentieth century. The recent impetus to West European union dates back to the Second World War and comes from several sources. Prominent activists in the resistance movements in France and political opponents to fascism in Italy and Germany, independently concluded that the solution to the war tragedy was an end to exclusivist nationalisms and to the nation-state system in Europe.[39] After the War, Jean Monnet, Altiero Spinelli and Willy Brandt became the chief architects of European unity.

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[37] Dunning, *supra* note 28 at 409.

[38] ASEAN, the Association of Southeast Asian Nations was founded in 1967 for security reasons as a bulwark against communism, but in 1992 agreed to establish an ASEAN Free Trade Area (AFTA) by the year 2000. See OECD, *Regional Integration and Developing Countries* (Paris: OECD, 1993) at 61-66. In Latin America there are already the Andean and Mercosur pacts and there was agreement in June 1994, amongst 19 countries to create a continent-wide free-trade zone. See "Latin American Nations To Pursue Free-Trade Zone" *Globe and Mail* (18 June 1994) B16.

[39] Much of the following argument is derived from J. Laxer, *Inventing Europe: The Rise of a New World Power* (Toronto: Lester Pub., 1991) at c.2.

The Second World War concluded with the division of Europe into communist and capitalist camps. The Americans were anxious to quickly rehabilitate West Germany in order that it become the main bulwark against communism, but Germany's neighbours did not look forward to revived German military and economic strength. France, Belgium, the Netherlands, and Luxembourg wanted Germany rehabilitated, not as a powerful independent state, but only in the context of federation and incorporation into West European institutions.[40] For their part, the defeated Germans and Italians needed a way to play an international role without arousing the fears of their neighbours. There was a confluence of interest in West European unity found in the American regime, in many of the victims of fascist aggression and in the new governments of the defeated Axis powers, centred around anti-communism and support for liberal democracy and capitalism.

West European unity first began as economic pacts in coal and steel and then broadened in the 1957 Treaty of Rome, establishing the European Economic Community with the aim of general economic integration. The idea was based on the optimistic notion that economic union would make war between member states impossible. While focussing on economic integration, the hope was that this would lead to political union, including military union. Political unification meant that citizens of one member country would have mobility and citizenship rights in other member countries.

The traditional concept of free trade animated the first phase of European economic integration.[41] Tariffs between member countries were removed in fewer than ten years. Labour mobility across borders was enhanced as well, but the goal was not only economic. For European federalists like Monnet, the freer movement of workers and goods were steps leading to the ultimate goal of European citizenship. National capital controls and trade in services remained mostly untouched in this phase. The 1970s and early 1980s saw little further economic integration but membership rose from the original six EEC countries to twelve.[42]

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40 S.E. Ambrose, *Rise to Globalism: American Foreign Policy Since 1938*, 5th rev. ed. (New York: Penguin Books, 1988) at 98-9.

41 Hine, *supra* note 10 at 4-6.

42 L. Schuknecht, *Trade Protection in the European Community* (Chur Switzerland: Harwood Academic Publishers, 1992) at 33.

The pace of integration quickened again from the mid-1980s with the Single European Act (1986) and then the Maastricht Treaty, implemented on January 1, 1993. Unlike the 1960s, a time of integration in which many reluctant corporations were dragged along, this time the hand of big business and neo-liberalism was apparent in the 'new issues:' financial deregulation, greater labour mobility, removal of non-tariff barriers, enhancement of corporate cross-border networking strategies and corporate mobility rights in services.[43] Having reached the limits of national mergers and consolidations, large corporations set their sights on European-scale integration. The European Business Roundtable was pivotal in shaping the 1985 White Paper which led to the Single European Act.[44]

Despite the influence of transnational corporations in defining the new issues and in tying them to European integration, the European Union is not wholly neo-liberal in its conception. The social charter, a recognized role for unions, the broadening of citizenship beyond exclusivist, ethnic-based nations, the Catholic Church's concept of subsidiarity, and the military alliance all ensure the strength of non-liberal elements in the overall design.

Monetary union and a single European currency were to be the crowning achievements of economic integration. The ECU was to replace all national currencies by 1999. That dream faded somewhat after currency crises struck in September 1992[45] and August 1993, when high German interest rates and massive speculation forced several countries to abandon the Exchange Rate Mechanism (ERM), which was meant to be transitional towards a single currency.[46] Britain and Denmark, the Eurosceptics, won exemptions from

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43 J.H. Dunning and P. Robson, "Multinational Corporate Integration and Regional Economic Integration" in J.H. Dunning and P. Robson, eds., *Multinationals and the European Community* (Oxford: Basil Blackwell, 1988).

44 A. Bressand, "The 1992 Breakthrough and the Global Economic Integration Agenda" in J. Story, ed., *The New Europe* (Oxford: Blackwell, 1993) at 315.

45 This crisis struck just before the French referendum on the Maastricht Treaty. Britain and Italy withdrew from the ERM. See C. Toulouse, "Europe After Maastricht: Into the Twilight Zone" (1993) 24 New Political Science 183.

46 "Why The Foot-Dragging by Europe's Banks?" *The International Herald Tribune* (18 August 1993) 6. The narrow band in which national currencies were supposed to float was widened from 2.5 per cent to 15 per cent. Many observers agreed that the relaxing of the grid of fixed parities meant the abandonment of the goal of a

joining the monetary union and were allowed to keep their own currencies. It is uncertain how many other members will be eligible to move to full economic and monetary union by 1999 because ten of the twelve EU members currently have government debts and deficits that are too high, or are forecast to become too high, to meet the convergence criteria[47] for joining the monetary union.

Bureaucratic, legal and political integration have proceeded apace. Since 1979 there have been popular elections of European Parliaments, but power has remained stubbornly in the hands of bureaucrats in Brussels, in the European Commission, and in those of the national member governments who together make up the European Council. Judges too have made their mark in the Court of Justice, in which European law takes precedence over national law. If Europe is in transition to becoming a country, it is being moved forward by elites and not by popular demand or popular revolution.

People perceive a lack of democratic control. Turnout in the 1994 European elections was the lowest yet and the election results were based generally on national rather than European issues. The idea of Europe becoming a country has not yet caught the public's imagination. A poll conducted in May 1994, by MORI for the newspaper, *The European*, showed that only 32 per cent of respondents favoured a federal Europe, with 49 per cent against.[48] Public disenchantment with the European Union dreams of the Eurocrats, the corporations and the politicians, was shown in France's razor-thin endorsement of the Maastricht Treaty in 1992, and in Denmark's rejection of the Treaty in the first of two referenda on the question.[49]

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single currency, at least for the short-run.

47 To join the European Monetary Union, the ratio of public debt to GDP must be 60 per cent or less and current deficits 3 per cent or less of GDP. In September 1994, the European Commission found that only Ireland and Luxembourg met these requirements. See *The European* (23-29 September 1994) 1.

48 From *The Economist*, excerpted in "It's Time to Ask: What is Europe For?" *Globe and Mail* (23 May 1994) A17.

49 After Danes turned down the Maastricht Treaty in June 1992, the government held a second referendum in May 1993, on a watered down version, allowing Denmark to opt out of the EU's common currency, defence and foreign policy.

Starting in 1991, four EFTA countries, Sweden, Norway, Austria and Finland, held talks on joining the European Union. With a population of about 25 million compared to the EU's 360 million, these countries had little negotiating leverage. It was largely a question of joining the EU on their terms or staying out. In referenda held between June and November 1994, Austrians, Finns and Swedes voted to join by margins of 66 per cent, 57 per cent and 52 per cent, respectively.[50] These countries will join the EU on January 1, 1995. Fifty two per cent of Norwegians[51] rejected entry. This was the second Norwegian "No" — the first was in 1972. The sequencing of the referenda was deliberate by the "Yes" forces, which ruled in all countries. Amongst the Nordics, it was hoped that victory in the more favourable country would lead to victory in the next, in a domino-like fashion. The strategy may have tipped the balance in Sweden's close result, but did not work on the Norwegians who, as the last to vote, were under the most pressure.

NAFTA evolved in a very different way from the European Union. Historical roots go back to two sources: the independence of European settler states in the Western Hemisphere from Europe and the goal of North American unity under American hegemony. The key events were the American and Mexican wars for independence, the Monroe Doctrine of 1823 and the animus toward 'Manifest Destiny,' first enunciated at the start of the U.S.-Mexican War in which Mexico lost much of its territory. Canada was the only major country in the Western Hemisphere to not make a revolutionary break from Europe, but it gained gradual political independence from Britain and at the same time fell under American influence.

"America is the country of the future," declared Ralph Waldo Emerson, "she should speak for the human race."[52] The idea that the extension of American influence represents the extension of freedom in the world dates

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[50] For Austria, "Parliament Vote: In Europe Shows Rightward Trend" *New York Times* (13 June 1994) A1. For Sweden, S. Svensson, "Swedes Vote Yes to Membership in the EU" (1994) 408 Current Sweden 1. For Finland, "Welfare Tops Finnish Agenda" *The European* (2-8 December 1994) 11.

[51] "Europe Split Over Norwegian Rejection" *Globe & Mail* (30 November 1994) A8.

[52] Excerpts of Emerson's "The Young American" in N.A. Graebner, ed., *Manifest Destiny* (Indianapolis: Bobbs-Merrill Company, 1968) at 8.

back to the American Revolution. The dream of an American-dominated continent emanates from that Revolution.[53] The Monroe Doctrine (1823) affirmed the United States as the dominant power in the Western Hemisphere. Although largely animated at the time by opposition to the Spanish and Portuguese recolonization of Latin America, the doctrine gradually came to be interpreted by later generations of American Presidents as the U.S. right to interfere in the internal affairs of other countries in the Western Hemisphere. Theodore Roosevelt went farthest in this regard when he added a corollary to the Monroe Doctrine by asserting the U.S. right to intervene forcibly in the affairs of Latin American nations whenever they engage in "chronic wrongdoing."[54] John L. O'Sullivan, the originator of the concept of American Manifest Destiny, suggested the prospect of U.S. expansionism to Canada when he declared that:[55]

> We are the nation of human progress ... It is the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the ... great experiment of liberty.

When the United States assumed the role of super power in the Second World War, it seemed that the Americans had gone on to grander visions than that of continental union. But after defeat in Vietnam and in the face of declining world influence in the mid-1970s, the spirit of nineteenth century American continentalism was revived through Ronald Reagan. Reagan began toying with the idea of a "North American Accord" and used the phrase in his opening campaign speech for the 1980 presidential election. As Lawrence Martin, who interviewed some of Reagan's key advisors, stated:[56]

> In [Reagan's] view, Providence had prescribed a singular role for the United States. It was the world's beacon of hope and freedom ... By virtue of its geographical placement, Canada, as Reagan saw it, was also blessed by Providence.

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53 W.A. Williams, *The Roots of the Modern American Empire: A Study of The Growth and Shaping of Social Consciousness in A Marketplace Society* (New York: Random House, 1969).

54 H.C. Vaughan, *The Monroe Doctrine, 1823* (New York: Franklin Watts, 1973) at 60. Teddy Roosevelt's corollary was repudiated in the late 1920s.

55 A. Schlesinger Jr., *The Age of Jackson* (Boston: Little Brown, 1945) at 427.

56 L. Martin, *Pledge of Allegiance: The Americanization of Canada in the Mulroney Years* (Toronto: McClelland and Stewart, 1993) at 7.

Reagan never waivered from the view that Canada was "part of the family."[57]

In 1980, the governments of Canada and Mexico would not embrace Reagan's North American Accord. As the only countries in the western hemisphere to resist the American-led embargo of Cuba, Canada and Mexico had long traditions of curbing the influence of their dominant U.S. neighbour. Canada's National Policy and British ties were early attempts at keeping the American influence at bay. In the 1970s and early 1980s, economic and cultural nationalist policies were embodied in the Foreign Investment Review Agency (FIRA), the National Energy Program, and varieties of Canadian media content and ownership legislation.[58]

Lacking a powerful European ally to offset the pull of the United States, Mexico had put in place much stronger policies to ensure its economic and cultural independence. The Mexican Revolution of 1910 to 1917 was a peasant revolution with strong anti-American overtones. Lazaro Cardenas (1934-1940) took Mexico on a nationalist-populist path that he described as neither socialist nor capitalist,[59] with similarities to the 'middle road' that Sweden was said to be traversing at the same time. Cardenas nationalised the oil industry in 1938 and subsequent Presidents continued along his path with strict regulation of the U.S. automobile industry in the 1950s and 1960s, restrictions on foreign investment in 1973 (the same year as Canada's FIRA), and the nationalisation of the banking system in 1982.[60]

It did not seem that the other members of Reagan's "family" wanted such a close continental embrace. Nor did Reagan's advisors, who were aware of the national sensitivities of their neighbouring countries, see much future in continental integration. But within a few years, economic and political elites in Canada and Mexico were embarked on a program of full scale neo-liberalism, the dismantling of long-standing policies aimed at economic and

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57 *Ibid.* at 10.

58 *Supra* note 7.

59 J. Cypher, *State and Capital in Mexico: Development Policy Since 1940* (Boulder: Westview Press, 1990) at 17.

60 D.E. Davis, "Mexico's New Politics: Changing Perspectives on Free Trade" (1992) 9 World Policy J. 655.

cultural independence, and 'trade' negotiations with the U.S.

Whereas earlier U.S. expansionism in the name of freedom resonated deeply with American popular culture, the recent initiatives to continental economic union did not have a popular base. Indeed, ordinary Americans opined that the Canada-U.S. Free Trade Agreement was the second most boring news story of 1988.

The initiative for the FTA, and then for NAFTA, came from several sources in all three countries. In the United States, the service sector of the transnationals, led by American Express and later also by the Intellectual Property Committee, wanted to put their issues on the world agenda. These included: 1) removing countries' investment restrictions that, among other things, curbed trade in services, and 2) getting recognition for extended patent monopolies on intellectual property that had nothing to do with trade, but could be piggy-backed onto trade talks. These concerns complemented those of United States officials, who were faced with record balance of payments problems by the mid-1980s. U.S. industries had become uncompetitive and the U.S. suffered large trade imbalances in goods traded with Japan and the Pacific Rim.[61] These officials became convinced that the American forte lay in services. As well, U.S. direct investments abroad helped substantially to reduce U.S. trade deficits by producing favourable balances in the 'invisibles' account.

The U.S. wanted the General Agreement on Tariffs and Trade (GATT) to open up the world to the American services and corporate investment advantages. But the GATT covered only trade in goods, not in services, and too many countries resisted removing curbs on foreign corporations. U.S. negotiators made little headway in the multilateral talks, but they realized they had much more clout bilaterally with countries that were dependent on them. Bilateral agreements would demonstrate the kinds of changes the U.S. wanted at the main show — the multilateral talks. If the U.S. could not get a global deal, they would, as U.S. Trade Representative William Brock put it, "get an agreement here and an agreement there, and pretty soon you're going to free up the whole world."[62]

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61 *Supra* note 13 at 9.

62 McQuaig, *supra* note 15 at 128.

While they were playing the bilateral card, there was one regional issue that stood out for the Americans. That issue was a secure supply of oil, one of the driving forces behind U.S. foreign policy. Canada and Mexico were net exporters of energy and the U.S. had long wanted a continental energy deal where they had ready access, even in times of shortages, to their neighbours' supplies. Bilateral deals were a good opportunity to overcome Canadian and Mexican strong nationalist feelings about maintaining control over their own resources.

When the U.S. wanted a bilateral deal with Canada, Canada was ready to negotiate, even though the issues each country wished to discuss did not overlap at all. Canada's priorities were freer trade in the older sense — secure and enhanced access to the American market. American priorities focussed on corporate rights and energy security. Americans wanted to ensure that economic sovereignist policies, such as those embodied in Canada's Foreign Investment Review Agency and the National Energy Program, would not occur again.[63]

The U.S. had a great advantage when it came to influencing Canada. Canada's National Policy, while curbing manufactured imports from the U.S., had not kept out their transnationals and these had become a powerful internal force in Canada.[64] The main Canadian initiative for the FTA came from the Business Council on National Issues (BCNI), representing 160 of the largest corporations in Canada, thirty per cent of which were foreign-controlled firms.[65] Since the majority of trade between Canada and the U.S. was intracorporate transfers, the border was a nuisance to American and Canadian transnationals. The BCNI had little difficulty persuading the new Conservative government of Brian Mulroney (1984-1993) of the benefits of a 'trade' deal with the U.S. The Conservatives had traditionally been the anti-free trade party, favouring Canadian independence vis-a-vis the United States, but had been transformed by the 1980s into a neo-liberal party along the lines of Thatcher's Tories in Britain. With a background as the manager of a U.S.

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63 *Supra* note 21 at 283-4.

64 G. Grant, *Lament for a Nation* (Toronto: McClelland and Stewart, 1965) at 40-41; G. Laxer, *Open for Business: The Roots of Foreign Ownership in Canada* (Toronto: Oxford University Press, 1989).

65 M. Hurtig, *The Betrayal of Canada*, rev. ed. (Toronto: Stoddart, 1992) at 198.

owned mining company in Canada, Mulroney turned out to be the most pro-American prime minister in Canadian history.[66] His government was ready to give up much Canadian sovereignty in the name of economic gain.

Mexico's transformation was even more startling. The long governing PRI had been a nationalist-populist party, keeping the Americans at bay, rejecting membership in the GATT as recently as 1980, and nationalizing the banks in 1982. The party alliance incorporated labour, peasants, 'popular middle classes' and smaller, domestic-market industrialists, with labour the most influential element. The compromise between national business, labour, and the state was labour peace in return for progressive social and wage policies, underwritten by state subsidies to, and protection for, national businesses.[67]

Mexico was not as closed to U.S. corporations as nationalist rhetoric would suggest. The Maquiladora program was established in 1965 as a form of export processing zone for U.S. firms in which machinery, vehicles and parts were imported to Mexico duty free for assembly and returned to the U.S. duty free. Mexico taxed only the 'value added,' the low Mexican wages.[68]

Mexico's rapid reversal of its economic nationalist policies was related to the crash in oil prices, the 1982 debt crisis and the weakening of labour within the governing PRI alliance. The traditional understanding between smaller Mexican industrialists (CANACINTRA) and labour was underwritten by state protectionism, subsidies and parastatal companies. The strategy began to unravel in the early 1970's when Mexican uncompetitiveness and foreign borrowing threatened devaluation and an International Monetary Fund stabilization program. Mexico escaped this fate temporarily as a result of the late 1970s oil boom, which facilitated even more foreign borrowing. The oil price crash which began in 1981 led to the suspension of debt repayments in 1982, peso devaluations, inflation and a 39 per cent reduction in real wages by 1983.[69] Wages fell as a proportion of total national income from 39.4 per

66 *Supra* note 56 at 11-19.

67 *Supra* note 60 at 667.

68 K. Kopinak, "The Maquiladorization of the Mexican Economy" in R. Grinspun and M.A. Cameron, eds., *The Political Economy of North American Free Trade* (London: MacMillan Press, 1993) at 141.

69 *Supra* note 60 at 658-663.

cent in 1980 to an astonishingly low 27.8 per cent in 1989 — compared to labour's 75 per cent share of total income in Canada.[70]

Rapidly deteriorating economic conditions hurt the ability of the government-linked union central, the CTM, to call strikes or guarantee wage increases. The CTM was under attack in any case by independent unions for its 'bossism.' The internecine wars between unions weakened labour altogether. By the late 1980s, the government routinely repudiated labour's strike actions and failed to negotiate with labour leadership when there were strikes.[71] Although labour opposed neo-liberalism and NAFTA, it was no longer central to the governing party alliance. Large business replaced small Mexican business as the dominant business voice in the PRI and the state bureaucracy became more independent of the party. The internal conditions were set for a 180 degree policy change that sent Mexico towards neo-liberalism, continental economic integration and American domination.

Unlike the European Union, NAFTA explicitly is only about continental economic integration. Political and social integration are not part of the Agreement. This makes it more like the European Economic Space Agreement to which Sweden was a party before deciding on European membership.[72] However, there are crucial differences with NAFTA. Unlike the EES, NAFTA allows each partner, in practice mainly the United States, to use its full range of non-tariff barriers to block the free importation of goods from the other partners. As well, NAFTA confirms that the U.S. has full access to Canada's energy supplies, even in event of shortages. Although NAFTA is not explicitly about political integration, it has major political and national identity implications for its two junior partners.

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70 A. Alvarez and G. Mendoza, "Mexico: Neo-Liberal Disaster Zone" in J. Sinclair, ed., *Crossing the Line: Canada and Free Trade with Mexico* (Vancouver: New Star Books, 1992) at 26-7.

71 *Supra* note 60 at 661.

72 I would like to thank Lennart Erixon for pointing out the similarities between the EES and NAFTA.

Swedish and Canadian Debates

The 'Swedish Model'[73] of an advanced welfare state, strong unions and corporatist arrangements was built on the purest class politics in Western experience. Left and right define most issues and class position is a good predictor of left or right orientation. In Sweden, unlike other countries, there have been few non-class poles around which public opinion divides.[74] Canada is at the opposite end in this regard. Class cleavages are usually less salient than divisions around Québec/Rest-of-Canada issues, ethnicity, religion, region and urban/rural splits.[75] These generalizations about Swedish and Canadian political traditions, however, are reversed on the issue of continental integration. For Swedes, joining the European Union was not a clear left or right issue, whereas for Canadians continental integration was.

Swedish entry into the European Union appears, at first glance, to be more complicated than the FTA and NAFTA. For Sweden, the European Union represents not just further economic integration, but also, more centrally, peace and security questions. As well, the European Union has political and social dimensions that Social Democratic enthusiasts of the EU point to as countervailing forces to the neo-liberal aspects of economic integration that favour business and transnational corporations. These issues — peace and a political and social Europe — ensure that Swedish entry into the European Union is not a straight right or left question.[76]

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[73] There is a broad literature on what constitutes the 'Swedish Model.' For a start see H. Milner, *Sweden: Social Democracy in Practice* (Oxford: Oxford University Press, 1990) and L. Mjset, "The Nordic Model Never Existed, But Does it Have a Future?" (1992) 64 Scandinavian Studies 652. Non-Swedes are more likely to believe that such a model exists than are Swedes.

[74] H. Bergström, "Sweden's Politics and Party System at the Crossroads" (1991) 14 West European Politics 8.

[75] A. Kornberg *et al*, "Determinants of provincial Voting Behaviour" in P.W. Fox and G. White, eds., *Politics: Canada* 6th ed. (Toronto: McGraw-Hill Ryerson, 1987) at 436-7. For a perspective that emphasizes the importance of class, see R. Brym, M. Gillespie and R. Lenton "Class Power, Class Mobilization, and Class Voting: The Canadian Case" (1989) 14 Can. J. of Sociology 25.

[76] See for example the draft statement of the Swedish Social Democrats "Preparing the EC membership negotiations: Standing Up for What Sweden Can Bring to the New Europe" *Stockholm* (21 August 1992).

On the other hand, in the Canadian debates about the FTA and about NAFTA, divisions clearly were on right or left lines. In the U.S., opposition to NAFTA came from both the left and the right. There has never been a Canadian federal election where voters were divided so strongly on a class and gender basis as in the 1988 "free-trade election."[77]

Since the main issues regarding 'free trade' centre on the diminution of governmental powers and the creation of citizen-like rights for transnational corporations, it is not surprising that issues concerning class and gender inequalities came to the fore. Continental political union and security questions did not figure in the debates at all. No one proposed political union in North America because the overwhelming power and influence of the United States precludes a federal or confederal union of counterbalancing nations and cultures in North America. Political union would mean an enlarged United States absorbing its smaller neighbours (on a population basis) into its ethos, not a genuine United States of North America. For Canada, political union implies the eventual disappearance of the distinctive features of its largest entity, that of English-speaking Canada.[78]

While the trade agreements do not foresee formal political union, they do have political implications. They remove much of the sovereignty of federal and provincial governments in Canada.[79] The political right in Canada supports the loss of Canadian sovereignty since it wants to reduce the interventionist role of government. The left abhors the loss of sovereignty precisely for this reason. Security or neutrality is not in question either. Canada is a junior military partner of the United States, with little possibility of being anything else. The chances of war between the two countries are remote.

Continental integration is more unidimensionally economic in Canada than in Sweden. But economic integration is a much broader issue in Canada than it first appears to be because it suggests, to many Canadians, the

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77 G. Laxer, "Constitutional Crises and Continentalism: Twin Threats to Canada's Continued Existence" (1992) 17 Can. J. of Sociology 199.

78 *Ibid.*

79 B. Ages *et al.*, *Which Way for the Americas* (Ottawa: Canadian Centre for Policy Alternatives, 1992) at 130.

disappearance of their country. In contrast, even the fiercest Swedish opponents of European Union did not argue that Sweden would disappear as a national and cultural entity if it joined the European Union.

Opposition to Swedish Entry

For a country known for its phlegmatic, undemonstrative character, the Swedish debate on entry into the European Union has been surprisingly passionate. Sweden's amazing economic success, record low unemployment, and very generous provision of social services seem to be things of the past. So too, it appears, are Sweden's famed consensus and cooperation between ideological adversaries. Signs of elite accommodation are still evident, not least around the European Union question, but strong divisions have been opening up in Swedish society since the 1980s as it faces a parting of the ways in a time of economic crisis.[80]

Regarding entry into the European Union, the elites were almost unanimously in favour, but were able to persuade only 52 per cent of voters in the November 13, 1994 referendum on the question. After a massive media campaign for the "Yes" side, threats of disinvestment and pleas of "trust us, we are your leaders," why did almost half the people vote against entry into the European Union?

A serious rift has opened in the governing Social Democratic Party and in the unions, between most of the leaders who were on the "Yes" side and many of their supporters who were on the "No" side. The question arises as to who best represents the soul of Sweden's proud Social Democratic tradition. There is division also in the Centre, formerly Farmer, Party. It will be interesting to observe whether elite accommodation can continue to hold or whether the loose opposition alliance that emerged around "No to European Union" will lead to a new political alignment, as occurred in Denmark and Norway in the 1970's.

I observed the Swedish referendum debates as an accredited foreign journalist and conducted a total of twenty-five interviews mainly in the

[80] W. Clement, "Exploring the Limits of Social Democracy: Regime Change in Sweden" (1994) 44 Studies in Political Economy 95.

Stockholm area in June 1993, and after the referendum in November 1994.[81] As an outsider, the most surprising thing I found was the similarity of arguments used by each side. Supporters of Swedish entry argued that for reasons of internationalism, cooperation, peace, democracy, the good of the economy and the environment, Sweden should join the European Union. Opponents used similar arguments to arrive at the opposite conclusion. The values of equality, thorough-going democracy and employment for all, were still thought to be dominant in Sweden and so each side claimed their solution as the best way to achieve these goals.

The impetus for Sweden to join the European Union came from Swedish big business and the main right-wing parties on the one hand and from the Social Democrats and most union leaders on the other.

Because the political right has been divided between three, and recently five, parties, the powerful employers' association, the SAF, has increasingly articulated a right-wing alternative to the unions and to the Social Democrats. They have been especially active in influencing the education system.[82] Since the 1970s, the SAF has favoured Swedish entry into the European Community.

The political influence of the SAF and big corporations acting individually, has been obscured, especially for foreign observers, by the outpouring of literature on the 'Swedish Model' and by the optimism of 'labour movement theory' (or alternatively the 'balance of power theory'). The latter focusses on how the power of the left has modified the Swedish political economy and has transformative potential to move towards socialism and economic democracy.[83] This literature has much to commend it, but its one-sided focus on the influence of unions and the left can give the false impression of weakness on the part of Swedish capitalists.

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81 For a complete list of interviewees see the Appendix.

82 Interview with Christian Bratt (1993).

83 W. Korpi, *The Democratic Class Struggle* (London: Roulledge and Kegan Paul, 1983); G. Esping-Andersen, *Politics Against Markets: The Social Democratic Road to Power* (Princeton: Princeton University Press, 1985).

Sweden has, on a per capita basis, the most transnational corporations in the world. Most of the major ones are linked by four main ownership groups: the Wallenberg empire, Volvo, Skanska and the Industrivarden-Svenska Handelsbanken groups.[84] Although it combines small and large businesses under the same umbrella, the SAF represents and is controlled by Sweden's large transnational corporations.[85]

The radicalization of Sweden's trade unions in the 1970s, centred around codetermination at work and wage-earner funds that would incrementally socialize capital, led to a counter offensive by the SAF that is still continuing.[86] From the 1920s to the 1970s, there had been divisions between home-market based businesses and export-oriented ones in their strategies of dealing with Social Democratic governments and the unions. Home-based businesses tended to work with the left in the Swedish version of the great compromise while export-oriented businesses tended to be more truculent.[87] These divisions have disappeared as Swedish corporations moved their investments outside of Sweden, initiating numerous mergers and cross-ownerships, giving Sweden one of the most concentrated capitalist classes in the world. By 1986, the seventeen largest Swedish firms with foreign subsidiaries maintained over half their total employment and almost half of their assets abroad.[88] Direct foreign investment by Swedish transnationals since 1986 has been massive, strengthening this trend.

Inside Sweden, the SAF ended the long-standing tradition of centralized bargaining with the LO, the largest (mainly blue collar) union federation (1990) and withdrew nominations to state decision-making bodies, thus ending all corporatist arrangements (1991).[89] Externally the strategy has been to

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84 G. Olsen, "Labour Mobilization and The Strength of Capital: The Rise and Stall of Economic Democracy in Sweden" in W. Clement and R. Mahon, eds., *Swedish Social Democracy* (Toronto: Canadian Scholars' Press, 1994) at 202.

85 J. Fulcher, *Labour Movements, Employers and the State* (Oxford: Clarendon Press, 1991) at 285-6.

86 *Supra* note 80 at 104-8.

87 G. Olsen, *The Struggle for Economic Democracy in Sweden* (Aldershot: Avebury, 1992) at 53-5; J. Pontusson, *The Limits of Social Democracy* (Ithaca: Cornell University Press, 1992) at 38-9.

88 *Supra* note 84 at 202-5.

89 *Supra* note 80 at 104.

escape the power of Swedish unions and Social Democratic governments altogether by leaving Sweden or to use the threat of leaving to bring electorates and governments to heel.[90] The major Swedish corporations were escaping Sweden for business reasons anyways, but the increased leverage that economic blackmail could bring helped to push the Social Democrats towards neo-liberal policies. By 1991, after nine years of Social Democratic rule, Sweden had the lowest corporate tax rate of all OECD countries.[91]

In the SAF's external strategy to move towards neo-liberalism, integration into the European Union is central. The new concept of free trade as corporate mobility, that animated the European Community from the mid-1980s, helped Swedish corporations escape the power of Sweden's unions and left-oriented voters. To fulfil conditions for entry into the European Economic Space Agreement, in 1989 the Swedish Social Democratic government completed the financial deregulations begun in 1974 and accelerated in 1985, sweeping away some of the world's toughest anti-foreign ownership regulations and restrictions on the outflow of capital.[92] The 1989 financial deregulation took place in the context of major Swedish tax reform and an overheated economy. The result was that Sweden's small coterie of major transnationals abandoned Sweden. With only 8.5 million people, Sweden became the largest foreign investor in the EC in 1990, the following year.[93] As stated by Christian Bratt of the SAF, "big companies don't want to be restricted to nation states any more."[94]

For different reasons, the Social Democratic and union leadership

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90 Just before the 1994 Swedish general elections, four core corporations warned the imminently victorious Social Democrats that they would not go ahead with plans for 50 billion kronor in investments in Sweden in the next five years if income taxes were raised. The four were Volvo, L.M. Ericsson, Stora Kopparberg and ABB Brown Boveri. See "Swedish CEO's Threaten to Pull Out Investment" *Globe and Mail* (13 September 1994) B8. General threats of pulling out of Sweden were alluded to in television debates and by managers in factories before the November 13, 1994 referendum on EU membership.

91 *Supra* note 80 at 122.

92 *Supra* note 87 at 68-9.

93 Stena, Svenska Cellulosa, Stora Kopparberg and Nobel Industries all made major purchases of British and German corporations. Olsen, *supra* note 84 at 217.

94 *Supra* note 82.

abandoned a Swedish-centred solution. Their social bases of support and unity weakened as divisions opened up between private and public sector workers, between blue and white collar workers, and as a result of 'wage drift' following the decentralization of wage negotiations.[95] The Social Democrats had already lost the policy initiative to the right on wage-earner funds in the early 1980s and on neo-liberal issues in the late 1980s. Currency controls were abandoned, taxes were no longer used to redistribute income and inflation was declared a greater economic problem than unemployment. The Social Democrats had lost their way and plummeted in the polls.[96]

Amidst these Social Democratic travails, communism collapsed in Eastern Europe, removing the Social Democrats' major objection to European entry. With the end of the Cold War, Swedish neutrality became less relevant and the prospects of joining the European Community with its common defence policy, less alarming.[97]

By the late 1980s Europe was economically dynamic again, having overcome a decade of 'Eurosclerosis.' With the flight of Swedish capital during this period, Social Democratic and union leaders concluded that economic integration with Europe was inevitable and that continental corporate power could be countered only by the development of a European-wide civil society, to which they felt they could contribute. Democratic control could be re-established, in their view, only in conjunction with other social and political movements in Europe.[98] Prospects for this seemed good as Social Democrats such as Jacques Delors and Francois Mitterand appeared to be leading the EC towards a 'social' Europe.

The combination of big business, Sweden's powerful trade unions, the major right parties and the dominant, and once again governing party, the Social Democrats, was formidable. Against such powerful arguments and

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95 *Supra* note 85 at 295; Ahrne and Clement, *supra* note 7 at 471.

96 K. Åmark, "Afterword: Swedish Social Democracy on a Historical Threshold" in K. Misgeld *et al.*, eds., *Creating Social Democracy* (University Park: Pennsylvania State University Press, 1992) at 429-432.

97 A.W. Johansson and T. Norman, "Sweden's Security and World Peace: Social Democracy and Foreign Policy" in K. Misgeld *et al.*, *ibid.* at 371-2.

98 D. Apter, *The Politics of European Integration in the Twentieth Century* (Dartmouth: Cambridge University Press, 1993) at 224.

forces, how could European membership be opposed? In fact, opposition was broadly based and the arguments against Swedish entry were compelling.

In contrast to Canada, where the debate has been between left and right, the debate in Sweden has been mainly within the left. Led by the Moderate (Conservative) and Liberal Parties, most of the Swedish right solidly favoured Swedish entry.[99] These parties were able to mobilize over 80 per cent of their supporters for the "Yes" side.[100] The leadership of the small, socially conservative Christian Democratic Party favoured EU entry but their supporters were evenly split in the referendum. The Centre, formerly the Farmers' Party, was divided, although like the Social Democrats, the party formally supported entry. Only the small Left, formerly the Communist Party and the still smaller Greens, were officially opposed. Both parties made significant gains in the 1994 election by making opposition to joining the EU their major planks.[101]

1993 to 1994 were not good years for the "Yes" side in Sweden. The surprising confluence of positive events, which led to consensus regarding Swedish entry into the EU in 1989 and 1990, turned sour. The end of the Cold War led to European instability and wars, not to peace. Europe was also in economic doldrums with unemployment levels in the double digits. There has never been a popular demonstration in favour of shifting power to Brussels or to the European Parliament and popular reaction against the European Union is widespread within member countries. For many Swedes, the European Union looked again like an unattractive option.

The strongest arguments against Swedish entry revolved around the loss of democratic control and Swedish sovereignty, a reversal in equality gains for

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99 One Moderate member of the Riksdag who opposed EU membership was dropped from the Party list for the 1994 general election.

100 A widely cited voters' exit poll published in *Dagens Nyheter* (14 November 1994) A7 exaggerated support for the "Yes" side by 5 per centage points compared to the referendum results. Its figures must be treated with caution, but at least they indicate which groups favoured and opposed EU membership and they provide orders of magnitude.

101 The Left Party went from 16 to 22 seats while the Greens re-entered the Riksdag after a three year absence, with 18 seats. See *Swedish News*, Swedish Information Service (19 September 1994).

women, and a reduction in economic sovereignty to pursue fuller employment policies. There also were suspicions about the creation of a European superpower with unenlightened policies towards the Third World and Eastern Europe. Because of Sweden's long history as an independent power, not having been conquered for over four and a half centuries, the Swedes simply assume national independence. But the "No" side gained much support by stressing the loss of Sweden's sovereignty to make its own policies once inside the EU.

Swedes are confident of their national identity so that fears of national extinction, of the sort expressed in English-speaking Canada, are not strongly echoed. But they are not entirely absent either and manifest themselves within the discourse about democracy and bureaucratic Brussels. They also emerged around a number of concrete issues such as concerns that Europeans living in crowded countries will buy up Sweden's modestly-priced recreation properties and will abuse the ancient tradition of *allemensrätten,* in which the public has access to private lands.[102] There also were concerns that Sweden's advanced regulations on food quality, the environment, preventing cruelty to animals, and liquor policies to inhibit alcoholism would be lowered.

More importantly, there are suspicions that the dominant Catholic population of the EU will impose innumerable rules, which for the Catholics merely are goals that can be ignored and for which they will receive priestly absolution, but that the Protestant Swedes will oppose and hate, yet will follow to the letter.[103] The Danish government, for example, has opposed European regulations more often than other nations, but ordinary Danes follow the rules more strictly than any other people as it is part of the Nordic culture to follow the rules. Expressed by all sides, these fears are an indication of national identity jitters. Finally, the annual cost of belonging to Europe is not insignificant and provides another reason to oppose Swedish entry.

If the European Union with its undemocratic constitution were a country, it would not be allowed to become a member of the EU. This statement is

[102] The Danes negotiated harder on these issues and won protections in contrast to the terms Ulf Dinkelspiel of the Moderate Party, agreed to for Sweden.

[103] Several interviewees referred to this argument which first appeared in *Dagens Nyheter*.

repeated by opponents of Swedish entry. The case that the EU is not democratic and will not become democratic is strong. The economistic phrase 'democratic deficit' does not begin to capture the depths of the problem.

The elected European Parliament is not very powerful and will not become powerful except at the expense of the Council of Ministers, representing the sovereign governments of each member state. Democracy at the European-wide level thus can come only through the full creation of a federated United States of Europe to which individual nations cede their sovereignty. (The 'fast speed' countries of Germany, France and Benelux are the strongest supporters of a fully federated Europe). Thus, national sovereignty and a democratic European political system are incompatible. Few supporters of the European Union in Sweden support federation of this sort. The SAF opposes it. They want democracy to be restricted to local matters while the economy, and with it questions of equality and inequality, is disengaged from democratic political control. The economy should be conducted at a European-wide level, while democratic politics remains at the local and national levels, according to an SAF spokesman.[104] Enough right-wing governments can always use their veto at the Council of Ministers to block the movement to genuine democracy at the European level.

Let us consider what would happen if democratic forms somehow triumphed within European Union institutions. Could a European civil society congeal to the point where real democracy made itself felt, regulated corporations, and provided for people's needs not met by the market? This is the hope of Social Democratic supporters of Swedish entry. To an English-speaking Canadian who has long observed popular movements, trade unions, and the New Democratic Party experience major difficulties crossing into Québec, it seems a wildly optimistic scenario. Swedish trade unions, which represent almost 90 per cent of all wage earners, do not have counterparts in France, which has a 12 per cent union membership level.[105] Who are their French counterparts with which to build a coordinated union strategy?[106]

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[104] *Supra* note 82.

[105] United Nations, *Human Development Report 1993* (New York: Oxford University Press, 1993). The unionization level was for 1989-90.

[106] Interview with Rudolf Meidner (1993).

Swedish feminists are likely to part company over the abortion issue with feminist nuns in Italy or Ireland.

Democratic traditions and movements are national and local. Labour is largely immobile, not least in Europe, and for the most part does not want to be mobile. Most people want to live in their home communities and home has a definite place. The left's strength depends upon support from immobile wage earners and from locally-rooted people's movements. The right can more easily unite cross-nationally around the common goal of profit making, for which cultural differences matter little.

Because of differences in language, culture, and deeply imbedded historical traditions, there is no common public debate in Europe. There is not a common media to act as watchdogs over the politicians.[107] Can a democratic European politics develop without these fundamental elements? There are grounds for scepticism. More likely, the European Union will remain undemocratic. Sovereign, democratic countries will have given up control over basic economic policies and so also over much of the social policy sector so that, amongst other things, transnational corporations can operate on a European level with few impediments from ornery citizens and democratic institutions.

Sweden's constitution stated that Swedish decision-making could only in a very limited sense be given to international organizations for peaceful purposes. But to enter the EU, Sweden had to change its constitution and state that European law supersedes Swedish law.[108] According to Per Gahrton, a Green member of the *Riksdag*, 80,000 pages of Swedish laws and regulation had to be changed.[109]

Democratic traditions are different in Sweden than in the EU. Power is more local, from the bottom up, less bureaucratic and less based on judicial interpretation. Many Swedes worry that these traditions will be erased. Swedish membership in the EU would mean not only the removal of power to a much larger and more distant centre but also the diminution of a

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[107] Interview with Per Gahrton (1993).

[108] Interview with Kennet Kvist.

[109] *Supra* note 107.

Parliamentary role. The European Council of Ministers represent governments, not Parliaments, and except for the Danish delegation, does not include opposition members. For opponents to Swedish entry into the European Union, the European Economic Space Agreement was an alternative to membership in the European Union. The EES allowed Sweden to gain the economic benefits of closer ties with Europe while avoiding the loss of democracy and sovereignty.

Swedish women have made equality gains far in excess of their sisters in the European Union and many feared that these would be reversed. Sweden's large public sector was crucial to the emancipation of women in two ways. Its expansion provided paid employment for women who make up over three quarters of its workforce and generous public services supported the raising of their children. A leading feminist commented that Swedish women are now more dependent on the state than on men,[110] but that this might change with the European Union. The EU envisages a common European currency in which the dominant German Bundesbank's tough anti-inflation policies would require a scaling back of the public sector. Many Swedish women feared that entry into the EU would contribute to a reversion to the housewife role that 80 per cent of their German counterparts currently occupy. Margareta Winberg, one of the two female Social Democratic cabinet ministers on the "No" side, summed up the feminist opposition in a leaflet entitled "For Women's rights, work and economic independence, vote No."[111]

The idea that Swedish membership would add to the movement toward European peace and security is dismissed by opponents. The European Union, they point out, may be important to help the French and the Germans avoid the wars of the past, but the Swedes have not been involved in these European conflicts for almost two hundred years. Even supporters of Swedish entry concede that the Swedish addition to the EU will not contribute significantly to European peace. But people like Gudmund Larsson, who chairs the LO's EEC committee, argue that post Cold-War Europe is more dangerous for

[110] Lena Ag of the Social Democratic women's organization as quoted in *Edmonton Journal* (23 April 1993) D3.

[111] Published by *Socialdemokratisk Europainformation* (4 November 1994).

Swedes than it was during the Cold War. For its own security then, Sweden needs to belong to a wider security system.[112]

Birgitta Hambraeus, Centre Party member of the *Riksdag*, and a spokesperson for "Network: Centre Party No to the EU" contends that Scandinavian history demonstrates that disunion, not union, leads to peace. Finnish-Swedish and Norwegian-Swedish relations improved greatly once Finland and Norway gained freedom from Swedish domination:[113]

> As long as you are of different strengths ... countries, cultures, language groups ... then it's very dangerous to make a union, because the people who are in the minority would feel suppressed.

The "No" side are concerned that the European Union will develop into a superpower and begin to imagine "enemies." Per Gahrton (Greens) sees the EU as a West European project that will exclude Eastern Europe for decades and perhaps trigger, at least in part, rival blocs of Turkish-speaking peoples and a Muslim bloc. Hambraeus is worried that a European super bloc will start to conceive of "interests" it has to defend:[114]

> Just as I don't think at all that the United States has a right to have interests with Arab oil. I mean this is pure colonialism, isn't it? Why should Europe have interests?

Because it was not a member of NATO and did not have to follow the American Cold War line, Sweden, under Olof Palme, was able to develop an independent foreign policy that was internationalist and pro-Third World. The trade unions were strong exponents of this policy. The "No" side pointed out that Swedish membership in the EU includes accepting Europe's common defence and foreign policies and discourages an independent position vis-à-vis the Third World. Furthermore, Sweden has to contribute 1.3 per cent or more[115] of its GNP (on a gross basis) for EU membership, largely as a contribution to the Mediterranean countries and to antiquated farming in Spain

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[112] Interview with Gudmund Larsson (1993).

[113] Interview with Birgitta Hambraeus (1993).

[114] *Ibid.*

[115] Opponents argued that in addition to the annual 20 million kronor contribution, Sweden would have to forego up to 30 million kronor in taxes now collected, as part of the harmonization process. Televised referendum debate Nov. 11, 1994.

and Portugal. The annual EU membership payment comes in the context of a major revenue crisis in Sweden and discourages it from giving an equivalent amount to poor Third World countries such as Somalia.

A major reason for opposing Swedish entry was weakened when prospects for a European Monetary System diminished. Amongst leading opponents, though perhaps not amongst ordinary citizens, the European Monetary System (EMS) and the eventual adoption of a single currency were powerful reasons to oppose European entry. After the EU referendum, "No" side leaders were calling for a second referendum on Sweden's inclusion into the EMS. The five inner countries of Europe assume that monetary union must precede or accompany political union. For Rudolf Meidner, who supports the EU on grounds of its promotion of peace, the European Monetary System was his strongest reason for opposition to Swedish entry:[116]

> What are the criteria for entry into the monetary union? Budget deficits, governmental debt, price stability, interest rates and stability of currencies. Not a word about unemployment ... All hopes that Sweden can regain full employment as a consequence of EC membership are totally futile.

Now plans for a unified currency are in difficulty.

After applying for membership in the European Community in 1990, fewer than 20 per cent of Swedes were opposed. But in the next two years, massive educational campaigns by the "No" side turned the majority against entry into the Union. The opposition was led by the Left Party and the Greens, along with feminists and dissident leaders amongst the Social Democratic Party, the Centre Party and Christian-Democrats. They persuaded the young, especially first time voters, women and rural voters.

In the referendum, the Social Democratic and union leaders were opposed by core supporters. By a two to one margin, blue collar workers voted "No," as did a majority of women (58 per cent) and voters who identified themselves as left-wing (over 57 per cent).[117] After the referendum, many

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[116] *Supra* note 106.

[117] The first two figures were cited in *Swedish Press Review* (14 November 1994) early edition at 2. The last figure comes from the exit poll cited above and underestimates the extent of "No" support.

on the left were bitter. "[Prime Minister] Carlsson's victory was over the workers in his own Party, like that of Ramsay Macdonald," remarked Nordal Åkerman, a noted author and historian. Several called the Social Democrats a "Stalinist Party" because there has always been a cult of the leader. Dissent is not respected and the careers of dissenters are blocked, they said. Yet Carlsson brought two feminist "No" leaders into cabinet, allowed them to campaign for "No" and retained them in cabinet after the referendum.

Some left Social Democrats are currently attracted to the Left Party that played such a central role in the "No" coalition. Three days after their referendum defeat, the Left Party headquarters seemed anything but defeated. For the first time since the Cold War, a much broader public was listening to them. Activists on the "No" coalition from the Left, Greens, Social Democrats and Centre Party have worked with, and now trust, each other. There is a potential for a political realignment and the emergence of an anti-European Union Party, as has developed in Denmark.

On the other hand, the Social Democratic and union leaders are very adept at cooptation. Immediately after the referendum, Agneta Stark, a "No" leader, was brought on as an advisor to Sweden's EU delegation on equality issues. The Social Democrats, 14 seats short of a majority, have relied on support from the Left Party rather than from the centre-right Liberal Party. Carlsson may continue to tie the Left Party into a working coalition to prevent disillusioned left Social Democrats from drifting into a Left Party-led oppositionist movement.[118]

Overall, the arguments against Swedish entry were persuasive for almost half the population. They attracted the same kind of support as did the "No's" in Norway but ended up several points below the 50 per cent mark rather than several points above it. The Norwegian "No" movement had several advantages over their Swedish counterparts. They had a major party, the Centre Party, onside. As well, they had buoyant oil revenues and a more rural population, who in both countries were strongly "No."[119]

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[118] Interview with Åsa Moberg (1994).

[119] "Norway Rejects Joining EU" *Globe and Mail* (29 November 1994) A1.

The Norwegian "No" may be reversed in yet another referendum. On the other hand, if Norway prospers while outside the EU, it will act as a model for Swedes of what life could be like on the outside. The debate about Swedish membership in the EU will not have ended once and for all. After a 20 year membership in the EC, Danish opposition was strong enough in 1992 to reject the Maastricht Treaty on the first of two referenda. The struggle for genuine democracy continues in Sweden.

Canadian Opposition to the FTA and NAFTA

For Canadians, the FTA (1989), not NAFTA (1994), was the decisive turning point regarding continental economic integration and economic liberalism. NAFTA was seen by most Canadians to be about the addition of Mexico to the existing agreement, a minor matter to Canada since economic and cultural relations between the two countries have never been important. While Canada and Mexico do compete in a wide range of exports to their major market — the U.S. — their direct relationship with each other will remain relatively unimportant even if trade and investment doubles or triples.[120] Nevertheless, the majority of Canadians opposed NAFTA, as they did the FTA.

NAFTA primarily is a bilateral economic integration agreement between the United States and Mexico, ending the latter's eighty-year old economic nationalist and anti-American tradition. Canada reluctantly was allowed into the two-way talks after it pleaded for inclusion to protect the "gains" of the pre-existing Canada-U.S. FTA. For Canada, NAFTA is a renegotiated and deepened FTA with the U.S.A.

Like the Swedes, English-speaking Canadians are a reserved lot — no hand over the heart patriotism for them. Canadian attitudes toward nationalism are a combination of an inferiority-superiority complex vis-à-vis the United States, dislike of traditional, ethnically exclusive nationalism, and quiet pride

[120] In 1992 Canadian exports to Mexico accounted for 0.5 per cent of total shipments abroad, while imports from Mexico were 1.9 per cent of the total. See B. Wilkinson, "The NAFTA, Manifest Destiny and All That" (Paper prepared for the Annual Conference for Canadian Studies, London England, 19 November 1993) at 3 [unpublished].

in the liveability and civility of Canadian society. Québecers have a distinct national identity not discussed here[121] and their long and central relationship with English-speaking Canada has helped shape the (English-Canadian) national identity. If not for the presence of Québec, bilingualism and multiculturalism would not be part of the English-Canadian fabric.[122] But another element of English-Canadian character evolved in relation to the dominant presence of the United States. I am referring to an activist, nation-building role for the state.[123]

Continental integration threatens many of the distinctive features of Canadian (referring to English Canadian) national identity. Unlike the nationalisms of most European states, Canadian nationalism is not based on an exclusivist or even particularly distinct ethnic make-up, religion or language. Statist traditions of positive government action have been crucial to the development of a distinct political culture in Canada. Canadians have been less suspicious of governments than have their neighbours to the south. The building of a national railway and the establishment of the Canadian Broadcasting Corporation could only have been done under public auspices because they were not profitable on a pure private market basis. The alternatives to distinct, publicly supported Canadian transportation and communications systems were private American ones. Without an activist state role of nation building in a country of great ethnic diversity and even greater geography, Canada would have been swallowed up into the United States long ago.

While statist and nation-building traditions had been animated largely by a traditional conservative and British ethos before the 1960s, these dropped by the wayside as the political right in Canada moved towards an American-style 'neo-conservatism.' But Canadian statist traditions were continued from the 1960s to the early 1980s led by the political centre and the left who developed policies to Canadianize an economy dominated by U.S.

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121 I have discussed Québec nationalism elsewhere. *Supra* note 77 at 209-211.

122 K. McRoberts, *English Canada and Québec: Avoiding the Issue* (North York: York University, 1991).

123 H. Aitken, "Defensive Expansionism: The State and Economic Growth in Canada" in W.T. Easterbrook and M.H. Watkins, eds., *Approaches to Canadian Economic History* (Toronto: McClelland and Stewart, 1967).

corporations and erected social services that increasingly were distinct from those in the U.S. The Foreign Investment Review Agency and the National Energy Program were statist attempts to regain Canadian control of the economy and to diversify activity beyond resource exporting. Medicare, a public health system of which most Canadians were immensely proud, came to symbolize a national identity distinct from that of the U.S. Canadians were thought to be building a more 'caring-sharing' society than the Americans with their competitive, 'survival-of-the-fittest' ethos. The philosophy underlying a positive government role in sustaining a Canadian national identity had moved from traditional conservative to mildly social democratic.

The FTA was aimed at the heart of much of Canadian national identity, because it diminished the role of governments in Canadian life, throwing its society wide open to private and continentally-oriented Canadian and American business. The continental corporate integration pact that Ronald Reagan described as an "economic constitution for North America," enshrined the American, neo-liberal philosophy in Canadian society. As Mel Clark, Deputy Canadian Trade Negotiator to the GATT Tokyo round talks put it:[124]

> The definitive characteristic of the FTA and NAFTA is they cede vital government powers to the U.S. and the private sector that were used to build an independent Canada, and, to that end, to moderate, curb or redirect market forces.

No longer could Canada pursue distinct statist paths. The political right in Canada and the U.S. had imposed a neo-liberal treaty from which it would be very hard for Canada to withdraw.

The 1989 Canada-U.S. FTA sparked one of the most passionate debates in Canadian history. Canadians responded most strongly to nationalist claims about the threat to Canada's distinctive way of life. John Turner, the Liberal leader, touched a nerve when in a television debate he said that Conservative Prime Minister Brian Mulroney had "sold out the country."[125] NAFTA never generated a similar reaction because there was a widespread feeling of

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[124] M. Clark, *Restoring the Balance: Why Canada Should Reject The North American Free Trade Agreement, Terminate The FTA and Return To GATT* (Ottawa: Canadian Centre for Policy Alternatives, 1993) at 1.

[125] R. Johnston *et al.*, *Letting the People Decide: Dynamics of A Canadian Election* (Montreal: McGill-Queen's University Press, 1992) at 27.

resignation that the FTA could not be reversed and that Mexico was unimportant. But NAFTA as well as the FTA touched fundamental economic, social, and national identity questions.

The 1988 federal election involved a broad range of issues, but as the campaign unfolded, it came close to being a referendum on the FTA. At the beginning of the campaign there were sizeable numbers of pro and anti-FTA voters who favoured the "wrong" political party on the question of the trade deal. But by the campaign's end, the Conservatives, the only major party supporting the Agreement, were capturing 88 per cent of voters on the 'pro' side, while the Liberals and the New Democrats, who both opposed the Deal, between them were taking 90 per cent of the anti-FTA vote.[126]

The FTA was opposed by a slim majority of Canadians in the 1988 election and opposition continued to grow after it was implemented.[127] The Agreement was passed, despite opposition by a majority of Canadians, because a general election, not a Swedish style referendum, decided the issue. In Canada's first-past-the-post election system, the Conservatives received 43 per cent of the vote but a majority of the seats, while the Liberals at 32 per cent and the New Democrats at 20 per cent split the opposition vote. English-speaking Canadians voted decisively for parties which opposed the Agreement (55 per cent to 42 per cent), while a slight majority of Québecers favoured the pro-FTA Conservatives.[128]

As we have seen, the concept of free trade has changed radically from the free market and small business competition emphasis before the 1980s to the current concept of monopoly rights for transnational corporations. Despite the metamorphosis of the concept, 'free trade' has continued to provoke strong reactions in Canadians because it has meant closer integration with the U.S.

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126 R. Johnston *et al.*, "Free Trade and the Dynamics of the 1988 Canadian Election" in J. Wearing, ed., *The Ballot and Its Message* (Toronto: Copp Clark Pitman, 1991) at 321, Table 5A and E.

127 In 1992, Donna Dasko, vice-president of Environics Research Group said that "support for the Canada-US Free Trade Agreement has never been lower. Canadians today absolutely loathe the idea of trilateral free trade," cited in Sinclair, *supra* note 70 at 182.

128 Chief Electoral Officer of Canada, *Thirty-Fourth General Election 1988 Appendices* (Ottawa: Supply and Services, 1989) at Tables 1, 5.

This has been viewed as more significant than the calculus of economic gains and losses. The distinctive Canadian way of life is seen to be threatened, perhaps even the very existence of Canada itself. The dramatic elections of 1891 and 1911 in which Canadians rejected reciprocity (free trade), involved these larger identity issues, just as in 1988.

Canadian nationality is more fragile than that of most European nations. The dominant language, English, does not distinguish Canada from its giant neighbour. And while countries such as Belgium, Switzerland and Austria share languages with neighbouring countries, in Europe there is no dominant country. Germany is the largest country and is ascendant in the European Union in financial markets and interest rate policy. Yet Germany accounts for about 25 per cent of the population and about 30 per cent of the GDP of the European Union.[129] In contrast, the United States contributes 87 per cent of the GDP of the NAFTA countries and 69 per cent of its population.[130] Furthermore, American culture is the dominant culture in the world and English the dominant language.

We saw that the impetus for the FTA and NAFTA came from the American and Canadian corporate elites and the regimes in each country. Support in Canada came also from regional forces that have historically resisted the economic domination of Southern Ontario and the political domination of the federal government. Québec nationalists endorsed the FTA as a way of reducing economic ties with English Canada and thereby weakening threats of economic retaliation if Québec separated. Bolstered by their distinct language and culture, Francophone Québecers did not feel their nationality was threatened by closer economic integration with the U.S. With its regional grievances and as the home to the largely foreign-owned oil and gas industry, the majority of Albertans supported the FTA, as did the Reform Party.

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[129] B. Wilkinson, "Regional Trading Blocs: Fortress Europe versus Fortress North America" in D. Drache and M.S. Gertler, eds., *The New Era of Global Competition* (Montreal: McGill-Queen's University Press, 1991) at 53. Wilkinson's figures are for West Germany only. I have modified them to account for the addition of East Germany.

[130] "Report on NAFTA" *Globe and Mail* (24 September 1992) C10.

As in Sweden, the range of elite support for continental economic integration and liberalization was formidable. In Canada, only the New Democratic Party was strongly against the trade agreement. As the centre party, the Liberals prevaricated, caught between their right, pro-business wing and their left, social wing. The latter tended to support social services and economic nationalism. In 1988, after a surge of opposition to the trade deal became apparent, the Liberal Party took a clear position against the FTA. When it came to NAFTA and abrogating the FTA, the Liberals returned to their prevaricating role. Although the Americans renegotiated the FTA twice, first with the NAFTA agreement and then in Clinton's side deals with Mexico on labour and the environment, the new Liberal Government of Jean Chretien, elected in October 1993, backed down. They ran on a platform of renegotiating NAFTA, threatening that they would not proclaim the Agreement. When the Americans would not reopen the NAFTA text guaranteeing the U.S. the same proportion of Canadian energy exports even during an energy crisis, the Liberal Government made a unilateral declaration to protect Canadian energy security. It was little more than a face saving device.[131]

Voters parted company with their political leaders and a majority opposed the FTA and NAFTA. There had never been such a political division by class in Canada, a political community not known for class politics. According to an Environics poll conducted during the election campaign, more than half the supporters of the Free Trade Agreement earned over $60,000 annually, while over half the opponents earned under $20,000.[132] The Conservatives won the seven seats with the highest average incomes in Canada, while the Liberals and New Democrats took the seven seats with the lowest average incomes. It is likely that fear of blue-collar job losses and erosion of Canada's social safety net drove working-class voters, especially males, into the opposition camp,[133] while upper-income voters followed the lead of the business elites

[131] "Canada Will Implement NAFTA on Jan. 1, Chretien says" *Edmonton Journal* (3 Dec. 1993) A1.

[132] "3 Leaders Swap Free-Trade Blows During Final Days" *Globe and Mail* (19 November 1988) A1.

[133] Liberals and New Democrats received 51 per cent of the votes of males earning $29,000 or under and only 38 per cent amongst those earning over $50,000. See J.H. Pammett, "The 1988 Vote" in A. Frizzell *et al.*, eds., *The Canadian General Election of 1988* (Ottawa: Carleton University Press, 1989) at 127.

towards a neo-liberal state.

Like their counterparts in Sweden, Norway and Finland,[134] Canadian women were more opposed to continental integration and neo-liberalism than Canadian men. The National Action Committee on the Status of Women (NAC), the umbrella group for most women's groups, carried on a vigorous campaign as part of the broader coalition in opposition to the FTA. They argued that women in the manufacturing and service sectors would disproportionately lose their jobs compared to men and that Canada's more enlightened child care, equal pay policies, and health care would be driven down to American levels.[135] Women were less persuaded by pro-business arguments than men. In the end women voted against the Agreement by a five to four margin, while for men it was the reverse.[136]

Swedes could not claim ill effects from their 1972, old-style free trade agreement with the European Community. The record low unemployment rate until 1991 would belie any such argument. However when Sweden began to prepare for new-style free trade and deregulated its financial sector to meet the conditions for entry into the EES, there was a massive flight of Swedish capital and jobs. Canadians experienced disastrous economic reversals after the new-style free trade as well. Canada lost 383,000 manufacturing jobs between January 1989, the start of the FTA, and March 1992, the low point in manufacturing employment.[137] Three in five manufacturing jobs lost were permanent layoffs caused by plant shutdowns.

Many economists dispute the argument that the FTA was a major cause of Canada's recent losses, citing the early 1990s recession and global restructuring as the causes of Canadian economic woes. These undoubtedly were major causes — all advanced countries experienced economic downturns. But although the United States faced similar cyclical and restructuring

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[134] Polls in September 1994, showed support for joining the EU at one-quarter to one-third less amongst women than amongst men in the Nordic countries. *The European* (30 September-6 October 1994) 4.

[135] S. Bashevkin, *True Patriot Love: The Politics of Canadian Nationalism* (Toronto: Oxford University Press, 1991) at 142.

[136] *Supra* note 133.

[137] Statistics Canada, *Historical Labour Force Statistics* (Ottawa: Statistics Canada, 1993) at 177 using seasonally adjusted figures.

changes, it lost only 10.2 per cent of its manufacturing jobs between June 1989 and early 1992, while Canada lost 23 per cent of all manufacturing jobs over the same period.[138] It is difficult to determine the exact contribution of the FTA to Canadian job losses. High Canadian interest rates and an overvalued dollar had devastating effects.[139] But there is little doubt that a substantial number of American branch plants shut down their operations once the protectionist reason for their location in Canada was removed. Many Canadian-owned businesses acted according to the spirit and improved mobility rights of the FTA and moved to American locations where wages and standards were lower.

By giving up its right to pursue traditional state activist policies, did Canada achieve its main aim in the negotiations — secure access to the U.S. market? The answer is No. Mel Clark, a former senior trade negotiator for the Canadian government studied the results of the first four years of the FTA. Canada fared much better in trade disputes with the U.S. when it went through GATT than when it used FTA dispute-settlement panels.[140] After a series of U.S. protectionist moves against Canadian imports in 1992, even Simon Reisman, Canada's chief negotiator for the FTA, seemed to have second thoughts about how much secure access Canada had won in the Agreement. "If the Americans say the hell with you and we'll do what we want, clearly the free-trade deal is over."[141]

The significance of NAFTA for Canada is that it extends and deepens the transfer of power from governments to corporations and to a Commission which will enforce the rights of corporations. A permanent Free Trade Commission and Secretariat will be established to implement and enforce the agreement. This is like the Brussels bureaucracy and European Court combined, but without the democratic voices of the European Council representing governments or the European Parliament, representing elected officials.

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138 *Supra* note 117 at 7. Wilkinson uses seasonally unadjusted figures. There was a recovery in manufacturing jobs in Canada of 110,000 or 5 per cent from the low point of March 1992 to December 1993. See *ibid.* at 177, unadjusted series.

139 L. McQuaig, *Shooting the Hippo* (Toronto: Viking, 1995).

140 *Supra* note 124 at 11-12.

141 A. McClellan, "American 'Bastards' says Reisman" in Sinclair, *supra* note 70 at 181.

The NAFTA Commission will ensure that the United States is fully consulted before Canadian federal and provincial laws are altered. Failure to comply with a Commission ruling will result in fines or retaliatory trade measures by other governments acting on behalf of corporations.

Provincial governments were exempt from the FTA, but although they were not party to the NAFTA, they will be subject to it. The federal government will have to ensure that a province conforms to the findings of a NAFTA dispute panel. If it does not conform, the federal government will be required to pay compensation costs to avoid trade retaliation.[142]

Crown corporations have been a fixture of Canadian life for decades. Many, like the CBC and Petro-Canada, were established to fulfil mandates that were not strictly commercial in nature; to promote Canadian culture, economic diversification or equalization. Such mandates cannot be fulfilled under NAFTA. The agreements provide that, "[A]ny government monopoly must act solely in accordance with commercial considerations."[143]

NAFTA is an economic liberal document with little pretence at preventing 'social dumping,' as the Europeans call it. In the NAFTA agreement itself there are no minimum standards on human rights, social programs, working conditions, wages, and the environment. The side agreements on labour and the environment, which the Clinton administration forced upon the Mexicans in order to shore up support in the U.S. Congress, are weak. They have to do with ensuring, or having the appearance of ensuring, that the Mexicans enforce their own laws in these areas.[144] It is open to question how effective the side deals will be regarding Mexico, but they don't address the more important question for Canadians of social dumping vis-à-vis the United States, with its low level of unionization, 'right to work' laws, lower social service and taxation regimes. Transnational corporations have been given mobility and citizen-like rights but have no location obligations to communities, workers or democratic polities.

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142 *Supra* note 79 at 130.

143 *Ibid.* at 13.

144 M. Watkins, "Afterword: The NAFTA Side Deals" in Cameron and Watkins, *supra* note 15 at 283.

The opposition sees the major issue as the loss of sovereignty and democracy. For Maude Barlow, Chairperson of The Council of Canadians, the free trade agreements are about "removing the right of Canadians to control our own future."[145]

Conclusion

What can be learned by comparing Canadian and Swedish opposition to the new economic and political integration agreements? In the old free trade debates, protected manufacturers and home-market farmers tended to oppose free trade. Consumers, often led by the organized working class, exporting farmers and importing retailers were proponents of free trade. To the extent that this was a left or right issue, the left tended to favour free trade of the older sort and the right to oppose it. The near reversal of the political line-up over what is now called 'free trade' or economic liberalization, tells us that the issues and the context have changed. The interests served and hurt by the new version of free trade are different.

Corporations have undergone a metamorphosis. When they were largely confined to home markets, they often sought state protectionism for their domestic monopolies against imports from competitors. But once corporations transcended home markets and integrated production across continents, they sought state and supranational guarantees for the removal of national barriers between different parts of their operations located in different countries. Where once they supported their version of national sovereignty to protect their nationally-bound, monopolistic interests, they now attack sovereignty and nationalism as enemies, this time to protect their transnational interests.

The new concept of free trade is no longer about the removal of monopolies. The business world has become more monopolistic than ever with three-hundred transnationals controlling about one-quarter of the GDP of the market economies of the world and the three quarters of the trade.[146] Free trade has come to mean intracorporate transfers between branches of the same corporation located in different countries. Trade in services like banking usually requires a physical presence in the "export" market, thus encouraging

[145] *Edmonton Journal* (23 December 1992) A17.

[146] Dunning, *supra* note 29 at 15.

foreign ownership and the transnationalization of service corporations. Like the old national protectionism, the new versions of free trade enhance and protect corporate monopolies, but now at the supranational level.

To articulate their newly dispersed corporate empires, transnationals and their ideological supporters adopted the language of their opponents. The motifs of internationalism, free trade, and the slogans of the anti-war and civil rights movements have been adapted and turned on their heads to justify the concentrated power of economic elites. Opponents of transnational capitalism are now branded as xenophobic, protectionists, opponents of international understanding and of the basic rights of foreign corporations.

The strongest initiatives for corporate supranationalism have come not at the global level but at continental or regional levels. Why is this? It has been easier to construct the elements of an emerging supranational state or international regulation that will protect and enhance the rights of transnational corporations in North America and Western Europe, bastions of advanced capitalism,[147] than it has been globally where the benefits of capitalism in the Third World are less evident and the potential for opposition greater. It is questionable whether these continental pacts will lead to global supranationalism. Walls are put up around these economic integration blocs, keeping out Third World imports and providing monopoly protection, for example, for pharmaceutical companies.

In Canada and Sweden, continental integration pacts were a means to circumvent both domestic union strength and national political cultures that were critical of corporate domination and of the commodification of human labour and human values. In Canada, it was called the 'cold shower' theory by economists who worked for or were close to the Royal Macdonald Commission.[148] Canadians, these advocates of neo-liberalism and corporate rights contended, were coddled and too anti-market. They needed a cold shower of bracing market intensity to shock them out of their lethargy. The problem was that, unlike voters in Reagan's America or Thatcher's Britain,

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147 Japanese corporate strategy has not relied on regional integration pacts, although one may emerge in east Asia.

148 *Royal Commission on the Economic Union and Development Prospects for Canada* (Ottawa: Supply and Services: 1985).

Canadians showed no inclination to take the recommended treatment. The breaching of Canadian sovereignty through the Canada-U.S. FTA would turn on the shower for Canadians. The Swedish SAF strategy of removing economic decision-making from Sweden and moving it to bureaucratic Brussels was conceived along similar lines.

The initiative for continental integration agreements comes from business and the political right, although in Europe there is a strong internationalist-peace and social component from the left. Giving unlimited rights to corporations and removing their obligations to political communities reduces the power of governments. This leads to loss of sovereignty and democracy.

How could such undemocratic and elitist politics be made popular? To succeed, corporate proponents of continental integration had to both consolidate the political right and to divide the potential opposition by winning over part of the left and the centre. The means at hand were different in the two countries. In Sweden, the Social Democratic and union leadership were the crucial allies, without whom a victory for corporate neoliberalism was not possible. In Canada, two regional versions of 'nationalism' that were traditionally opposed to centralist, pan-Canadian nationalism, were the key allies in Brian Mulroney's Conservative FTA victory. These were Québec nationalism, associated since the Quiet Revolution of the 1960s with the centre-left, and Alberta's (right) peripheral regionalism.[149]

It is not surprising that the left is opposed to corporate rights and is a defender of bottom-up democracy. These agreements are not popular anywhere. They are led by the elites, sometimes with the support of leaders of the left, but many of the people are opposed because they are concerned with secure jobs, social services, citizen rights, sovereignty, democracy, and popular national traditions. The traditional working class, women, and peripheral regions were opposed in both countries and through grass roots organizing, managed to rally about half the voters to their sides, despite the overwhelming unity, money, power and influence of the elites favouring continental integration.

[149] The pro-FTA Conservatives won 88 out of 101 seats in Québec and Alberta and only 81 out of 194 seats in the rest of the country.

There were some differences in emphasis between the debates in Sweden and Canada. Democracy was a stronger focus in Sweden than sovereignty while independence and national identity prevailed as themes in English-speaking Canada. But these are differences in discourse around essentially similar themes.

Proponents of continental economic integration agreements may not prevail in the long-run. The 'inevitable' direction of history may shift again. The long historical struggle for popular democracy continues.

APPENDIX

PEOPLE INTERVIEWED IN STOCKHOLM IN JUNE 1993

Rolf Andersson, Research Director, Municipal Workers' Union.

Christian Bratt, Director European Affairs, at the Swedish Employers' Confederation (SAF).

Mats Carlsson, Foreign Policy Advisor to the Swedish Social Democratic Parliamentary Group.

Per Gahrton, then Central Board member for the Green Party, currently Member of the Riksdag for the Green Party (and earlier for the Liberal Party).

Birgitta Hambraeus, member of the Riksdag for the Centre Party (green wing of the Party).

Carl Hamilton, former Chairman of the Program Committee on European Affairs for the Liberal Party and current member of the Riksdag for the Liberal Party.

Sten Johansson, Chairman of Social Democrats against membership in the European Union.

Wuokko Knocke, Sociologist and an authority on women immigrants in Sweden. Researcher at the Arbetslivscentrum (now the Intitutet för Arbetslivsforskning).

Kennet Kvist, former General Secretary of the Left Party and in 1994 a member of the Riksdag. In 1993, he was political secretary of the Parliamentary group, working on the Swedish Constitution and the EU.

Gudmund Larsson, Chair of the Swedish Labour Confederation's (LO) European Union Committee.

Rudolf Meidner, Economist, Editor of *Economic and Industrial Democracy* and author of the original "Meidner Plan" for wage-earner funds.

Eva Moberg, playwright, freelance journalist, peace activist, environmentalist.

Kristina Persson, Founding member of "Network for Europe," a pro-EU organisation and representative of TCO, Confederation of White-Collar Employees, currently Member of the Riksdag for the Social Democrats.

PEOPLE INTERVIEWED IN NOVEMBER 1994 AFTER EU REFERENDUM

Göran Ahrne, Professor of Sociology, University of Stockholm.

Nordal Åkerman, author and political journalist, Lund.

Christian Bratt (see above).

Per Gahrton, (see above) and Green Party representative in the European Parliament. A controversial leader of the No side.

Lena Gonas, Research Professor at Insitutet för Arbetslivsforskning, served on Government Commission on Equality.

Yvonne Hirdman is a Swedish feminist historian and Research Professor at the Institutet for Arbetslivsforskning, Stockholm.

Wuokko Knocke (see above).

Rudolf Meidner (see above).

Åsa Moberg, media journalist, author and a leader of the anti-nuclear power movement in Sweden in the 1970's and early 1980's, near Lima Sweden.

Lars Ohly, Secretary of the Left Party, Stockholm.

Göran Rosenberg, Editor-in-chief *Moderna Tider* and author, Stockholm.

Birger Viklund, Researcher, Institutet for Arbetslivsforskning, Stockholm.

PRESS CONFERENCES ATTENDED NOVEMBER 11-14 1994

Ingvar Carlsson, Social Democratic Prime Minister and Mona Sahlin, Deputy Prime Minister.

Ulf Dinkelspiel, Former Trade Minister in the Bildt government. Responsible for negotiating the terms of Swedish entry to the EU.

Professor Olof Ruin, Department of Political Science, University of Stockholm analysing the referendum results. Ruin is a Social Democrat and strong supporter of the Yes side.

TELEVISION DEBATES AND COVERAGE ON THE REFERENDUM (TRANSLATED INTO ENGLISH)

Friday, November 11, 1994 — TV 2

Yes Side	No Side
Ingvar Carlsson (Prime Minister)	Agneta Stark — economist
Carl Bildt (former Conservative PM)	Kenth Pettersson — union leader, Retail workers
Marit Paulsen — farm spokesperson Chair, Network for Europe	Eva Hellstrand, farmer

Saturday November 12 1994 — TV 4

No Side	Yes Side
Kenth Pettersson	Mona Sahlin Dep. Prime Min.
Marita Ulvskog (Minister of Public Administration)	Percy Barnevik, President Asea Brown Boveri
Hans Lindqvist — leader of Nej till EU	Kristina Persson Social Democrat member of Riksdag

THE PARTIAL REPUBLIC: A REVIEW OF *THE PARTIAL CONSTITUTION*

by Cass R. Sunstein
(Cambridge: Harvard University Press, 1993)

Andrew Fraser*

Introduction

Classical republican ideas were once a vital force in the revolutionary birth of a distinctive American political culture. Republicanism posed a radical challenge to the monarchical culture of eighteenth century Anglo-American civilization. Colonial America was still a monarchical polity in which a traditional hierarchy of presumptively natural social orders was held together by complex networks of patronage and influence capped by the majestic image of the Crown. The colonists readily accepted their status as subjects of the king but that did not necessarily preclude the influence of classical republican values among members of the political class.[1]

In fact the very existence of a sharp traditional cleavage between the patrician and plebeian orders of colonial society gave the ancient republican ideals of mixed government and civic virtue an immediate and obvious relevance. Even in England it was widely acknowledged that the existence of the king, lords and commons as independent elements of a mixed and balanced polity gave a republican flavour to the constitution. Both "at home" and in the colonies, those who sought to reform the existing monarchical polity typically called upon the patrician elite to cultivate and practise the civic virtues appropriate to their station.[2] Only a virtuous citizenry could successfully resist the corrupt practices that were seen to be subverting the ancient British constitution.[3]

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1 G.S. Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1993) at 11-24, 57-77, 109.

2 *Ibid.* at 83.

3 See generally J.G.A. Pocock, *The Machiavellian Movement: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

Even those who had no intention of turning the world upside down and who sought instead to enlighten and improve monarchy could invoke the republican ideal of the disinterested citizen. In a polity where "governmental service ... was generally thought to be a personal sacrifice required of certain gentlemen because of their talents, independence and social pre-eminence,"[4] the language of civic virtue had an obvious resonance for members of the patrician elite. Republicanism could be said to "put an enormous burden on individuals" who "were expected to suppress their private wants and interests and develop disinterestedness."[5] But this was not an expectation alien or unfamiliar to those who were accustomed to the exercise of political authority in the Anglo-American world of the late eighteenth century. That being so, republicanism was not a distinctive form of government but rather a "form of life" or a schema of civic action that did not so much displace monarchy as transform it. According to Gordon Wood, "Republicanism did not replace monarchy all at once; it ate away at it, corroded it, slowly, gradually, steadily, for much of the eighteenth century."[6]

Unlike the revolutionary ideologies of the nineteenth century, republicanism was not an underground movement "confined to cellar meetings and marginal intellectuals."[7] On the contrary, "there were no more enthusiastic promoters of republicanism than among members of the English

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4 Wood, *supra* note 1 at 83.

5 *Ibid.* at 104.

6 Wood, *supra* note 1 at 95. Wood's account of republican citizenship deals with only one dimension of civic action. He describes the role of the citizen solely in terms of the burdens and sacrifices it imposes upon the individual. But civic action has at least two dimensions: the expressive and the communicative. Reasoned deliberation within a community of peers calls for disinterested communicative action aimed at persuasion and mutual accommodation. The expressive dimension of civic action is essentially heroic or agonistic in nature. The public sphere provides a dramatic setting where actors compete for glory and recognition. Agonistic striving allows citizens to disclose who they are. Acting to overcome the futility and mortality of one's life through the performance of exemplary deeds does not amount to self-denial or self-sacrifice. On the contrary, the agonistic practice of citizenship offers, the real possibility of self-fulfilment. Every citizen and every constitution must bring the tension between these two dimensions of citizenship into some sort of balance. M.P. d'Entreves, "Agency, Identity and Culture: Hannah Arendt's Conception of Citizenship" (1989) 9 Praxis International 1.

7 *Ibid.* at 99.

and French nobility, who were presumably closest to monarchy and who depended for their status upon it."[8] Nevertheless republicanism represented a real threat to the fundamental structures and assumptions of monarchical polities in the late eighteenth century. Royal authority rested upon a bedrock belief in the natural and even sacred character of the hierarchical order over which it presided. Because neither kingship nor the entrenched hierarchy of natural social orders were understood as products of conscious or deliberate human artifice, they could not easily be called into question. But it was precisely the preordained, natural quality of royal authority and social hierarchies that were challenged by the republican movements of the revolutionary enlightenment.[9]

That challenge had its deepest roots in the ancient Aristotelian conception of the polity as "an association of persons formed with a view to some good purpose."[10] On this view, the political order is natural only in the teleological sense that it is through the development of political institutions that we can realize the full potential of the human nature that distinguishes us from other animals. Participation as a citizen in the public life of a self-governing republic depends upon the distinctively human faculty of reasoned speech. Only by deliberating together in public as a community of peers can citizens come to specify the good purposes for which the polity has been formed and the means by which they might be achieved.[11] In the context of the eighteenth century enlightenment this age-old republican insight into the nature and purposes of political life allowed the opponents of monarchy to treat the established forms of government as products of human artifice. As such the existing polities could, in principle, be remade and reconstructed to achieve a set of rationally ordered goals and principles.

It was the revolution against the imperial Crown-in-Parliament that brought to the surface the republican tendencies already immanent in the rapidly expanding colonial societies of British North America.[12] Traditional social hierarchies of patronage and dependence had become visibly weaker in the

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8 *Ibid.* at 99.

9 *Ibid.* at 95-109.

10 Aristotle, *The Politics*, trans. T.P. Sinclair (Harmondsworth: Penguin, 1962) at 25.

11 *Ibid.* at 28-9.

12 Wood, *supra* note 1 at 169.

period leading up to the final break with Great Britain. But it was the conscious mass conversion of the American people at large to republicanism that transformed "a petty rebellion within the Empire into a symbol of liberation for all mankind."[13] For the revolutionary leadership, independence offered "an opportunity to abolish what remained of monarchy and to create once and for all new enlightened republican relationships among people."[14] They were now in a position to treat the newly independent states as "associations of persons formed with a view to some good purpose."[15] It was an axiom of the generation of men who founded the American republic that their culture and their politics were man-made and could be shaped as they saw fit.[16] But as they set about the practical tasks of social and political reconstruction, the revolutionary leaders quickly came to recognize the limitations inherent in classical republican political theory. The ancient republics provided no useful models for the creation of a modern American republic. This was so, not just because the Greek "city-states" were typically much smaller in size and population than the newly-independent United States of America, but, more importantly, because the ancients had no experience of a more or less autonomous civil society standing outside and apart from the state.

In the classical polis, the modern distinction between state and civil society had no relevance. Indeed there was no such thing as civil society in ancient Greece. Both the economy and society were firmly embedded in the polity. For that reason it makes little sense to speak of the ancient Greek "state." To speak of a "state" presupposes the existence of a civil society over which it rules as "an abstract entity constituted by power."[17] By contrast, power in the polis was wielded by the people "and they constituted both state and society wrapped up in one."[18] The polis was a civic community whose claims were total. Unlike modern civil societies the polis was certainly "not a conspiracy of self-seeking individuals joined for mutual profit and protection in a

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13 P. Maier, *From Resistance to Revolution: Colonial Radicals and the Development of Resistance to Britain, 1765-1776* (New York: Knopf 1972) at 272.

14 Wood, *supra* note 1 at 169.

15 *Ibid.* at 190.

16 *Ibid.* at 190.

17 P.A. Rahe, "The Primacy of Politics in Classical Greece" (1984) 89 American Historical Review 265 at 268.

18 *Ibid.* at 268.

temporary legal partnership that could be dissolved when it ceased to suit their interests."[19] Modern civil society emerged as a zone of free interaction between strangers in the towns and cities of late medieval Europe; its boundaries were guaranteed by the legal institutions of property and contract.[20] Within that juristically protected sphere of free social interaction, more or less autonomous individuals were able to devote themselves to the pursuit of their own private interests. To the extent that the institutions of modern civil society became the most vital factor in shaping the values of those individuals, the civic virtues of disinterested public service quickly lost ground to the private virtues of thrift, hard work and productivity.[21]

As a consequence, American republicanism had to adapt itself to the realities of a dynamic, expansionist and aggressively capitalist civil society. As Wood points out, "Classical virtue had flowed from the citizens participation in politics; government had been the source of his civic consciousness and public spiritedness." But the virtues relevant to a modern American republic "flowed from the citizen's participation in society, not in government."[22] Because American society was devoted, above all else, to commerce and the production of wealth, the pursuit of private interests would have to be recognized as a source of virtue. Before long it became evident that even within the internal political order of the state itself the frank and open pursuit of private advantage would probably displace the classical ideal of disinterested public service.[23]

The Republic of Reasons

In the two centuries since the American revolution, the republican tradition has been progressively reduced to the status of an ideological residue of limited practical or political significance. Even those American legal scholars

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19 *Ibid.* at 269.

20 A. Black, *Guild and Civil Society in European Political Thought from the Twelfth Century to the Present* (Ithaca: Cornell University Press 1984) at 32-43.

21 J.T. Kloppenberg, "The Virtues of Liberalism: Christianity, Republicanism and Ethics in Early American Political Discourse" (1987) 74 Journal of American History 9; I. Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth Century England and America* (Ithaca: Cornell University Press, 1990).

22 Wood, *supra* note 1 at 217.

23 *Ibid.* at 243-70.

who have deliberately set out to revive the republican ideals of the founding generation have no great faith in the transformative power of that old-time civil religion. At most, they believe that appeals to the republican tradition may serve a useful "heuristic" or "argumentative" function for constitutional lawyers operating within the established legal framework of the contemporary American nation-state. It no longer seems credible to regard republicanism as a "form of life"[24] or as a schema of civic action[25] that has operational significance for citizens in their everyday lives. As Frank Michelman puts it, "[f]or a citizen of Geneva it was perhaps imaginable that positive freedom could be realised for everyone through direct-democratic self government, a sovereignless civic process of ruling and being ruled, with no place for legal authority beyond the process itself."[26] In the modern United States of America however, "national politics are not imaginably the arena of self-government in its positive, freedom-giving sense."[27] Among most American republicans, there seems to be general agreement that the United States has long since ceased to be a strong republican polity; the only question for many is when the drift away from the foundation principles of the early republican constitution became irreversible.[28]

There are others, however, who resist suggestions that American history is a tale of steady civic decline. Those who take this more upbeat view generally reject the assumption that republicanism is a distinctive form of life or schema of civic action set in fundamental opposition to the dominant liberal paradigm of constitutional discourse. This is the stance adopted by Cass Sunstein in his book *The Partial Constitution*.[29] Far from representing

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24 *Ibid.* at 96.

25 A. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press, 1990) at 97, 111-2.

26 F. Michelman, "Traces of Self-Government" (1986) 100 Harvard L. Rev. 4 at 75.

27 *Ibid.* at 75.

28 On the concept of "strong republicanism", see A. Fraser, "Strong Republicanism and a Citizen's Constitution" in W. Hudson and D. Carter, ed., *The Republican Debate* (Sydney: University of New South Wales Press, 1994) at 36-60; cf B. Barber, *Strong Democracy* (Berkeley: University of California Press, 1984). For a republican discussion of America's civic decline, see, for example, W. Karp, *Buried Alive: Essays on Our Endangered Republic* (New York: Franklin Square Press, 1992).

29 C.R. Sunstein, *The Partial Constitution* (Cambridge, MA: Harvard University Press, 1993) at 373.

republicanism as an oppositional ideology, Sunstein's book is the work of a consummate political insider. In fact, the book has been described by one reviewer as "a memorandum to the White House about the way that 'new liberals' (in whose camp Sunstein would count himself) should respond to the unexpected opportunity to reshape American constitutional doctrine."[30] Having been publicly identified as a plausible candidate for the federal judiciary,[31] Sunstein is clearly no ivory tower academic divorced from the real world of politics and legal practice.

Even so, Sunstein is not just another ambitious neo-liberal on the inside track to power. He is more often described as a leading figure in the recent republican revival in American constitutional scholarship. His republican values are evident in the neo-Aristotelian ideal of deliberative democracy that he defends in *The Partial Constitution*. In supporting that ideal Sunstein believes he is doing nothing more than helping to preserve the core commitment of the constitutional order established in the aftermath of the American revolution. For Sunstein, the contemporary American constitutional regime remains faithful to its republican roots because it still rests upon the conviction that political life can and should be carried on to a very substantial degree by disinterested citizens exercising their powers of reasoned speech. But he sees no necessary conflict between the republican ideal of deliberative democracy and the dominant liberal traditions of American politics. Both liberalism and republicanism, according to Sunstein, find common ground in "the principle of impartiality" that "requires government to provide reasons than can be intelligible to different people operating from different premises."[32] That same principle apparently justifies a curious eclecticism that places Sunstein's republicanism alongside some strange bedfellows. Even though Sunstein's argument in *The Partial Constitution* draws on the cold, market-driven logic of the law and economics movement, his reform agenda is dominated by the new modelled interest-group politics of the feminist and gay lobbies.

Sunstein's thesis rests on the historical premise that the whole point of the Constitution was to create a "republic of reasons" that would reflect both a

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30 S. Levinson, "Unnatural Law" (1993) The New Republic 40.

31 *Ibid.* at 44.

32 Sunstein, *supra* note 29 at 24.

liberal hostility to all forms of authoritarianism as well as a specifically republican opposition to a monarchical polity supposedly justified by the "natural order of things." Liberal republicanism also saw the Constitution as a way of countering the risk that public officials would act in a "partial" manner to promote their own self-interest at the expense of the interests of the public as a whole. As long as those public officials were required to provide "public-regarding reasons" in support of their actions the danger of self-interested representation could be contained. The framers also sought to control the powers of private groups or "factions" over governmental processes by designing "a system in which representatives would have the time and temperament to engage in a form of collective reasoning."[33]

A powerful stream in the liberal theory and practice of American politics has always denied that laws can or should be seen as the product of deliberation. Even before the adoption of the Constitution, powerful forces were pressing for the recognition of interest-group politics as the defining characteristic of American democracy. On this view, political discourse would ordinarily owe more to the self-seeking, instrumental forms of reasoning employed by the *bourgeois* individuals dominating the life of American civil society than to the deliberative style of reasoning favoured by the disinterested *citizen* selflessly seeking to promote the public good. Sunstein, of course, does not deny the reality of interest-group politics in the American governmental process. Instead, he contends that the Constitution was designed to prevent "the distribution of resources or opportunities to one group rather than to another solely on the ground that those favoured have exercised the raw political power to obtain what they want."[34] A wide range of constitutional provisions prohibit the exercise of what Sunstein calls "naked preferences."[35] The ban on naked preferences found in, *inter alia*, the equal protection clause, the privileges and immunities clause or the contracts clause requires governmental action to be justified in terms of some public purpose. Government generally "must be responsive to something other than private pressure" and the instrumental logic underlying the process of aggregating and trading off interests.[36]

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[33] *Ibid.* at 17-22.
[34] *Ibid.* at 25.
[35] *Ibid.* at 25.
[36] *Ibid.* at 25-6.

In his first chapter Sunstein shows how current legal doctrines embody the impartiality requirement established by the framers. Even though the ban on naked preferences has been, for the most part, only weakly enforced by the courts, there can be, he says, no question that outcomes must be "justified by reference, not to raw political power, but to some public value that they can be said to serve."[37] Lawmakers must, at the very least, be seen to be playing the public role of the citizen even if they are really, at heart, moved mainly by the self-interested desires of the bourgeois.

Having established the centrality of the impartiality requirement in American constitutional doctrine, Sunstein then sets out to show how the need to preserve governmental neutrality between competing interests has come to be used as a means of insulating the *status quo* from democratic scrutiny. According to the dominant view of the impartiality requirement, "any departure from the status quo signals partisanship" while "respect for the status quo signals neutrality."[38] Sunstein believes that this judicial credo of "status quo neutrality" is fundamentally flawed by its failure to acknowledge the central insight of modern legal realism, namely, "that existing rights, and hence the status quo, are in an important sense a product of law."[39] In other words, it is "a matter of simple fact that people own things only because the law permits them to do so."[40]

The fact that an existing right has been established by law is not, in and of itself, a complete and final justification for the continued existence of that right. Existing distributions of legal rights and entitlements to property, wealth, or income may not be capable of independent justification in a democratic process of deliberation and decision making. In one example cited by Sunstein, it could be said that the existing pattern of legal rights, rules, and regulations that have constituted the American system of private control over broadcasting actually work to diminish the capacity of most citizens to exercise their constitutional right to freedom of speech. Legislative efforts to reform the existing distribution of entitlements, perhaps by imposing a fairness requirement on private broadcasters, should not therefore be viewed as

37 *Ibid.* at 27.
38 *Ibid.* at 3.
39 *Ibid.* at 4.
40 *Ibid.* at 4.

"partial" or partisan simply because they have the effect of upsetting the status quo. That sort of status quo neutrality "shuts off, at the wrong stage, the American system of deliberative democracy" by refusing to open up existing legal practice to a process of public debate and legislative decision.[41]

The Supreme Court and the Status Quo

Sunstein contends that the Supreme Court, both past and present, has interpreted the Constitution in a "partial" manner. All too often the Court has based its decisions on the flawed assumption that the Constitution itself is biased in favour of the status quo. Prior to the judicial "revolution of 1937" the Supreme Court employed the principle of status quo neutrality to make "the system of laissez-faire into a constitutional requirement."[42] To support this claim Sunstein discusses three landmark decisions handed down by the Court around the turn of the century: *Plessy* v. *Ferguson*[43] which upheld the doctrine of separate but equal in public transportation; *Lochner* v. *New York*,[44] which struck down a New York law imposing maximum hours for bakers; and *Muller* v. *Oregon*[45] which upheld a law setting maximum hours for working women. According to Sunstein, all three cases took the status quo "as the baseline for deciding issues of neutrality and partisanship."[46]

Sunstein's analysis of these three cases is not especially convincing. In fact, the more one attempts to apply the concept of status quo neutrality to particular cases, the more confusing and incoherent it becomes. This is so even in the case of *Lochner* v. *New York* which seems, at first glance, to provide a perfect illustration of Sunstein's thesis. On the face of it, *Lochner* seems to treat freedom of contract as part of the natural order of things, not as a product of legal artifice. By invoking that fundamental freedom, the Court does appear to insulate the status quo from democratic scrutiny. But, curiously enough, Holmes' famous dissenting judgement in *Lochner* treats the New York statute as an example of a traditional sort of law restricting the

41 *Ibid.* at 6.
42 *Ibid.* at 40.
43 163 U.S. 537 (1896) in Sunstein, *supra* note 29 at 41.
44 198 U.S. 45 (1905) in Sunstein, *supra* note 29 at 41.
45 208 U.S. 412 (1908) in Sunstein, *supra* note 29 at 41.
46 Sunstein, *supra* note 29 at 41.

freedom of individuals to make unregulated contracts.[47] And, indeed, modern historical scholarship has established that a tightly regulated economy was more the rule than the exception for most of the nineteenth century.[48] In that context the free labour ideology that finds expression in the majority opinion in *Lochner* amounted to a revolutionary assault on the status quo. This was evident as well in the *Slaughterhouse* cases decided soon after the Civil War. There Justice Field's minority opinion sought to read the Fourteenth Amendment as a codification of a radical republican free labour ideology that had already overthrown the institution of slavery and was now seeking new fields to conquer.[49] This analysis of *Lochner* suggests that it is always going to be difficult to understand what we mean by the status quo in a nation whose deepest commitment is to an open-ended process of perpetual growth.

In *Plessy* v. *Ferguson* and *Muller* v. *Oregon* it is even more difficult to follow Sunstein's argument. After all, the decisions in both cases actually upheld legislative moves to *change* the status quo. Prior to the passage of the Louisiana statute requiring segregated seating in railway carriages, blacks and whites shared the same coaches. Similarly in Oregon females were free to work as long as males before the legislature acted to limit the hours worked by women. Sunstein's opposition to the outcome of these cases seems to have less to do with the court's alleged commitment to status quo neutrality than with the efforts of the respective state legislatures to institutionalize new forms of legally enforceable racial and gender discrimination.

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47 Lochner, *supra* note 43 at 75-6; see also, G.E. Maggs, "Yet Still Partial to It" (1994) 103 Yale L. J. 1627 at 1643-4.

48 W.J. Novak, "Public Economy and the Well-ordered Market: Law and Economic Regulation in 19th Century America" (1993) 18 Law & Social Inquiry 1; C.M. Rose, "The Comedy of the Commons: Custom, Commerce and Inherently Public Property" (1986) 53 U. Chicago L. Rev. 711; H.N. Schreiber, "The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts" (1971) 5 Perspectives in American History 329; J. Lindgren, "Beyond Cases: Reconsidering Judicial Review" (1983) Wisconsin L. Rev. 583; M. Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge MA: Harvard University Press, 1977).

49 *Slaughterhouse cases*, 83 U.S. (16 Wall) 36 (1873); see also E. Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York: Oxford University Press, 1970) and R.J. Kaczorowski, "Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction" (1986) 61 New York U. L. Rev. 863.

It is an article of faith for Sunstein that all forms of racial or gender discrimination are morally wrong and constitutionally impermissible unless the discrimination favours members of a historically disadvantaged group. Affirmative action programs designed to promote the interests of racial minorities or women are not therefore an illegitimate form of discrimination. Otherwise legal discrimination on the basis of race, gender, sexual preference or disability offends against the constitutional norm of equality before the law. For that reason Sunstein dismisses the attempt of the *Plessy* court to draw a sharp distinction between "civil" and "political" equality on the one hand and "social" equality on the other.[50] On the basis of that distinction the court ruled that discrimination between blacks and whites in terms of their civil or political rights would be unconstitutional while discrimination in the social sphere was not prohibited by the Constitution.[51]

The categories employed by the *Plessy* court are strikingly similar to those employed over half a century later by Hannah Arendt in her discussion of the crisis over the desegregation of schools in Little Rock. She distinguished the social from the public and private realms. In her view, the public realm was constituted on the basis of equality while the constitutive principle of the private sphere was exclusivity. But the social realm was in fact based upon the principle of discrimination. Every social group maintains its identity by discriminating between insiders and outsiders. She also believed that because parents should have the right to control the associational life of their children, education properly belongs to the social and not to the public realm. It followed that if white parents did not want their children to associate with black children their choice should be respected. So long as the social custom of racial segregation was not imposed by force of law, the principle of separate but equal could properly be applied in the field of education.[52]

Given the widespread perception nowadays that compulsory integration of "public" schools has failed to overcome established customs of racial separation and social discrimination.[53] Arendt's position is not one that should be dismissed out of hand. Especially not when growing numbers of

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50 Sunstein, *supra* note 29 at 42.

51 *Ibid.* at 42.

52 H. Arendt "Reflections on Little Rock" (1959) 6 Dissent 45.

53 J. Traub, "Can Separate be Equal" *Harper's Magazine* (June 1994) 36.

blacks in the United States now apparently look upon the *Brown*[54] decision as a white plot to destroy black pride and self-sufficiency.[55] From Arendt's perspective one could conclude that the basic flaw in *Plessy* was not that it upheld the principle of status quo neutrality, or that it recognized the legitimacy of social discrimination, but rather that it wrongly located *public* transportation and *public* accommodation in the social sphere. Railway carriages and hotels where people appear together in public but encounter each other as strangers with whom they do not expect to and need not have any further social connection are not social institutions. Use of such facilities is an experience affecting both the private, civil rights of the individual and the public, political rights of the citizen. This is obviously so in the case of railways whose construction requires the exercise of a power of eminent domain that can only be justified when it serves some public purpose.[56]

Accommodation in hotels open to the "public" should be regarded as a civil right belonging to every individual simply by virtue of his or her status as a member of a civil society of free and autonomous individuals. It might be, however, that some hotels or resorts traditionally frequented by members of particular social or ethnic groups should be free to discriminate simply because they are social rather than public institutions. In such cases it may be a mistake to push the principle of equality beyond the public or political sphere, where it properly belongs, into the social or private spheres that are quite differently constituted. It may be too late to employ this line of argument in the formulation of public policy today. But the Supreme Court in 1896 could have used its distinction between the social and the public realms to forbid segregation in public transportation and public accommodation while conceding the legitimacy of separate schools for black and white communities only so long as public facilities and resources were provided to each group on the basis of strict equality. Had such an approach (recognizing the legitimacy of racial discrimination but carefully confining it to the social sphere) been adopted by the Court, race relations in the United States might have developed very differently over the next half century.

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54 347 U.S. 483 (1954).

55 Traub, *supra* note 53 at 36-7.

56 Sunstein, *supra* note 29 at 36-7.

Engineering Equality

Sunstein's analysis of *Muller* v. *Oregon* and his preoccupation with the issue of gender discrimination more generally owes more to a liberal penchant for social engineering than to a republican concern with deliberative decision making or the cultivation of the civic virtues. For Sunstein the problem in *Muller* v. *Oregon* "was the conclusion that the existing social roles of women and men were natural and just, and that a law that tended to perpetuate and even helped to create 'differences' could be justified by reference to them."[57] Even though the Oregon law was presumably designed to protect women workers from an evil similar to that suffered by the New York bakers in *Lochner*, Sunstein contends that "the Court treated the differences between the sexes as a sufficient justification for laws disadvantaging women."[58] Despite appearances, women were disadvantaged by the Oregon legislation because its effect would be to make women workers more costly and less remunerative to employers and would therefore tend to "freeze women out of the workforce."[59] For Sunstein the movement of women out of the domestic sphere into the labour force is an unambiguous good even if they are subjected to the unfair and exploitative working conditions already suffered by male workers.

Here and elsewhere Sunstein wants to extend the principle of equality beyond the public realm into the domain of social and even private life. Accordingly he advocates a shift in the constitutional foundation for a woman's right to abortion on demand away from the current privacy argument towards a doctrinal strategy focused on the principle of equal protection under the law. In other words, restrictions on abortion should be held to be unconstitutional because they amount to "a form of sex discrimination."[60] On this view an act of abortion amounts to "a refusal to allow one's body to be devoted to the protection of another."[61] Laws that restrict access to abortion amount to the conscription of women's bodies to save the life of another person. This is said to be analogous to a law requiring black people to become

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57 *Ibid.* at 64.
58 *Ibid.* at 63.
59 *Ibid.* at 63.
60 *Ibid.* at 273.
61 *Ibid.* at 274.

blood donors to prevent the death of others needing a transfusion. Such restrictions on abortion represent a form of sex discrimination because the law makes no such demands on the bodies of men. That being so, the principle of equal protection forbids laws limiting a women's right to abortion.[62]

This argument clearly subordinates republican concerns with civic virtue and personal responsibility to the traditional liberal view that every person has a self-regarding property interest in their own body. The owner of a body should be lawfully entitled to keep it for her own exclusive use and enjoyment: hence the supposed parallel between the compulsory acquisition of donor blood and the trespass committed by a foetal stranger when it comes to occupy or squat in a woman's womb. Sunstein recognizes the difficulty with his blood donor analogy when he acknowledges that pregnancy is the consequence of a voluntary act.[63] One might suppose that a republican would recognize the legitimacy of at least some restrictions on abortion that aim to discourage women from employing the procedure as just another form of birth control. Even if one acknowledges that reasonable efforts at contraception sometimes fail, is it not reasonable to expect people to accept responsibility for the consequences of their own actions, particularly when the lives and interests of other persons are affected? Waiting periods or counselling procedures for example, might be seen as procedural devices to encourage women to consider the interests, not just of the foetus, but of their sexual partners as well.

Sunstein is not at all concerned to ensure that the decision to abort is made in a disinterested and deliberative, as opposed to an instrumental and self-interested manner by the woman concerned. This indifference extends even to situations where the woman is married. He quotes with approval the Supreme Court opinion overturning a law requiring notification of husbands on the grounds that such a rule would deprive women of their constitutionally protected liberty by subjecting them to a form of paternal dominion.[64] But can permitting a married woman to receive an abortion without the knowledge of her husband really be essential to the liberty and property interests of the woman in her own body? If the members of a republican household need not

[62] *Ibid.* at 281.
[63] *Ibid.* at 281.
[64] *Ibid.* at 284.

deal together with the decision to abort the offspring of the marital relationship in an open and deliberative manner, how can the representatives of the nation as a whole ever be expected to subordinate their own selfish and private interests to the common good?

Within the framework of Sunstein's argument it is no answer to say that the household is a private realm while representative political institutions belong in the public sphere. The whole point of his doctrinal strategy is to displace the argument from privacy by an appeal to the principle of equality. But it seems that Sunstein is prepared to allow women to reap the benefits of equal protection without expecting them to shoulder the burdens as well. This becomes evident when Sunstein rejects the obvious analogy between the existence of a male-only draft and the demands made on the bodies of women by laws limiting access to abortion procedures. In Sunstein's view, "legal restrictions on abortion and a male-only draft serve similar functions"[65] within the pervasive social structures of gender inequality. Just as restrictions on abortion help to constitute a traditional domestic sphere to which women are confined, the military conscription of males alone serves to reinforce the traditional dominance of men in the public realm.[66] Given the importance of the citizen-soldier to the maintenance of republican liberty, one might suppose that the appropriate civic response to that sort of gender discrimination would be to require women, not only to become eligible for military conscription but to require them to serve in combat as well.

If restrictions on abortion represent a violation of the equal protection clause, male-only draft registration and male-only combat duty must also infringe the principle of gender equality. In a note buried at the back of his book, Sunstein denies "that male-only registration or male-only combat necessarily violates the equal protection clause" but then quickly evades the problem by declaring that the "question turns on issues of justification that I cannot discuss here."[67] But it is hard to see why the right to abortion on demand for women is somehow central to the future of deliberative democracy in the American republic while the issue of male-only conscription and combat duty is not even worth discussing. If the justification for sexual

65 *Ibid.* at 276.
66 *Ibid.* at 276.
67 *Ibid.* at 396, note 25.

discrimination in military matters has to do with "natural" differences in strength and aggression between men and women, it makes little sense for Sunstein to claim that the draft helps to secure the dominant position of males in the public world while confining women to the private domestic realm. It is not immediately obvious that an automatic obligation to shoulder the life-threatening burden of military service is designed to reinforce male privilege in the public realm while their automatic exemption will somehow prevent ambitious and self-interested young women from getting on with their careers. In any case, if there is no "natural" justification for sexual discrimination in military service, the question becomes one of public choice. In discussing conscription Sunstein fails to consider the relationship between the modern constitutional norm of gender equality and the traditional role of the armed citizen in the maintenance of a free republican polity.

Given the course of American and world history in the present century, this is no merely academic issue. More than a few concerned American citizens have seen a direct linkage between the rise of a highly militarized national security state and the steady eclipse of republican values in the United States.[68] Now that the military machine at the disposal of the executive is an all-volunteer or mercenary force it is probably even less susceptible to popular control or influence than it has been in times past. The fact that the American military intervention in Vietnam was carried out by a largely conscript army was one important factor causing opposition to the war to penetrate deeply into almost every sector of American society. Republicans, therefore, need to consider whether *all* citizens in what has long since become an imperial republic should not bear an equal responsibility to perform military service.[69]

The conscription of both men and women for service, including combat duty, in the American military forces might turn out to be a much more effective check on the war-making powers of the executive than the original hollow and ineffective constitutional provision requiring congressional approval for declarations of war. Conscription of both sexes on the basis of equality could have that effect precisely because it would stimulate and

[68] Karp, *supra* note 28; A.S. Miller, *Democratic Dictatorship: The Emergent Constitution of Control* (Westport, Conn: Greenwood Press, 1981).

[69] W.C. McWilliams, "Weapons and Virtues" (1982) 2 Democracy at 97-106.

encourage widespread popular debate and much more careful deliberation over the use of American military power. Such a policy would of course generate anomalies of its own. The question would inevitably arise as to whether a woman could legitimately avoid her civic obligation to perform military service, thereby escaping the risks of combat, by choosing to become pregnant, an option that will never be available to a male conscript. If, upon deliberation, a decision is made to excuse women from all or part of this military obligation, it may not seem so unreasonable after all to expect them to shoulder some gender-specific civic responsibilities of their own.

From that civic perspective, Sunstein's rhetorical use of the conscription metaphor seems both partial and manipulative. Assuming the traditional role of the male protector, he raises the spectre of conscription to elicit sympathy for the female "victims" of restrictive abortion laws. But he then carefully avoids any reference to the civic significance of compulsory military service in the modern national security state. What sort of republican would see conscription as a problem that has more to do with the right to abortion than with the role of the military in a free society? His curious reluctance to tackle thorny issues that have always been central to republican political thought might easily be seen as one more indication that Sunstein would prefer to limit the process of deliberative decision making to a relatively narrow circle of political and legal insiders, more or less effectively insulated from direct popular control or influence.

Realism and Regulation

Despite his sustained rhetorical assault on the allegedly dominant credo of status quo neutrality, Sunstein proposes very little in the way of a fundamental republican challenge to the established constitutional order. For all his repeated suggestions that status quo neutrality poses substantial obstacles to necessary and desirable changes, Sunstein ends his book with a celebration of "two of the most distinctive yet overlooked features of the American constitutional tradition: its remarkable lack of complacency and its extraordinary capacity for self-revision."[70] More often than not his critique of status quo neutrality is narrowly focused on the proclivity of courts and sometimes legislators to adopt a common law conception of the world. In

[70] Sunstein, *supra* note 29 at 354.

other words the liberty and property interests of the private individual become the baseline from which the constitutional requirement of impartiality is assessed. Nevertheless Sunstein does not completely reject the constitutional relevance of this common law perspective. He acknowledges that "the takings and contracts clauses cannot easily be read to create a constitutional baseline other than that of the status quo."[71] On the other hand he wants to encourage, not just judges, but also legislators and administrators to recognize that the legal status quo acquired a whole new dimension after the New Deal and the judicial revolution of 1937. With the rise of the regulatory state, the status quo cannot any longer be understood purely and simply in terms of common law rights and liberties. Such an approach, he claims, is "poorly adapted to modern government. Our status quo is no longer the common law at all."[72]

Sunstein regards the New Deal and its eventual judicial vindication as a crucial watershed in American legal and constitutional history. The revolution of 1937 reflected in the decision of the Supreme Court in *West Coast Hotel* v. *Parrish*[73] "was based above all on the understanding that the common law and existing distributions of resources would be entitled to no extraordinary protection from democratic politics."[74] American civil society would no longer be conceived simply as an assemblage of rights-bearing individuals, nor could the Constitution be read only as a device to confine and limit the exercise of state power. Instead civil society had to be understood as a constituent element in a complex interdependent system of needs within which legal rights and entitlements were no longer absolute but rather contingent on their perceived contribution to the collective welfare.

During the New Deal era a novel, realistic and pragmatic understanding of law insisted that common law rules did not simply reflect a pre-existing natural order; "they were human devices that created the very categories through which judges perceived legal and social realities."[75] Ownership rights were not rooted in a pre-ordained natural order of things; they were created

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71 *Ibid.* at 153.
72 *Ibid.* at 301.
73 300 U.S. 379 (1937).
74 Sunstein, *supra* note 29 at 51.
75 *Ibid.* at 51.

by the legal system. Property rights were therefore essentially "a delegation of public power by government."[76] In this realist perspective, the constitution was designed, not to limit, but to enhance the power of a centralized nation-state to promote the collective welfare goals of a complex and integrated socio-economic system.

With the rise of the regulatory state, new institutional structures and constitutional priorities could not be justified by reference to their *genetic* legitimacy as essential components of the "original understanding" of the Constitution. For that reason, Sunstein favours a different *telic* standard of legitimacy that emphasizes the capacity of governments to achieve public purposes.[77] To the extent that the growth of the positive, interventionist general welfare state involved a shift from genetic to telic legitimacy, three cornerstones of the original understanding of the American constitutional order were dramatically revised. Federalism, checks and balances, and judicial review all came to be seen as anachronistic obstacles to effective government.[78] If any of these constitutional principles are to be revived, they must receive a substantial political justification consistent with the systemic imperatives of sustained economic growth and development. In Sunstein's opinion, a merely formal appeal to the alleged centrality of these principles to the original understanding of the Constitution amounts to little more than a species of "legal authoritarianism."[79]

Federalism, checks and balances, and judicial review were all originally conceived as defences against the danger of tyrannical government. Sunstein's celebration of the centralized regulatory state might therefore seem to raise the spectre of a modernized despotism armed with an enhanced power to normalize and discipline a subject population in accordance with its therapeutic program of gender and racial equality. But Sunstein is fully aware that if a modern "despotism is to be at all, it must be enlightened."[80] The

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76 *Ibid.* at 52.

77 On the distinction between genetic and telic legitimacy see Fraser, *supra* note 25, *passim*.

78 Sunstein, *supra* note 29 at 60-61.

79 *Ibid.* at 60-1, 107-10.

80 L. Krieger, *An Essay on the Theory of Enlightened Despotism* (Chicago: University of Chicago Press, 1975) at 34.

contemporary regulatory state is but one version of the scheme of enlightened despotism that has been a recurrent temptation for western statesmen and legislators since the eighteenth century. The practical efficacy of that modality of political power rests upon the paradoxical proposition that "the effective quantity of available state power varies directly with the imposition of controls to channel and direct it."[81] To the extent that the authority of the modern nation-state is grounded in its capacity to promote the collective welfare, it cannot simply detach itself from the will of the constituent community from which it derives its original claim to genetic legitimacy. If federalism, checks and balances, and judicial review have been drained of their genetic legitimacy, some alternative means of channelling and directing state power becomes essential. It is in this context that Sunstein's ideal of deliberative democracy should be understood.

The Political Function of Free Speech

Sunstein opposes the equation of a majoritarian despotism with democracy precisely because it cannot claim to be enlightened. He denies that there is any necessary "opposition between constitutionalism and democracy, or between rights and democracy."[82] If government is to exercise enhanced statutory powers to upset existing patterns of common law rights and entitlements, it must be subject to limitations designed to ensure that the process of political will-formation is capable of generating rational and enlightened policy choices. For that reason Sunstein supports a continuing role for judicial review to protect rights essential to the democratic process itself: "Government interference with the right to vote or the right to speak calls for active judicial protection of the background conditions for political deliberation, political equality and citizenship."[83] Courts should also give close attention to governmental decisions that become possible only because certain groups or interests are denied a fair hearing in the legislative process. Otherwise, if the process of deliberative democracy works as it should to exclude arbitrary and irrational decisions, courts should defer to the social outcomes mandated by the legislature.

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81 *Ibid.* at 39.

82 Sunstein, *supra* note 29 at 142.

83 *Ibid.* at 142-3.

For Sunstein the most significant threat to constitutional government flows from a belief in unchecked majoritarianism. He argues that the constitutional commitment to deliberative democracy requires something more than a simple inquiry into what the majority of people "want." There is a vital difference between the economic principle of "consumer sovereignty" and "the Madisonian principle that vests ultimate sovereignty in the people."[84] Sunstein insists that popular sovereignty means that "citizens and representatives are supposed not to seek and pay for 'what they want' but to deliberate about social outcomes."[85] Private "preferences are frequently not fixed and stable"[86] and may be subject to change following a process of discussion and debate. Constitutional democracy aims not so much to satisfy existing preferences "but also and more fundamentally" to protect "free processes of preference formation."[87]

In effect, Sunstein discovers in the Constitution a fundamental distinction between the public-regarding role of the citizen and the private self-regarding aspirations of the bourgeois individual. Markets are the obvious and most appropriate arena for the satisfaction of the preferences people have as private consumers but it is through the political process that citizens can express their social aspirations and arrive at collective considered judgements about the common good. The collective desires that citizens express through political activity may well diverge from the market choices they would make as private consumers.[88] As long as the political process actually provides a "government by discussion," it will be constitutionally permissible for citizens to "override existing preferences in order to foster better and more diverse experiences."[89]

The fundamental norms of "government by discussion" in a "deliberative democracy" demand "extraordinary" constitutional protection for political speech.[90] Freedom of speech for all citizens is absolutely essential if the

84 *Ibid.* at 164.
85 *Ibid.* at 164.
86 *Ibid.* at 164.
87 *Ibid.* at 177.
88 *Ibid.* at 181.
89 *Ibid.* at 185.
90 *Ibid.* at 198.

process of political will-formation in a powerful and centralized nation-state is to be open to all shades of opinion. Unless that condition is met the political process will be incapable of generating outcomes that are widely perceived to be enlightened expressions of the public interest.

But Sunstein hastens to add that freedom of speech does not necessarily imply the immunity of all the existing legal rights and entitlements that presently shape the system of broadcasting and communication in the United States. If "legal rules that are designed to promote freedom of speech" happen to "interfere with other legal rules — those of the common law," they "should not be invalidated if their purposes and effects are constitutionally valid."[91] On this basis, Sunstein contends that the legislative imposition of fairness requirements intended to open up radio, television and newspapers to a broader and more diverse range of political opinions are well within the bounds of constitutional propriety. Conversely laws and regulations that confer upon broadcasters and publishers exclusive property rights that prevent certain people from speaking might well be regarded as an infringement of First Amendment rights. If so, Sunstein concludes that the legislature may well be under a constitutional duty to restructure the legal rules governing the broadcasting marketplace to require more attention to public issues and a greater diversity of views.[92]

This "Madisonian" approach maintains that the First Amendment is principally about securing the conditions for sustained political deliberation.[93] An important corollary of this view is that speech which is not "political" will not receive the "extraordinary" protection enjoyed by speech that "*is both intended and received as a contribution to public deliberation about some issue.*"[94] Examples of speech acts that Sunstein believes may legitimately be subjected to governmental restrictions include certain forms of "hate speech", such as cross-burning, commercial speech, libel of celebrities and pornography.

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91 *Ibid.* at 205.

92 *Ibid.* at 223.

93 *Ibid.* at 232.

94 *Ibid.* at 236 [emphasis in original].

For those who look upon governments as the natural enemies of free speech Sunstein's breezy confidence that one can make reliable and impartial distinctions between political and non-political speech is not likely to he persuasive. His discussion of both cross-burning and pornography provoke the suspicion that he is all too eager to outlaw forms of speech and expression that do not fit neatly within the discursive norms governing the articulation of respectable middle-class opinion. Sunstein himself acknowledges that the anti-pornography crusade of recent years has an obvious political character.[95] So too does the attempt to outlaw cross-burning that was struck down by the Supreme Court in *R.A.V.* v. *St. Paul*.[96] How can it be that those who seek to ban pornography or cross-burning are entitled to First Amendment protection while the cross-burners or pornographers who have flouted the conventional canons of mainstream political discourse and social morality are beyond the constitutional pale?

Cross-burning seems an obvious political attack on governmental policies promoting mass immigration, multiculturalism and racial integration. Nevertheless Sunstein justifies the proscription of this sort of "hate speech" by invoking the "fighting words" doctrine articulated over fifty years ago by the Supreme Court in *Chaplinsky* v. *New Hampshire*.[97] In that decision the Court held that certain words can inflict injury "by their very utterance" and because they are essentially devoid of political or ideological content they stand outside the scope of First Amendment protection. By relying upon this doctrine to carry the weight of his argument Sunstein himself retreats into a form of status quo neutrality. Other American legal scholars contend that the "fighting words" doctrine should be opened up to public scrutiny and not simply accepted as part of the established constitutional order.[98]

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95 *Ibid.* at 239.

96 112 S. Ct. 2538 (1992).

97 315 U.S. 568 (1942).

98 See, for example, H.L. Gates Jr., "War of Words: Critical Race Theory and the First Amendment" in H.L. Gates Jr. *et al.*, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties* (New York: New York University Press, 1995) at 17-58.

The duhious status of the "fighting words" doctrine is suggested not only by the fact that "since its promulgation the Supreme Court would never once affirm a conviction for uttering either 'fighting words' or words that 'by their very utterance inflict injury'."[99] On the other hand, the continuing threat posed by the doctrine to freedom of speech is evident in the enthusiasm with which it has been embraced by those who seek to outlaw racist speech. In effect, the "fighting words" doctrine allows Sunstein to have his cake and eat it too. He can deny that cross-burning is a form of political speech while maintaining that racist attitudes are part of a profoundly political mechanism of caste subordination that should he dismantled by positive governmental action. His approach to the regulation of pornography seems to be no less one-eyed.

Sunstein acknowledges that pornography is political in the broad ideological sense that it reflects "a point of view ... about how important things in the world should be structured."[100] At the same time, he maintains that pornography has nothing to do with debate and discussion with respect to public affairs. But then he reads out a catalogue of charges against pornography that flow from his obvious political commitment to the orthodox tenets of contemporary feminist ideology. In his view pornography should be banned because it "reflects and promotes attitudes towards women that are degrading and humanizing and that contribute to a variety of forms of illegal conduct, prominent among them sexual harassment."[101] Other scholars including many women, have argued that pornography has played an important historic role in weakening the power of the state, giving it a clear political significance. It also presented in a favourable light the figure of the independent, financially successful pornographic whore who scorned the ideals of female virtue and domesticity promoted by male authorities.[102] Sunstein's transparent partiality in seeking to use state power to repress unpopular forms of political speech such as pornography and cross-burning gives one reason to suspect that his "Madisonian" approach to the First Amendment has more

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99 *Ibid.* at 25.

100 Sunstein, *supra* note 29 at 239.

101 *Ibid.* at 266.

102 See generally, L. Hunt, ed., *The Invention of Pornography: Obscenity and the Origins of Pornography, 1500 - 1800* (Cambridge: MIT Press, 1993); C. Romano, "Between the Motion and the Act" *The Nation* (15 November 1993) 568.

to do with the legitimation requirements of a modernized and presumptively enlightened despotism than with the expressive needs of groups and individuals on the margins of American society.

The Political and the Unpolitical

The problem of drawing boundaries between the political and the non-political turns out to be central to a critical evaluation of Sunstein's constitutional theory. His understanding of politics is explicitly focused "on the distinctive American conception of sovereignty, and thus on democratic self-governance."[103] Speech is political when it addresses the affairs of the governments exercising a sovereign authority delegated to them by the American people. Speech and other activities relating to non-governmental issues and concerns take place in a private, non-political realm outside the scope of the extraordinary First Amendment protection of political speech. As we have seen, Sunstein works within a set of categories distinguishing between a political or public sphere of the state that is the proper domain of the citizen and the private, non-political realm of civil society inhabited by the bourgeois individual. However vague he may be about the institutional forms appropriate to a modernized deliberative democracy, Sunstein never doubts that the political decisions shaping the distribution of rights, entitlements, powers, duties and privileges within American society will continue to be made within the established framework of the regulatory state.

That bedrock assumption of Sunstein's constitutional theory is now very much open to doubt. Our status quo is no longer the regulatory state at all. Sunstein's analysis is fixated on the formal constitutional structure of the state as the exclusive locus of the "political." But over the past few decades it has become clear that the "political" has "migrated out of the official arenas — parliament, government, administration — into the *gray zone of corporatism*."[104] The power to shape our lives has been dispersed into the corporate, scientific and professional bodies where technological innovation and investment strategies are conceived and executed. According to the German social theorist Ulrich Beck these developments are potentially so

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[103] Sunstein, *supra* note 29 at 349.

[104] U. Beck, *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (Frankfurt am Main: Suhrkamp 1986) at 307-8 [emphasis in original].

sweeping and so dangerous in their consequences that the process of technical and economic modernization has lost its non-political character. Given the massive proliferation of risks associated with the development of new nuclear, microelectronic and genetic technologies, "corporate and scientific-technological activities have acquired a new political and moral dimension."[105]

At the same time, it is not at all clear how the dispersed centres of corporate and scientific power can be held politically accountable for the consequences of their activities. The conventional principles and practices of responsible government have no obvious application to techno-economic processes that occupy a sort of no-man's land between the political and the unpolitical. Beck contends that the realm of corporate-technological activities has acquired "the precarious intermediate status of a *subpolitics*, in which the scope of the social transformation set in motion by those activities are inversely proportional to their legitimacy."[106]

Precisely because the interventionist regulatory state has been so successful during the first two thirds of this century in overcoming the inequities and injustices associated with the first stage of capitalist modernization, it has lost much of its raison d'être. As ordinary people come to experience themselves as genuinely autonomous individuals, freed from the shackles and constraints of ascribed class, caste or gender identities, the social welfare state loses the political constituency essential to a strongly interventionist stance. As a consequence the power to determine the forms of social life has migrated out of the formal constitutional structures of the political system into the subpolitical domain of scientific and techno-economic modernization. In effect, "the political has become unpolitical and the unpolitical political."[107] The formal political institutions must now accept responsibility for developments that they are unable to plan or control. On the other hand scientific, technical and economic decisions loaded with political content are made routinely by persons and institutions who can claim no constitutionally legitimate public authority.

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[105] *Ibid.* at 304.
[106] *Ibid.* at 304 [emphasis in original].
[107] *Ibid.* at 305.

Under these circumstances the "Madisonian" understanding of popular sovereignty invoked by Sunstein has become little more than a polite constitutional fiction. Not only does the concept of popular sovereignty as a whole lack any firm basis in reality, but its component elements seem equally devoid of meaning. "Sovereignty" implies the existence of an absolute, unitary and indivisible centre of public law-making authority set outside and apart from the private realm of civil society. But the emergence of a corporatist process of decision making has tended to dissolve the boundaries between the state and civil society. As a consequence the state has lost its sovereign monopoly over politics. It is now difficult to locate clear lines of jurisdiction and responsibility even within the increasingly fragmented internal political order of the corporate welfare state. What we might mean when we refer to "the people" in the pluralistic mosaic of modern multicultural societies is even more mysterious. Certainly it seems impossible to imagine anything like a unified popular will underwriting the majesty of the law.[108] If it exists at all within the framework of a modern corporatist political economy, "sovereignty" belongs, not to the state or to the people, but to a complex, interdependent and subpolitical system of needs.

Sunstein's ideal of deliberative democracy is bound up with the traditional image of a sovereign political centre endowed with the constitutional power to steer the development of society and the economy. But if in fact a sort of de facto sovereignty has devolved into the subpolitical arena of corporate and scientific decision making, the process of deliberative democracy at the formal constitutional centre of the political system may not amount to much more than an elaborate charade masking the realities of power. If so, the problem for republicans today is to find new ways to institutionalize the ancient ideal of deliberative democracy in the dispersed loci of corporate, scientific and professional power that now stand beyond the reach of constitutional discourse. Sunstein should have recognized that the Constitution of the United States, and of every other Western democracy, is partial, not because it is biased in favour of the status quo, but because it has failed to constitutionalize the subpolitical realm of corporate power now driving a society of perpetual growth and uncontrollable change.

[108] I. Maus, "Sinn and Bedeutung von Volkssouveränität in der modernen Gesellschaft" (1991) 24 Kritische Justiz 137.

The Corporation as Body Politic

In coming to grips with that problem contemporary republicans should recall the legal history of the corporation in the early American republic. During the half century following the adoption of the Constitution a significant body of public opinion believed that, not only charitable, educational, and ecclesiastical corporations, but even many business corporations should be recognized in law as civil bodies politic. In other words, the corporation should be looked upon as a "little republic." It followed that the members of the corporate body politic should be recognized, prima facie, as political peers, equally responsible for the conduct of their common affairs. For some republicans that meant that voting should be conducted on the basis of one person, one vote rather than one share, one vote. Proxy voting was also disapproved by those who regarded the practice as a clear dereliction of the duty of every member of the corporation to engage in a civic process of deliberative decision making. This republican model of the corporation as a body politic assumed that shareholders should identify themselves, not just as self-regarding bourgeois individuals for whom voting was a purely instrumental device to advance one's own private interests, but also as corporate citizens concerned with the common or public interests affected by their collective activities.[109]

In a "scarcity society"[110] preoccupied above all else with the production of wealth and the pursuit of prosperity that civic conception of corporate enterprise was probably doomed from the start. American civil society was unambiguously the domain of the bourgeois, not of the citizen. Within that realm it was the instrumental logic of money-making, not the deliberative reasoning of the public-spirited citizen, that governed the process of decision making in commercial and industrial enterprises. Everywhere in American society equality meant that every man "was as good as his neighbour and possessed equal rights" but, most obviously in the sphere of corporate governance, his relative importance came to be "weighed by his purse, not by his mind, and according to the preponderance of that he rises or sinks in the scale of individual opinion."[111]

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[109] Fraser, *supra* note 25 at 190-213.

[110] Beck, *supra* note 104 at 25-6.

[111] Wood, *supra* note 1 at 243.

But, now that we find ourselves on the path towards another form of modernity that Beck calls the "risk society", the civic model of the corporation as a body politic may finally come into its own. In the early period of industrial capitalism, the stage of "simple" modernization, social life was organized around the production of wealth and the discovery of new ways of making nature useful. According to Beck, we are now entering a second stage of "reflexive" modernity in which scientific-technological "progress" has effectively dissolved the boundary between nature and society. The result has been that the "gain in power from techno-economic progress is being increasingly overshadowed by the production of risks."[112] A process of permanent scientific and technological revolution is generating risks that are not just ecological but social as well. The invisible poisoning of the environment is coupled with the recurrent and increasingly all-pervasive threat of structural unemployment. Rising living standards and increasing levels of individual autonomy through the expansion of the labour market exist side by side with the feminization of poverty and the threat to the family posed by new reproductive technologies. No longer specific to one class, caste or social grouping, these increasingly generalized risks threaten all of us. But at the same time the production of such risks heightens our dependence on the technical and scientific understanding we need simply to recognize and understand the nature and scope of the dangers we face. In these circumstances it becomes vitally important to develop new forms of reflexive rationality within the subpolitical realm of corporate, scientific and professional power.

According to Beck the conditions necessary to free citizens from the irresponsible and unaccountable control of corporate managers and professional power must be institutionally secured at the level of the subpolitical. Within each profession and enterprise it must become possible for counter-expertise, alternative forms of professional practice and other forms of internal critique to confront the risks of development. Only then will it be possible for corporate and professional institutions to resist the temptation to repress scepticism over the alleged benefits of scientific and technological development. That sort of scepticism must set itself in opposition to an ideology of progress that has turned into the "secular religion of modernity." Promises that technological innovations will somehow lead to

[112] Beck, *supra* note 104 at 17.

material and moral progress are essentially a method of legitimating social change without having to secure the consent of those affected. Despite the mounting risks and changes associated with reproductive technologies such as *in vitro* fertilization, for example, the subpolitical domain of medicine has no parliament or executive in which the consequences of such developments can be investigated *in advance*. Instead political discussion will take place only after governments and the public have been presented with a fait accompli.[113]

Beck's discussion of how new forms of reflexive rationality might be institutionalized on the subpolitical level is somewhat vague. It is probably also overly optimistic. He suggests that the "disempowerment of politics" in the formal constitutional sense raises the question "whether the *other* society perhaps without any plan, consent or consciousness might be produced in the workshops of techno-economic development."[114] At best, he suggests, the classical theory of popular sovereignty made possible an incomplete democracy. The effective political monopoly vested in the representatives of the people created the contradictory constitutional form of a "democratic monarchy" in which citizens were transformed into "democratic subjects" the moment the electoral process was complete. That being so, Beck believes that the devolution of sovereignty into the subpolitical realm may actually create new forms of decentralized power open to democratic influence and control.[115]

The Risks of Refeudalization

Another German political theorist, Ingeborg Maus, is less confident that the disempowerment of official politics will automatically produce the "other," more rational and democratic society. She believes that Beck has neglected the *quality* of the decentralization that is now hollowing out the formally sovereign structures of the regulatory state.[116] This parcellization of sovereignty may not be synonymous with the progressive unfolding of the logic of "reflexive modernity" at all. In fact these same developments might

[113] *Ibid.* at 372, 344, 334.
[114] *Ibid.*
[115] *Ibid.* at 307, 312, 314.
[116] Maus, *supra* note 108 at 145.

more plausibly be understood as a process of refeudalization.[117] Scientific, technical and economic decisions are made on a subpolitical level beyond the reach of constitutional norms. In other words, corporate and professional power is not exercised within a public sphere that would make it visible and open to a process of deliberative reasoning and discursive justification. Beck hopes that the dissolution of a sovereign political centre will somehow open up new spaces for democratic social movements in the subpolitical domain. But all subpolitical groups and entities are not created equal. On the contrary the disempowerment of constitutional politics is leading to a situation where the least powerful subpolitical groups or movements now have even less capacity to exert influence over the most significant loci of corporate, scientific and professional power than was once available to them through the medium of a politically effective regulatory state.

That is not to say that Maus recommends a hopeless attempt to reconstruct a unitary, political centre. Nor does she follow Beck in his enthusiasm for the judicial vindication of fundamental democratic rights. That strategy she regards as just another symptom of the regressive refeudalization of modern society. Appeals by social movements engaging in various forms of civil disobedience to judicially enforced fundamental rights are essentially a throwback to the medieval right of resistance. As such, this strategy effectively abandons the ground that later came to be occupied by the enlightenment theory of popular sovereignty. Popular sovereignty was distinguished from the right of resistance "by the fact that it was not derived from existing rights or from a valid constitution."[118] On the contrary, it was the sovereign people that preceded and established the legal and constitutional order as a whole.

In the philosophy of the enlightenment, popular sovereignty also meant that only the government, and not the people, was bound by the constitution.[119] In both Germany and the United States, the theory and practice of judicial review has effectively usurped the sovereignty of the people by endowing the law of the constitution as interpreted by the courts with an authority beyond the reach of a popularly elected legislature. Functioning as a sort of systemic

[117] *Ibid.* at 141.
[118] *Ibid.* at 139.
[119] *Ibid.* at 139.

super-ego, judicial review posits a pre-given constitutional order that binds not just governments, but the people as well.[120] To give contemporary doctrinal meaning to the enlightenment theory of popular sovereignty, judges reviewing the constitutionality of governmental or citizen activity would have to be presented with a set of institutional norms and practices designed to make possible effective popular participation in the structures of both private and public governments within the total constitutional order of the corporate welfare state. For too long, judges have been content to find, in the mere habit of obedience, the legitimate foundation of governmental authority.

A certain scepticism seems advisable over the capacity or willingness of the judiciary to promote a process of democratization either within the internal political order of the state or on the subpolitical level of civil society. In the exercise of its relatively limited role in the resolution of particular disputes, the judiciary seems likely, more often than not, to promote the expansion, rather than the limitation, of the telic powers that have already devolved into the corporate and professional groups dominating the subpolitical realm. This has certainly been the effect of recent High Court decisions announcing the discovery of an implied bill of rights in the Australian constitution. Media corporations and not individual citizens have been the primary beneficiaries of the judicially crafted right of free political expression.[121]

A mental shift toward a telic view of politics has become characteristic of the modern corporate welfare state. As corporate capitalism prospered, the cult of the divine economy had an important impact on constitutional and legal theory throughout the Western world. Everywhere the absolute imperative of economic growth and development became a basic axiom of judicial, as well as of legislative and executive decision making. Nowhere has the normative force of that systemic requirement been more clearly expressed than in a maxim coined by Isaacs J., the author of the pivotal *Engineer's* decision.[122]

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120 I. Maus, "Justiz als gesellschaftliches Uber-Ich. Zur Funktion von Rechtsprechung in der 'vaterlosen Gesellschaft'" in W. Faulstich and G.E. Grimm, *Sturz der Götter? Vaterbilder im 20. Jahrhundert* (Frankfurt am Main: Suhrkamp, 1989) at 121-149.

121 *Australian Capital Television* v. *The Commonwealth* (1992) 66 ALJR 695; A. Fraser, "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 Sydney L. Rev. 213.

122 *The Amalgamated Society of Engineers* v. *The Adelaide Steamship Co.*, (1920) 28 CLR 129.

Isaacs J. took it to be the "duty of the judiciary to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes."[123] To resist the telic logic of development would be to separate the judiciary "from the progressive life of the community."[124] That judicial postulate has effectively endowed the corporate structures of the economy with a more or less autonomous jurisgenerative capacity (in German, *Eigengesetzlichkeit*).[125] In practice the unquestioned primacy of the divine economy means that the legal norms deemed necessary and appropriate to the management of a complex socio-economic system will tend to remain more or less congruent with the needs of the most powerful economic actors.[126] Judges are no less likely than politicians or orthodox legal theorists to reject any conception of fundamental law or democratic rights that conflicts with the immanent logic of a corporatist system of needs. For these reasons *judicial* power is more likely to contribute to the problem of refeudalization than to provide a solution. The reconstruction of popular sovereignty in an increasingly parcellized society must take the actual decentralization of the *legislative* function as its point of departure.[127]

The problem for republicans, in other words, is to constitutionalize the new forms of effective legislative power that have emerged on the subpolitical level. In this context Sunstein's "liberal republican" vision of deliberative democracy is not only anachronistic and outdated; it is pathetically inadequate

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123 *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.*, (1922) 31 CLR 421 at 438-9.

124 *Ibid.* at 439.

125 I. Maus, *Rechtstheorie und politische Theorie in Industriekapitalismus* (Munich C.H. Beck, 1976) at 218, 232-4.

126 R. Cullen & P. Hanks, "Getting the Political Architecture Right" (1993) 31 Osgoode Hall L.J. 6, argue that the constitution should be interpreted in such a way as to promote the process of economic growth and development, a view that merely makes explicit what has long been implicit in the actual functioning of politics and law throughout the Western World.

127 Maus, *supra* note 108 at 147. To the extent that judicial power has acquired a legislative character, the judiciary should itself be reconstituted to institutionalize new forms of democratic and professional accountability consistent with republican principles of mixed government, see Fraser, "Beyond the Charter Debate: Republican Rights and Civic Virtue in the Civil Constitution of Canadian Society" (1993) 1 Rev. of Const. Studies 27.

as a solution to the constitutional problems facing the emergent "risk society." Sunstein discusses the problem of risk management only in the limited context of a jurisdictional conflict between the compensation-oriented procedures of the common law and the alternative regulatory strategy of changing incentives or restructuring private behaviour in such a way as to deter harmful conduct.[128] Within this framework government will remain the *ex post facto* regulator of risks that have been generated by a process of techno-economic development that it is powerless to plan or control.

In any case, the effectiveness of the regulatory strategies proposed by Sunstein are very much open to doubt. Given the corporatist character of the relationship between the state and the subpolitical realm, it is precisely the most important producers of risks that enjoy privileged access to government. That influence may be reflected, not through the enactment of definite rules, but rather through the most indefinite sorts of regulations. Even when more specific regulations have been adopted to "manage risks" the threats implicit in investment decisions and the choice of locations for plants and offices may often lead to a remarkable "implementation deficit." As the distinction between public and private dissolves into a complex process of corporatist intermediation, the regulatory state is transformed into a conglomerate of authorities representing various socio-economic interests.[129]

Deliberative Democracy in the Regulatory State

The concept of the regulatory state occupies a central place in the development of Sunstein's argument but his analysis of the structure and functions of the federal bureaucracy is remarkably superficial. He begins his book with the claim that the Constitution is partial, not just because its judicial interpretation has been biased in favour of the status quo, but also because people have tended "to identify the meanings and workings of the Constitution with the decisions of the Supreme Court."[130] To treat the Constitution as a whole "a shift to administrative and legislative bodies, and to democratic arenas generally is necessary."[131] For that reason, he declares

[128] Sunstein, *supra* note 29 at 334-8.
[129] Maus, *supra* note 108 at 285-6, 290.
[130] Sunstein, *supra* note 29 at 10.
[131] *Ibid.* at 10,

that the book is addressed, not just to judges, but to anyone "thinking about constitutional liberties in the modern state."[132] To his credit, Sunstein frequently appeals for judicial restraint in the face of legislative or administrative initiatives emerging out of a process of deliberative decision making. But these conspicuous displays of good intentions are largely undercut by the fact that the great bulk of the book occupies itself with the doctrinal analysis and critique of one Supreme court decision after another. He never attempts to analyze the internal workings of the legislative or administrative branches of the national or state governments to determine whether or why the process of deliberative decision making is the rule or the exception.

Typically, in his discussion of the problem of standing, Sunstein simply assumes that a shift away from the traditional common law rules to others more sensitive to the regulatory purposes embodied in a statutory scheme will somehow further the ideal of deliberative democracy. But the common law rules which limit standing to persons claiming injury to a recognized liberty or property interest may well be appropriate in situations where bureaucracies allocate resources and sanctions belonging to the state, leaving individuals within a protected zone of autonomy. A broader approach to standing may be more appropriate when the administrative problem becomes one of identifying the "outputs" to be produced by an agency in the realm of, say, education or health policy.[133] It would be naïve in the extreme to suppose, however, that the range of interests represented in administrative proceedings under an expanded standing regime will automatically produce a "democratic" process of "deliberative" decision making.

It has long been evident that "broad participation rights do not, by any means, ensure that all relevant interests will be represented before the agencies."[134] This is particularly unlikely in situations "where the impact of a decision is widely diffused or that no single individual is harmed sufficiently

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[132] *Ibid.* at 10.

[133] C. Offe, "The Theory of the Capitalist State and the Problem of Policy Formation" in L. Lindberg *Stress and Contradiction in Modern Capitalism: Public Policy and the Theory of the State* (New York: Lexington Books, 1975) at 125-44.

[134] R. Stewart, "The Reformation of American Administrative Law" (1975) 88 Harvard L. Rev. 1668 at 1763.

to have an incentive to undertake litigation."[135] It might be suggested that "public interest advocacy" would provide representation for such scattered and diffuse interests. But not only are resources for such public interest advocacy very limited but the lawyers involved in such work themselves select the interests to be represented. To make things worse, the public interest lawyer is rarely "subject to any mechanism of accountability to ensure his loyalty to the scattered individuals whose interests he purports to represent."[136] In any case, even if an administrative agency does permit its clientele to participate in the determination of both the inputs and outputs of its decision making process, the result will most likely be a problem of political overload.[137] Not all of the interests clamouring to be recognized can be usefully incorporated into the "simulated debate" characteristic of a corporatist process of policy-making.[138] In such circumstances, pressure will develop to limit the availability of standing to those interests functionally relevant to the stability and survival of the regulated industry. That move will inevitably be justified by the argument that the only genuinely democratic process of deliberative decision making is that which takes place within the popularly-elected legislature. With that rhetorical move we arrive back at square one.

Sunstein never provides us with any good reason to believe that the idea of deliberative democracy can be realized within the increasingly obsolescent and ineffectual structures of the regulatory state. His reform proposals actually reflect the political weakness and deepening irrelevance of the post-New Deal regulatory state. The resurrection of the fairness doctrine in broadcasting policy or campaign finance controls would do little to diminish the capacity of the corporate sector to set the political agenda in the United States. Requiring broadcasters to allocate more air time to a somewhat broader range of professional politicians and organized interest groups does nothing at all to encourage a process of deliberative decision making *within* media corporations. Nor would such regulations do much, if anything, to transform the passive consumers of televised political propaganda into active, public-spirited citizens.

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[135] *Ibid.* at 1763.

[136] *Ibid.* at 1765.

[137] Offe, *supra* note 133 at 139-43.

[138] Z. Bauman, *Memories of Class: The Pre-history and After-Life of Class* (London: Routledge, 1982) at 43.

Sunstein's other major reform proposals flow from his "opposition to caste." Here too it is not at all clear how securing the right of women to abortion on demand, the legally enforced integration of public schools or the expansion of affirmative action programs will breathe new life into the ideal of deliberative democracy. Far from representing a fundamental challenge to the status quo, the forces promoting the dissolution of traditional class, caste and gender identities are already at work in the emergent structures of the risk society described by Beck. One of the risks we face is that the collapse of traditional identities may make it more, rather than less difficult to promote the democratization of the economy. As class, caste and gender recede in importance, individuals are becoming self-sufficient units within a corporatist system that generates increasingly standardized patterns of work, consumption and leisure on a global scale. Facing the multiplying risks of modernity on their own, individuals will be hard pressed to resist the powerful forces promoting the refeudalization of the subpolitical realm.

Conclusion

Sunstein's essentially bourgeois commitment to liberal individualism has effectively hollowed out his simultaneous allegiance to civic republicanism. Accordingly, equality seems to him to be an ideal best invoked to secure the right of women to treat their bodies as a species of exclusive private property. As far as one can tell, he is not in the least interested in the extension of the republican principle of political equality into the realm of corporate governance. But, given the disempowerment of the regulatory state, the future of the deliberative democracy in the United States and elsewhere probably depends upon our capacity to constitutionalize the irresponsible and unaccountable forms of corporate power that now dominate the institutional life of modern society. To deal with this problem Sunstein would have had to turn his attention away from the equal protection clause and focus instead on the Article IV guarantee of republican government. After all, one of the most obvious symptoms of the civic republican tradition in America is the fact that the guarantee clause has long since been reduced to a dead letter.[139]

[139] *Luther* v. *Borden*, 48 U.S. (7 How.) 1 (1849); G.M. Dennison, *The Dorr War: Republicanism on Trial, 1831-1861* (Lexington: University Press of Kentucky, 1976).

And yet, once it has been recognized that modern corporate enterprise actually functions as a form of 'private' government, the constitutional guarantee of republican government should operate to mandate federal judicial, legislative, or executive intervention to enforce the norms of deliberative decision making within the process of corporate governance.[140] Given his professed sympathy for a Madisonian understanding of the republican tradition this should not be a difficult point for Sunstein to grasp. After all, for Madison the greatest threat to the deliberative forms of republican government was the growth of "factions." By nature, the spirit of faction is focused on the selfish pursuit of some private passion or interest "adverse to the rights of other citizens, or to the permanent and aggregate good of the community."[141] Within the body politic of the modern business corporation the "one share, one vote" rule displaced the republican principle of "one voice, one vote" thereby enshrining in law an entrenched institutional preference for the interests of large capital investors. At the same time, that shift in the constitutional balance of corporate governance destroyed the political identity of the corporation as a deliberative assembly of natural persons attempting to arrive at a shared sense of institutional purpose through a disinterested and public process of debate and discussion.

Unfortunately, the continued intellectual dependence of American courts and lawyers upon the atavistic myth of sovereignty has occluded the contemporary civic significance of the guarantee clause. Nevertheless the durability of any republican form of government worthy of the name now depends upon the capacity of the polity to institutionalize reflexive schemes of civic action within the subpolitical corporate entities that straddle the rapidly eroding boundary between state and civil society. In other words, the survival of deliberative democracy demands that the constitutional commitment to republican principles of civic freedom and political equality keeps pace with the changing institutional structures of modern society.

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[140] M. Nadel, *Corporations and Political Accountability* (Lexington MA: Heath, 1976) and A.S. Miller, *The Modern Corporate State: Private Government and the American Constitution* (Westport: Greenwood Press, 1976).

[141] T. Berg, "The Guarantee of Republican Government: Proposals for Judicial Review" (1987) 54 U. Chicago L. Rev. 208 at 230.

If it should happen that governmental powers become detached from the formal constitutional structures of the sovereign nation-state and attach themselves as well to the ostensibly "private" forms of corporate enterprise and professional organization, should not the republican principle of deliberative democracy follow in their wake? In the past five decades the subpolitical domain of corporate power has come to occupy an intermediate realm between the public sphere of the state and the private realm of civil society. Accordingly new deliberative forms of corporate governance must be developed in which the citizen and the bourgeois encounter each other on a plane of equality. Unless and until that happens, the American political system will remain, at best, a partial republic (or, perhaps more accurately, a disguised monarchy). The Constitution may well remain in place but as an increasingly hollow core, practically devoid of coherent and effective civic meaning.

ESTIMATED PROPHET:[1] A REVIEW OF *SEXY DRESSING ETC.*

by Duncan Kennedy
(Cambridge: Harvard University Press, 1993)

David Fraser*

Risin' up to paradise ...
You will follow me
We'll rise up to glory
My word fill the sky with flame
Might and glory goin' be my name[2]

Introduction

I have tried to write a standard book review. You know the kind — an introduction with a general overview of the work under examination, followed by a more detailed study of the book, offering a summary of the author's position — and containing an analysis of this position by the reviewer, usually accompanied by references to the author's previous work, to demonstrate the reviewer's erudition and scholarly integrity and by references to the reviewer's own works, again to prove erudition and scholarship and generally, but not always, to show that the reviewer could actually have done a better job than the author.

* Visiting Scholar, University of British Columbia, Faculty of Law. Thanks to Cary, Dave, Maria, Michael and Vaughan for hospitality and bibliographical assistance. Thanks also to Jerry, Bob, Phil, Bill, Mickey and Vince for inspiration. Thanks always to Kate. Let there be songs to fill the air.

1 R. Weir and J.P. Barlow, "Estimated Prophet", The Grateful Dead, *Terrapin Station* (Arista Records, 1977).

2 Weir and Barlow, *supra* note 1.

I tried to follow this tried and true formula but I have been unsuccessful. I just couldn't do it. This doesn't mean that I am incapable of referring to Duncan Kennedy's other work, or that I am above citing my own publications (see below for proof to the contrary). Rather, it means that I simply can't do a standard review in this case. I trace my failure to adhere to the traditional rules of the genre to several, sometimes interrelated sources. First, the structure of the book makes it difficult to review. *Sexy Dressing Etc.* is a collection of previously, but separately, published essays. This means that not only is the book not a "book" in the traditional sense of an original work,[3] but it also means that the essays which constitute the work under review are already in circulation in the world of academic discourse and peer review and have been for some time. My comments on the substantive arguments of Kennedy's work would add little.

Second, I agree with most of what Kennedy has to say about the various topics with which he deals in the essays which make up *Sexy Dressing Etc.* His description of the role of the radical intellectual in the American (legal) academy is one which is intriguing and probably accurate.[4] His critique of the concept of "merit" and of objections to affirmative action in the legal academy is devastating.[5] The way in which he links Legal Realism and the "poststructuralist" work of Michel Foucault demonstrates convincingly the truth contained in the aphoristic "we are all realists now" as well as the danger of thinking that such an aphorism could ever encapsulate (and thereby dismiss) the sophisticated intellectual insights of Critical Legal Studies.[6] Finally, his careful and detailed examination of the possibilities and dangers contained in the ways in which legal and popular discourses can eroticize

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3 I recognize that in this postmodern era, such an assertion about genre and originality is incredibly problematic.

4 See D. Kennedy, "Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute" in D. Kennedy, ed., *Sexy Dressing Etc.* (Cambridge: Harvard University Press, 1993) 1.

5 See D. Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia" in *Sexy Dressing Etc., supra* note 4 at 34.

6 See D. Kennedy, The Stakes of Law, or Hale and Foucault!" in *Sexy Dressing Etc., supra* note 4 at 83.

domination and violence resonates clearly with some of my own work.[7] Because I am intellectually and personally, if there is a difference, more comfortable trashing something[8] than I am attempting to describe and analyze work with which I am in agreement, it is not possible for me to "review" this book.

Third, I actually know Duncan Kennedy. While I might immunize myself from some accusations of bias and a lack of intellectual "distance" and "objectivity" by being forthcoming about this, in the eyes of some readers I would be forever condemned for my lack of integrity in writing a review of a book by someone I know. So I will not pretend that this is a "review" in the traditional sense. Instead for all of the reasons I have just outlined, I will, in what follows, simply offer some observations and thoughts concerning my engagement with *Sexy Dressing Etc.* and the broader and more general politics of the academy which underlines this work.

2. *Playin' in the Band*: Law, Popular Culture and CLS

Some folks trust in reason
Others trust in might
I don't trust in nothin'
But I know it come out right.[9]

As I disclosed in my opening comments, I know Duncan Kennedy. As a matter of fact, a few days after I received my review copy of *Sexy Dressing Etc.*, I flew to Boston, where, among other tax-deductible sabbatical-related activities, I met with Duncan at *Casablanca*, a Harvard Square bar. There we discussed the state of the world in general and CLS in particular, over a few

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7 See, for example, D. Fraser, "The Owls Are Not What They Seem: David Lynch, The Madonna Question and Critical Legal Studies" (1993) 18 Queen's L.J. 1 and D. Fraser, "Oral Sex in the Age of Deconstruction: The Madonna Question, *Sex* and The House of Lords" (1993) 3 Australasian Gay and Lesbian L.J. 1. I told you I wasn't above self-serving citation.

8 See D. Fraser, "Laverne and Shirley Meet the Constitution" (1984) 22 Osgoode Hall L.J. 783. There I go again.

9 R. Weir, R. Hunter and M. Hart, "Playin' in the Band", Bob Weir, *Ace* (Grateful Dead Records, 1972).

fine single malt scotches.[10] I mention this not just as a further declaration of personal interest in the book under "review" but also because the other reason for my trip to Boston and our conversation on that subject offers, I think, a good insight not only into the intellectual project which informs Kennedy's book, but also into the points at which Duncan's view of CLS differs from my own.

In addition to meeting with Duncan and prowling the bookstores of Harvard Square, I also attended six Grateful Dead concerts at the Boston Garden. I went to these shows with several friends, almost all of whom either practice or teach law and all of whom could be described as sitting, in old-fashioned, pre-fall of the Eastern Bloc terminology, on the left of the political spectrum. Not only does this demonstrate the narrow base of acquaintance in my life, but it also, I believe, hints at the fact that there is some connection between the Grateful Dead and a progressive vision of the connection between law and politics as epitomized in the CLS mantra "law is politics". I am not asserting here that the Dead offer the only locus where discourses of law and popular culture can and do intersect. Indeed, *Sexy Dressing Etc.* offers clear and cogent proof of the existence of multiple sites of intersection. I wish rather to stake a milder claim that where we find these discursive matrices can offer insights into the nature of our political engagements.

Duncan and I discussed my choice of finding potential political struggle in the "Deadhead community" but he remained unconvinced not just as to the grounds of my "deadication" but as to the connection between the Grateful Dead and a possible progressive (legal) politics. When I offered him a spare ticket to attend and see for himself that there is, in fact, "nothing like a Grateful Dead show", he declined, claiming that had the offer been for a Rolling Stones concert, he probably would have accepted.

Herein lies the key to my differences with Duncan and my problems with *Sexy Dressing Etc.*. He is a little bit Rolling Stones, I am a little bit Grateful Dead. This does not mean that there is a world of difference between us on every issue. Indeed, the Dead regularly perform "Rolling Stones" songs, such

[10] On the importance of Scotch in legal scholarship, see D. Fraser, "What's Love Got To Do With It?: Critical Legal Studies, Feminist Discourse and the Ethic of Solidarity" (1988) 11 Harvard Women's L. J. 53. There I go yet again.

as the Jagger/Richards compositions "Satisfaction"[11] and "The Last Time"[12] popularized by Mick and the boys. While the Rolling Stones are featured on *Beverly Hills 90210*, the Grateful Dead served as a key plot device on a recent episode of *LA Law* where a husband's devotion to the band and his refusal to "grow up" lead his wife to institute divorce proceedings. Thus both groups figure as tropes at the center of American popular culture. At the same time, however, an examination of the differences between the appeal of *Beverly Hills 90210* and *LA Law* (which I don't have time to go into here) would reveal crucial distinctions which go to the heart not just of popular culture but of CLS. While the Stones might break records for gross attendance on their rare tours, year in and year out, the Dead are the highest grossing live band in rock and roll. The Rolling Stones offer fleeting moments of progressive potential while the Dead give a glimpse of the possibility of creating an enduring alternative to the mainstream of American culture and politics.

To cut a long story short and to avoid a lengthy and esoteric analysis of the Rolling Stones versus the Grateful Dead analogy, suffice it to say that the key difference between them, like the key difference between Duncan and myself, is one of genre and sources, of outlook and influences. The Rolling Stones are historically part of the English invasion, a phenomenon of the early Sixties when English rock groups, influenced by African American blues musicians to whom they had listened, brought to America a style that reinvigorated what was really a bland and very "white" popular music scene. In other words, working class English kids taught middle class American kids about a kind of American music that audience had ignored in its original form.

[11] Up to 1993, the Dead had performed "Satisfaction" thirty times. This information comes from *DeadBase*, the quasi-official compilation of set lists from every Grateful Dead show. J.W. Scott, S. Nixon, and M. Dolgushkin, *DeadBase VII* (Hanover, New Hampshire, 1993). M. Jagger and K. Richard, "Satisfaction" The Rolling Stones, *Out of Our Heads* (London Records, 1965)

[12] *Last Time* had been performed twenty-three times up to 1993. M. Jagger and K. Richard, "Last Time" *ibid.*

On the other hand, the Grateful Dead came out of San Francisco in the Sixties. Influenced by traditional American blues and folk combined with the "hippie" ethic and the magically liberating effect of psychedelics, the Grateful Dead sought to trace a path from America's past to the potential of a new and open future. Thus, the Dead offered to Americans the possibility of imagining a new American future.[13]

The points of intersection between the Stones and the Dead are clear. Products of the revolution in American popular culture of the Sixties, they each opened up new possibilities to a mass of disaffected, alienated American youth. Among these disaffected American youth, searching for a better world in the Sixties were the "founding fathers" of CLS, including Duncan. That he should prefer the Stones to the Dead is a sign not only of the gap which separates the east and west coast of America, but also of the fact that the America which finds itself reflected in *Sexy Dressing Etc.* is only one of several imaginable Americas. This is the strength and the weakness of his book.

3. *US Blues*: Duncan Kennedy's America

I'm Uncle Sam, that's who I am[14]

This is an American book. It is written by an Harvard Law School professor about the dilemmas facing those in the academy who seek to build a better America. This does not mean that it is not relevant to those of us who find ourselves in countries outside the United States nor that the book is parochial in its perspective. Indeed, it becomes relevant for us not just because

[13] It is important to remember here that my analysis is cursory. It would be necessary to expand and clarify many of the points made briefly here. Thus, for example, while the Dead are a "San Francisco" phenomenon, their following in the United States knows no geographical bounds. At the same time, there are clear and distinct differences between "West Coast" Dead shows and "East Coast" dead shows. For an introduction to this and other subtleties of the Grateful Dead experience, see D. Shenk and S. Silberman, *Skeleton Key: A Dictionary for Deadheads* (New York: Doubleday, 1994).

[14] R. Hunter and J. Garcia, "US Blues" The Grateful Dead, *From the Mars Hotel* (Grateful Dead Records, 1974)

at some sad yet basic level, "we are all Americans now"[15] but because Kennedy is cosmopolitan in his intellectual endeavors. Thus, *Sexy Dressing Etc.* is deeply informed by a variety of European sources. Interestingly enough, this European turn is what makes this book truly American. Kennedy adopts and adapts a variety of genres and influences with such success that, like the Rolling Stones, he turns "their" theory into one of his very own. Let him explain his position.

All the essays attempt to mix and meld European and American theory, without letting either dominate. Legal realism is a pervasive American influence, along with its kindred movements, pragmatism and institutional economics. A central problem is how people like me can (should) relate to American black liberation theory and American radical feminism.

The Continental 'fancy theory' is based in Freud and Marx, but I am mainly conscious of trying hard to assimilate, to cannibalize and then actually *use*, structuralism, neomarxism, phenomenology, existentialism and post-modernism (and, I suppose, whatever else may come into fashion). 'Radical Intellectuals in American Culture and Politics' is homage to Gramsci; 'A Cultural Pluralist Case for Affirmative Action,' to Sartre, Althusser, and Derrida; 'The Stakes of Law,' to Foucault; and 'Sexual Abuse, Sexy Dressing, and the Eroticization of Domination,' to 'Saussure, Levi-Strauss, and again Foucault.'[16]

The intellectual "program" which informs this book, like the best of CLS writing, is the hybridization of European "intellectual" theory and American "legal" theory. On this approach, and in his choices of intellectual "sources", I agree with Duncan. His summary of the influences within American legal and social thought is one I share. I am also quite comfortable with his "European" influences. While I might choose to emphasize other parts of "fancy theory" or offer different readings of the same authors in my own

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[15] I make this comment despite some lingering "better instincts" that "we" are not the same. See D. Fraser and A. Freeman, "What's Hockey Got To Do With It, Anyway? Comparative Canadian-American Perspectives on Constitutional Law and Rights" (1987) 36 Buffalo L. Rev. 259.

[16] *Sexy Dressing Etc., supra* note 4 at x-xi.

work,[17] these differences are simply the result of different personal predilections and/or generational differences. My perhaps more fundamental disagreement with Kennedy concerns the underlying thrust of the essays in the book. More particularly, what I might describe as the potentially most problematic aspect of this book is that this is an American book which seeks to establish the intellectual as one who can, does, should and must engage in political struggles around the key defining issues of the culture in which he finds himself.[18] So far, so good. The problem, however, is that Duncan sees the intellectual in what is in his own terms a particularly American vista.[19] In short, Duncan sees the American intellectual as a creature different from his European "counterpart" because of the unique evolution of American society. In each of the essays in this book, he painstakingly outlines his own struggle as an American intellectual in terms of struggles surrounding issues of race, gender and sexuality. For him, what sets the American intellectual apart is the unique way in which American popular culture has evolved as an integral part of capitalism, but at the same time as a profoundly democratic instrument. Unlike the situation in Europe where the intellectual, whether of the left or the right, has a personal positional stake in "culture" in the traditional and fundamentally conservative sense, the American intellectual is a product of a culture which is polymorphous in its influences and perversities. Thus Kennedy is able to make the argument that the American progressive law professor can be found at the center of important political struggles,[20] that affirmative action for law professors of color is justified on the grounds that cultural diversity is a key part of any sensible vision of America,[21] that postmodernism and legal realism can go a long way to explaining and, possibly righting, the unequal distribution of wealth broadly defined in the United States[22] or finally that law and popular culture intersect at the point at which the erotic domination of gendered bodies is at its

17 I will spare the reader any further self-reference. Most cites are available online or on CD-ROM.

18 I have chosen the gendered masculine intentionally. While Kennedy is explicitly conscious of issues of gender, he writes self-consciously as a male law professor. I can only do the same.

19 This is especially true in the Gramsci essay but I think it is a theme which underscores the entire work. Kennedy, *supra* note 4 at 20-23.

20 Kennedy, *supra* note 4.

21 Kennedy, *supra* note 5.

22 Kennedy, *supra* note 6.

strongest and weakest.[23]

At a basic level, Kennedy sees the intellectual, in this case, the radical law professor, as a pop star. For him law and law teaching in America are clearly a product of and then part of the replication of the American political and cultural imagination. Unlike Camille Paglia, Duncan does not seek to trash and abandon the academy as the route to stardom. Instead, he constitutes the academy as a central part of the American star-making, culture-producing machine. This, he argues, is what sets American intellectuals apart from their European counter-parts who remain stuck in the now outdated realm of high culture. The European intellectual is an opera star, the American CLS type is a rock star. La Strada vs. MTV. Domingo vs. Jagger, or Kennedy as Madonna. But Kennedy is wrong. He is wrong for two reasons. First, I think he mischaracterizes the situation of the European intellectual. Second, as a Mick Jagger/Madonna wannabe, he misses the America to which he wants to belong.

Kennedy is wrong about the European intellectual not because he mischaracterizes the role of the intellectual in the European tradition but because he seems to believe that the European tradition has any real meaning today. In other words, the old "public intellectual" in Europe is dead not because there are not any intellectuals who play the role — Jurgen Habermas is an excellent example of the typical intellectual as societal conscience tradition — but because the "Europe" on which the role of the "European intellectual" depends no longer exists. Indeed, it has long since ceased to exist. At least since the end of WWII, the so-called European intellectual has played one of two roles. First he (and he is always a he) played the traditional role outlined by Kennedy. Second, he became an American.

Thus, European intellectuals, especially French intellectuals, have since the 1950's, become, along with the rest of Europe and the world, simply part of the American sphere of influence.[24] They have travelled to the United States, they have been appointed to prestigious American institutions, they have

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[23] D. Kennedy, "Sexual Abuse, Sexy Dressing, and the Eroticization of Domination" in *Sexy Dressing Etc., supra* note 4 at 126.

[24] See J.-P. Mathy, *Extreme-Occident: French Intellectuals and America* (Chicago: University of Chicago Press, 1993).

slowly but surely, as have we all, become Americans. Sartre became famous because it became a trendy thing for disaffected and alienated American youth in the Sixties to explain their disaffection by referring to "alienation" and "being-in-itself". Derrida became famous because he taught at Yale and was translated into English. And in a strange but perfectly understandable twist, Duncan Kennedy was invited to speak at the Gramsci Institute on the role of the American intellectual.

I realize that this is an over-simplified analysis of a very complex and deeply nuanced intellectual history which must still be written. But I think the fundamental point remains a valid one. American culture is now world culture. American intellectual culture is now world intellectual culture. Even such postmodern developments as subaltern studies, which seek to give a voice to the silenced Other of the "Third World" could never be understood outside the hegemony of "America", just as resistance is always, as Foucault pointed out, part of the phenomenon of power.

Of course, this does not mean that culture, even in the world of American culture, is a static phenomenon. Indeed, the *metissage* which Kennedy identifies as uniquely American can now be found in virtually every so-called indigenous cultural response to American hegemony. But it is not my intention here to engage in a broad cultural critique. Rather, I want simply to point out that the American intellectual whom Duncan wishes to establish as a counterpoint to his politically *passe* and ineffectual European counterpart is simply a world phenomenon. There is nothing particularly "American" here in Kennedy's CLS except the most important fact which he seems to ignore by drawing the American/European distinction is that we are all Americans now. There is one culture and it is MTV.

This brings me to my second problem with Duncan's work. Again, however, let me reiterate that my disagreement with Kennedy is mostly one of emphasis. At some level I know that he may well share my concern but has opted for a strategic denial for the good of the movement. But my tendency to trash means that I refuse for my own neurotic reasons to adhere to the same boundaries. If Kennedy is right and American intellectuals (or as I would argue, all of us), are at the center of popular culture, then he must, I think, accept the consequences of such a siting in America today. The consequences are, it seems to me, certainly dangerous, and potentially fatal,

to Kennedy's work and CLS in general. Let me offer the Baudrillardrian[25] apocalyptic postmodern reading of CLS.

We are not just in the world of popular culture but in a world in which there is nothing but popular culture. We now inhabit the simulacrum of that most American of French intellectuals. We live in a world in which "reality" is televisual, where only that which is capable of reproduction as a television or computer image is in fact real. The meaning of this for Duncan's vision of CLS as situated at the center of the struggle for meaning in popular culture is obvious. There is no longer any meaning, merely reproduction of more and more images. There is no longer any center, just a set of unattached pictures, bits and bytes. Finally, there is no longer any struggle in any traditional sense. Perhaps there is a battle for ratings, or some debate between active or passive matrix color, or maybe a choice to be made between WordPerfect and Microsoft Word, but there is no more politics. To return to the CLS mantra that "law is politics," then there is no more law.

CLS becomes a simulation of its old self, more real in our new postmodern reality. Rather than a "movement" or a grouping of like-minded individuals, CLS has become a series of unrelated texts, circulating in the hyperspace of *Lexis* searches and citation.[26] The desire to "humanize" our daily, working lives which characterizes much of *Sexy Dressing Etc.* becomes meaningless when our existence takes on the aspect of the inhuman.[27] The wish for "community" becomes futile in the age of "communication", when we are "connected" only in cyberspace, on the Internet. This is the fate of CLS. Like all texts, like all signifiers, it is now free-floating, detached, circulating in ways which are beyond any control, hybridizing, cannibalizing itself.[28] Even Mick Jagger has come to realize the inevitability of the simulacrum. The

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25 J. Baudrillard, *Simulations* (New York: Semiotext(e), 1983.)

26 Or "worse" yet, it will suffer the fate of semiotics and become just another marketing tool of Madison Avenue. See L. MacFarquhar, "This Semiotician Went To Market" (Oct. 1994) *Lingua Franca 59.* At one level this has already happened, as some law schools market their "crits" as part of the diversity they offer to students who must make a market choice in deciding which offer of admission to accept.

27 J.-F. Lyotard, *The Inhuman: Reflections on Time* (Cambridge: Polity Press, 1991).

28 J. Baudrillard, *Transparency of Evil: Essays on Extreme Phenomena* (New York: Verso, 1993).

Rolling Stones now give concerts on the Internet.[29]

4. *Dark Star*: Whither Duncan?

Shall we go
You and I
While we can
Through the transitive nightfall of
diamonds?[30]

So what does it all mean? At one level, there is no difference between the Rolling Stones and the Grateful Dead. They are both highly successful rock bands. They make lots of people happy and they make lots of money for themselves. They share many of the same (American) roots. They are still around after so many of their contemporaries have gone by the wayside of transitory fame and glory on the airwaves and in the concert halls.

But at another level, they act as completely different signifiers. The Stones are old time sex, drugs and rock and roll. They brought African American musical roots to mainstream suburbia and pleasure to millions. But in the end, they sold out to the top 40, they got corporate sponsorship for their tours and they now simply invoke in a safe and nostalgic way the Sixties. You can go to a Stones show, relive your lost youth for a few hours, maybe smoke a little dope and then return to life in corporate America. You can get the Stones on the Internet. A Rolling Stones concert allows those of my generation who attend to escape into nostalgic abandon for a couple of hours, after which "reality" quickly returns.

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29 See N. Strauss, "Rolling Stones Live on Internet: Both a Big Deal and a little Deal" *New York Times* (22 November, 1994) U5. There is also a high-tech Deadhead community. *Skelton Key*, contains the most up-to-date information in Appendix III — "How To Become A Nethead" Shenk and Silberman, *supra* note 13. "It allows Heads to create together in words the kind of community they've been sharing through song and dance for nearly thirty years." at 346.

30 R. Hunter and J. Garcia, "Dark Star" The Grateful Dead (Warner Bros., 1968).

The Grateful Dead on the other hand have maintained control of their own music and tours.[31] They don't survive from album sales hut from live shows. Thousands of Deadheads who follow the band see themselves as part of a community and argue that being a Deadhead has an ethical content which they carry with them in their daily lives.[32] They circulate tapes of every show, tapes which are traded, not sold and which the band allows to be recorded in the tapers' section of every concert. At some level, the Grateful Dead offer hope that the Sixties can live on.

Of course, if my criticism of Duncan is correct, all of this is an unadulterated pipedream, nothing more than a slightly more sophisticated version of the nostalgia of which I accuse him and the Rolling Stones. The Sixties, after all, if they ever existed, are clearly over. They are in fact a simulacrum which circulates in every Dead tape I trade. So again, where to? In other words, is there any mode of collective resistance to hegemony in a cyberspace seemingly devoid of old-fashioned content? How can we resist when resistance becomes just another free-floating signifier?

Quite simply, I don't know. Some days I feel like Baudrillard is right, that struggle, like everything else, is meaningless. On those days I listen to my Dead tapes and long for the lost days of my youth. On other days, I look to real examples of what appears to be resistance in cyberspace, at hackers fighting and subverting corporate control of the information superhighway at every turn.[33] On those days, I listen to my tapes, or go to shows and think

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31 Of course, it is important to note that the Dead are not exactly struggling at the poverty line. They own and control Grateful Dead Merchandising which sells everything from tie-dye T-shirts to Dancing Bear ties. Deadheads spend large amounts of money on Dead-related articles. The existence of a Grateful Dead iconography of skeletons, roses, Dancing Bears etc. means not only the creation of a semiotic flow of signs by which we recognize and communicate with each other, but also opens a huge marketing opportunity. There is no purity, even in the revolution.

32 All of this may well be simply my own form of the nostalgia of which I accuse Duncan but I believe that enough other people share my belief that there is a there there at Grateful Dead shows and among Deadheads so that "nostalgia" might in such a case be a powerful political trope.

33 See B. Sterling, *The Hacker Crackdown: Law and Disorder on the Electronic Frontier* (Penguin: London, 1994.)

that when Jerry sings "*We will survive, we will get by,*"[34] he might actually know something I only feel and that the 15,000 Deadheads who cheer these lyrics as one share the same transformative optimism. On days like that, I think Duncan might be right. At these moments, I agree with sociologist Rebecca Adams when she says:[35]

> "People say Deadheads are throwbacks. I think they're *pioneers*. They recognize that reality is subjective — there is no *right way* — and have been cognizant of these multiple realities for a lot longer than most other people. This is post-modernism. It's the cutting edge."

It is possible, then, on our better days, to see within postmodernity a politics within the simulacrum which might permit us to imagine a better world in which we might all participate in the same ways as Deadheads do in the ongoing creation of a collective experience which is at one and the same time "real" and still beyond concrete description or meta-narrative. In his well known history of the Students for a Democratic Society, SDS, the prototypical Sixties Left, American organization, Kirkpatrick Sale traces the origins, rise and downfall into schismatic and dogmatic groups of the organization which many saw as the vanguard of the New Left and as the organization which carried the hopes and dreams for a better America.[36] He concludes with the following:[37]

> "Whether from this legacy will evolve a new organization and a new leftward spirit to carry on the task that SDS began, only the future can tell. But it is certain that this is the place to begin."

The same could well be said of both CLS and *Sexy Dressing Etc.* Duncan's book is the place to begin for a clear, insightful and often brilliant view of the past and present. Whether there is a future for the forces of "the Left" is not a question which can be answered here or anywhere except in the circulation of images and texts which make up the struggle in which we engage in the

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[34] R. Hunter and J. Garcia, "Touch of Grey" The Grateful Dead, *In The Dark* (Arista, 1987).

[35] See Shenk and Silberman, *supra* note 13 at xiii.

[36] *sds* (1974)

[37] *Ibid.*, at 657.

simulacrum some still like to call "the law". As for me, I have lots of tapes.[38]

The bus came by and I got on
That's when it all began
Cowboy Neal at the wheel
The bus to never ever land.[39]

[38] For further verification of my status and other evidence of the possibilities of community among Deadheads, see "We Are Everywhere — David & Vaughn (*sic*) at Stella Blu Cafe in Sydney, Australia" (1994) 21 Relix 10.

[39] W. Kreutzmann and R. Weir, "The Other One," The Grateful Dead, *Anthem of the Sun* (Warner Bros., 1968). It should be noted here that this particular citation is problematic for several reasons. First, all compositions on *Anthem of the Sun* are listed thereon as "by the Grateful Dead." The attribution to Billy and Bob is found on a later album *Skull and Roses* (Warner Bros., 1971). Second, on *Anthem of the Sun*, the song's official title is "That's It for the Other One." The song's title has been shortened by common usage to "The Other One." Finally, *Skull and Roses* was given the official title of *Grateful Dead Live*. This title was never accepted by the band or by Deadheads. *Skull and Roses* comes from the cover art, which has entered into Dead iconography. The working title of the album was *Skull Fuck*. Although this was rejected by Warner Brothers as "unmarketable," it remains in common usage among the Band and others in the extended Grateful Dead family as well as in *Deadbase*. This set of textual ambiguities could be invoked as further evidence of the "postmodern Dead." For a more detailed analysis of these issues, further self-reference is required. See V. Black and D. Fraser, "Cites for Sore Ears (A Paper Moon)" (1993) 16 Dalhousie L.J. 217.