

## Les ateliers de l'éthique The Ethics Forum

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# An interview with Avigail Eisenberg: "Reasoning about the Identity of Aboriginal People"

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Article abstract

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A list of her publications is available at  
<http://web.uvic.ca/polisci/eisenberg/pubs.htm>.

Martin Blanchard of CRÉUM asked Professor Eisenberg if she would be willing to be interviewed via email on the subject of an article she had just finished writing, entitled "Reasoning about the Identity of Aboriginal People". (This text is forthcoming in *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice*, Stephen Tierney ed., London: Ashgate.) She kindly accepted to answer his questions.

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# AN INTERVIEW WITH AVIGAIL EISENBERG: “REASONING ABOUT THE IDENTITY OF ABORIGINAL PEOPLE”

BY MARTIN BLANCHARD

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## ABSTRACT

Avigail Eisenberg is an Associate Professor in the Department of Political Science, University of Victoria. She was also a fellow of CRÉUM during the 2004-2005 academic year. She has written important work on the issues of identity, race, gender, minority rights, and in particular, Aboriginal claims. Her writing displays intelligent and acute commentaries in which she demonstrates an ability to tackle difficult questions in a refreshing way.

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## RÉSUMÉ

Avigail Eisenberg est professeure au département de sciences politiques de l'Université de Victoria. Elle était également professeure invitée au CRÉUM durant l'année 2004-2005. Elle a écrit nombres d'articles et d'ouvrages majeurs sur les questions d'identité, de race, de genre, de droits des minorités et, en particulier, sur les revendications autochtones. Ses textes sont non seulement agréables à lire, mais ils font preuve d'une intelligence et d'une finesse remarquables, où elle démontre une habileté à affronter des questions difficiles de manière rafraîchissante.

Une liste de ses publications est disponible sur <http://web.uvic.ca/polisci/eisenberg/pubs.htm>

Martin Blanchard, chercheur au CRÉUM, a demandé au professeure Eisenberg si elle accepterait de faire une entrevue par courriel à propos d'un article qu'elle vient de terminer, dont le titre est “Reasoning about the Identity of Aboriginal People”. (Ce texte sera bientôt publié dans *Accommodating Cultural Diversity: Contemporary Issues in Theory and Practice*, dirigé par Stephen Tierney, London: Ashgate.). Elle a aimablement accepté de répondre à ses questions.

**1. Martin Blanchard (M.B.):** Hi Avigail! It's really nice to be able to talk with you again. I have just finished reading your excellent paper, "Reasoning about the Identity of Aboriginal People" and I would like to ask you a few questions about the subject of Aboriginal identity and how this affects our understanding of politics and, in particular, what this means in terms of making space for identities in political institutions.

I will begin with a statement that summarizes the paper. You write at the outset that "some assessment of minority identity is usually an inevitable part of the process of deciding whether a minority practice or set of rules ought to be prohibited by or protected from public regulation". The important word here is "identity", by which you seem to understand not only this or that practice that a given group claims to be central to its existence; identity, if I read you well, is also the particular *meaning* that a given group assigns to a practice, or set of practices and institutions. For instance, not only are hunting and fishing activities part of an Aboriginal identity, but identity would also be *what it means* for a particular Aboriginal group to make these activities central to its way of life. Your claim would then be that stories, or narratives, that mediate the meanings that a particular group confers to its activities form an "inevitable part" of designing public policies and institutions.

I would like to know where this definition of identity stands concerning what has been labeled the "politics of recognition". Is identity merely some kind of "information" that will serve political stability, institutional design, and other ends? Or should we understand identity as some kind of good that deserves recognition by itself, just as equality and liberty can be defended as goods that deserve recognition for the sake of equality and liberty, and not only for the sake of stability? If you prefer the second answer, how should we understand the following: that, as you say, we may have to include identity claims in our political understanding *because* they "lead directly to a set of complex issues at the heart of how well or poorly minorities are treated"? In other words: what is the status of identity in a sound conception of politics? Is identity worth pursuing

for its own sake, or should it be anchored to more fully developed claims of equality and the like?

**Avigail Eisenberg (AE):** Hello Martin. Thanks for these great questions and for the opportunity to develop answers in this format. The particular question you pose brings together several different concerns that I think are very interesting in the context of thinking about diversity and difference in Canada.

I think that in some contexts, identity is a primary good in the sense that Rawlsian liberals understand the idea of primary good. Let me try to explain this more completely.

If we understand identity as Taylor asks us to, as a matter of the self-understanding of an individual or the collective self-understanding of a group, then the conditions required to sustain a particular identity, or to sustain the activity of developing or living that identity, are surely fundamentally important within any worthy society. The aim of much liberal philosophy is consistent with establishing these conditions of self-understanding even if, according to critics, liberals fails to meet this aim. Many liberal debates can be interpreted as debates about what conditions have to be in place so that individuals can develop and explore their self-understanding or identity. So a core question for contemporary liberalism is what terms are fair terms for the development of one's identity?

Ideally, liberalism is committed to facilitating political relations in which individuals are secure about their identities and, by and large, the aim of liberal governance is to ensure that some of the key conditions are in place to allow individuals to develop their identities as they choose. But liberalism has had some important blind spots or failures when it comes to establishing fair terms for individuals and groups to develop their identities. Two important failures are related to: 1) liberalism's cultural bias; and 2) liberalism's colonial bias. Let me say something about the cultural biases of liberalism in response to your question.

Will Kymlicka has written extensively about liberalism's cultural bias, especially in arguing that benign neglect is an incoherent position for the state to take about cultural accommodation. (Others (e.g. Uma Narayan) have described the problem as the 'false universalism' of liberalism.) It seems to me that Kymlicka's account does a great job in exposing the problem of benign neglect and proposing as a solution an agenda that requires a state that is more actively involved in cultural accommodation. However, his solution has raised a number of concerns amongst which is that it relies too heavily on a powerful state, that it increases the power of the state over minorities, and that there is no reason to believe that the state is a benevolent or uninterested actor in relation to minorities.

I think these are interesting criticisms. They raise all sorts of questions about how to ensure that the state doesn't use its powers to govern cultural minorities in ways that only help to augment state power over minorities and respond effectively – but perhaps not justly – to threats to state sovereignty posed by minorities. The problems they identify should lead us to scrutinize more closely the ways in which the state makes decisions about minority accommodation. Given the interests of the state in ensuring stability, given the aims of justice, and given the problems of cultural/colonial bias and essentialism, can decisions about the accommodation of cultural and religious minorities be made in a way that is fair to the minority groups concerned?

This is a task that Kymlicka doesn't get into beyond proposing the broad distinction between internal restrictions and external protections. And this distinction is, in some ways, too broad because most cultural practices are both internal restrictions and external protections. Because most cultural practices are not neatly categorized, the distinction requires that we make fair judgments about whether a practice is more an external protection or more an internal restriction. In fact, pragmatically, it necessitates that such judgments are made by an adjudicative body, or a deliberative public empowered to do so. Here is the state in action, applying its discretion in a manner that will make all the difference to the ways in which minorities are treated.

In order to control the discretion used by the state to decide whether a practice is more like an external protection of internal restriction, it would seem necessary to determine what counts as an external protection/internal restriction from the point of view of the minority group and how that might differ from the point of view on the matter of the mainstream community. As you correctly suggest, a group practice derives its meaning through its role in the narrative of that group. If we want to understand how the practice contributes to the character and quality of autonomy enjoyed by individuals in relation to that group or how the practice gives expression to and shapes the range and meaning of opportunities open to individuals as group members – that is, how the practice contributes to a context of choice – then we have to know something about the group's identity and the role of the practice in that identity.

For this reason, the project of protecting minority rights inevitably involves understanding something about the group's identity, and how that identity bestows meaning on a range of opportunities and choices. Therefore, protecting minority rights fairly often requires that institutions assess minority identities. From this the question arises how institutions can assess minority identity fairly.

This process of assessing minority identity is not the same as protecting any given identity or treating any identity as valuable no matter what practices or values it endorses. The task of understanding cultures with some accuracy does not mean endorsing any culture's view of how to live. Charles Taylor's view, which seems correct to me, is that there has to be a presumption in favour of the value of a culture, but not an automatic endorsement of any cultural practice. No doubt some cultural practices should be banned. The question though is what is a fair way to reach that decision? Sometimes, elements of a group's narrative have to be regulated or banned because of their consequences for other groups and sometimes the effects of a practice on some group members provide good reason to restrict a practice. Sometimes, the reasons for prohibiting a practice have to do with its impact on the environment or on animals – e.g.

certain forms of animal slaughter might simply be too cruel, by any credible standard, for the state to allow them even if a cultural or religious group considers them required within their way of life. Few people disagree that traditions and practices ought to be restricted in some contexts. In fact, cultural and religious traditions anticipate such restrictions through internal rules that delineate exceptions (e.g. fasting rules or circumstances where eating forbidden foods is allowed). The question of whether or not there ought to be restrictions in some contexts is not at the centre of most controversies. Rather, the more difficult question, at least for public institutions that aim to treat people as equals within diverse societies, is when such restrictions ought to apply and what sort of reasoning procedure ought to be followed in order to determine whether to prohibit a controversial practice. This reasoning procedure inevitably implicates institutions in reasoning about a group's identity.

So what it means to treat members of minority groups as equals is to consider the 'lay of the land' from their vantage point, which in part is their identity. Doing this is not only a means to learn information about the minority in question, but also to learn about the dominant group and the ways in which rules and practice may sustain and shape their identity-related interests and undermine those of others.

What I have in mind (roughly) is an inquiry that would pose the following questions: 1) Are rules, regulations and procedures neutral amongst different group practices or do they advantage some groups and disadvantage others?; 2) If the rules or their effects are biased in terms of how they impact the identity of some communities, why are the rules in place? What values or practices are the rules meant to protect? How well – i.e. directly and effectively – do they protect them? Often these reasons are also matters related to identity – e.g. the need to protect the identity of another group or the need to protect the identity-related interests of individuals to dissent or to be treated as equals. These considerations have to be brought out into the open, assessed and weighed. 3) On balance, which has stronger identity-related considerations attached to it, the values or

practices protected by the rule or the harm done to the group's identity by the rule (and thus by prohibiting the group's practice)? The precise way in which all this is carried out – the standards and values that are used as a guide to reasoning about the identities of minorities – capture, in part, what it means to treat people as equals.

In relation to liberalism's second blind spot, namely, colonial bias, I think the problem is much more serious. The state is so much more of a protagonist in these relations that it is difficult to modify state institutions so that they fairly (and legitimately) assess the identities of groups of people that the state has exploited and subjugated. We shouldn't expect, for instance, the Supreme Court of Canada to render a decision that fundamentally draws the sovereignty of the Canadian state into question (although some decisions have come close to doing so). But in some cases about Aboriginal rights, Canadian sovereignty is precisely what is at issue. So conflicts that are heavily informed by questions of Aboriginal self-determination and which involve a search for post-colonial values can't be solved in the way that I have sketched above in relation to cultural accommodation. But I think that questions of identity are nonetheless relevant here as well.

**2. MB-** Am I reading you right in thinking that revealing the colonial bias of liberalism is an important, or even a strong virtue of identity? That assessing Aboriginal identities in Canadian institutions would lead us to make our colonial past explicit and help us do something about it? If so, how would you qualify a post-colonial relation between institutional practices and group identities in Canada?

**AE-** Yes, you are reading me correctly. I think that grappling with problems and conflicts amongst people in terms of identity is a way of understanding how public institutions and structures have to be shaped/reshaped in order to treat people fairly. At the moment, there is a heightened anxiety in the public and amongst scholars about identity pol-

itics – I’ve called it “identity wariness”. I think the exact opposite response is required – we need to confront the challenges posed by identity directly, carefully, transparently, with humility, but also with some degree of confidence that sometimes there are good reasons to restrict minority practices and these reasons can and should be articulated and defended publicly. Also, sometimes there are no such good reasons and this has to be acknowledged. We might think that the difficult task of confronting the identity-related nature of claims directly can be avoided. But, doing so does not translate into avoiding the indirect consideration of identity in relation to political decision-making. Rather, avoiding a direct approach invites decision-makers to apply their own discretion about a minority’s identity in deciding, for instance, what *shari’a* is all about and whether Muslims need access to it in arbitration processes; whether French is really threatened in Quebec and therefore needs special legislative protections in relation to commercial sign laws; whether Aboriginal ways of life are more collective than individualistic in ways that justify different means of political representation. It is when we apply our own discretion to such matters that problems with respect to identity emerge and social conflict becomes more likely.

Our institutions have to engage in a process of responding to threats posed to the identities of groups without engaging in objectionable forms of essentialism or applying ethnocentric biases. They have to figure out how to weigh identity claims with other sorts of claims (like physical harm) and, most importantly, they have to uncover the ways in which more often than not, competing identity claims are at stake in many conflicts.

With respect to post-colonial relations, there is no reason to think that any one approach will be adequate to reach this goal. But the willingness of Canadian institutions to frame problems in terms of competing identity-related claims might be a step in disassembling colonial reasoning within public institutions today because this step draws into question the discretion related to matters of identity which decision-makers and the public use all the time in assessing Aboriginal peoples. Our institutions are not

neutral towards Aboriginal peoples. Rather they sustain the identities – self-understandings, historical myths, ways of life, practices, etc. - of mainstream Canadian society and may undermine the identities of other communities. This is not to suggest that our goal should be creating ‘neutral’ institutions and rules. I’m not sure that neutrality is always possible. But being neutral and being fair are two different standards sometimes. The fairness question depends on whether and how institutions or rules might undermine the identities of minority groups and whether they ought to be reformed.

An approach that focuses on the ways in which rules, practices, institutions, and regulations happily sustain some identities and undermine or threaten others is bound to draw into question the fairness of Canadian political and legal institutions in relation to Aboriginal peoples. But the matter of Aboriginal identities is complicated. Under relations of domination, communities and individuals often adopt values and practices, which become part of their identity and ways of life, as strategies for survival. Sometimes these practices are best abandoned and sometimes they are not. Taiaiake Alfred has suggested that Aboriginal people should pick and choose amongst practices, structures, and norms those that will strengthen the community and lead them into the future – what he calls self-conscious traditionalism. Aboriginal communities experience a host of internal conflicts and disputes about which practices ought to be at the heart of their community’s identity and which ought to be abandoned or made to be more marginal.

Another reason why an identity-based approach is bound to draw into question the fairness of Canadian political and legal institutions in relation to Aboriginal peoples is because mainstream institutions and society are also shaped by colonialism. But there is a far less active and honest debate in mainstream Canada about how to pick and choose amongst practices, structures and norms those which will best see us into the future. Mainstream institutions in Canada were shaped partly by the need to create and sustain dominance over Aboriginal people. I think an



approach that highlights the identity-related features of these practices and structures will make vivid the ways in which mainstream institutions are implicated in identity politics and how (or whether, in relation to Aboriginal peoples) they might be reformed.

**3. MB-** In relation to what you have said about mainstream Canada, what do you think of the role of jurists in these affairs? I sometimes think that it is a good thing that jurists can at least offer a solution, whereas many politicians stubbornly refuse to contemplate identity claims. But notwithstanding easy critiques of our political institutions, will it not eventually become a problem if jurists take the lead in recognizing different identities? For instance, Court activism could degenerate into some kind of hyper-formalism where the text of the Constitution and past judgments would replace political debates. The solution could be to press for more deliberative societies, but then a new problem appears, that of reconciling deliberation with identity – something that scholars have mainly done in the appreciation of deliberation instead of identity (except for extraordinary persons such as yourself and Melissa Williams, for instance). Do you see the lack of political courage degenerating in this kind of way?

**AE** – Political courage is a great way of putting it. I agree that we don't want hyper-formalism or judicial activism to replace democratic deliberation and decision-making. But here are a few points to consider along these lines.

First, it's true that it is difficult to get the public to consider things in a light that it refuses to consider. But I'm not sure that this is the situation which confronts us. Imagine, for instance, a deeply patriarchal public and the prospect of getting such a public to take seriously the idea that women are political equals. When people undertook that project (and as they continue to pursue it today), they did so partly by drawing on values that were already viewed by that public as important. In many cases, the problem is not that the basic values that we hold dear are the wrong ones. Rather, the problem is the cultural blinders that have been employed to give practical

expression to these values and the way in which, sometimes, the practical ways of giving expression to normative values are thought to be synonymous with the values themselves. So the problem is not political equality. It's how political equality is translated into practice under patriarchy and then how these practices are viewed as the 'best' means to expressing equality even though they clearly have the effect of disadvantaging women in politics.

Identity-related considerations are already implicitly used to make sense of many conflicts. In some cases, we can't avoid such considerations. So, the assessment of identity is already pervasive in decisions involving minorities. But such assessments are often based on stereotypes and prejudices, false universalism, lack of information, and un-reflexive reasoning. Moreover, this private discretion is applied all the while public decision-makers claim to be neutral and unbiased. The result is often that minorities and Aboriginal people consider public decisions in Canada to be racist, colonialist or biased in other ways. We need to ensure that these reasoning processes are more transparent and fair. We can't do this without confronting the fact that the assessment of identities is sometimes an unavoidable part of democratic decision-making.

Second, this project has to take place on several fronts – by reforming legal and political institutions, and generally, by holding the public accountable for the standards used in public debate. I've always thought that it's a mistake to think of the court as outside the deliberative sphere of politics. Courts contribute to political processes by setting standards of fairness towards minorities and by distilling from political and public debate the values and reasons that ought to be employed in setting those standards. This isn't to suggest that courts don't act independently in the political process. Their mandate, even in a political atmosphere hostile to judicial activism, is to protect the substantive values which ensure that democratic processes are fair – i.e. which ensure that everyone has political voice. Nor do I mean to suggest that courts can't be leaders and act against the public in ways that force or forestall political change. But they

can't do that for very long; that is, rarely if ever can courts resist persistent political and public opposition to their decisions.

The decisions of courts offer good examples for political research about minorities because, in any given case, the court has to come to a determinate decision and, at the appeal level, it has to do so on the basis of reasons which are publicly accessible. Public debate and deliberation is obviously more open-ended. Outside the judicial realm, we also have political institutions engaged in deliberative decision-making (e.g. commissions of inquiry) where conclusions are reached and reasons are publicly accessible. We also have lots of rich research that can trace the ways in which public debates occur through news media. Each of these forums is guided and influenced by the others. But some are easier to follow, have more transparent reasoning processes and seem more determinate in their decision-making.

**4. MB-** This exchange is so great that I can't stop myself to ask one last question! In your response to my first question, you assert the importance of collective self-understandings as being fundamentally important to the way persons see themselves. I totally agree with you on this issue, but in my own work on identity, I have never stopped to question myself about some problems facing identity claims. I hope I am not simply internalizing a critic's viewpoint, but identity is in itself a multi-faceted notion, and I find that some aspects are problematic.

Let me push one of these problems further. It's about identity being accounted for in differences. One objection to identity claims is that instead of relying on identity and differences, it will be justice and commonalities that will help Native peoples to find a way out of their subordination. In other words, identity would be too narrow a concept to understand claims about justice.

Aboriginal peoples seem to follow this point as well. For instance, some Aboriginal persons have argued that we, as non-Aboriginals, *cannot even*

*understand* their point of view, because of the differences that separates "us" from "them". These differences are tracked in things like "their" thinking in a circular way, while "we" are be trapped in a linear way of thinking. But as you argue in your article, Aboriginals "have complained that identity narrowly restricts the sort of claims they can make". On the one hand, Aboriginals claim that their particular identities makes it impossible to understand them fully; on the other hand, they complain that identity-based claims restrict the possible claims they can make. Opponents of identity would point to these facts and propose to abandon identity altogether – at least in political situations.

Some proponents of identity will bite the bullet and propose a difference-based approach. In such an approach, one claims self-determination, for instance, not for reasons of equality between groups, but, more controversially, because one claims to be different – and different groups would inherently possess their own self-determining rights. This may not be the best way to qualify the difference-based approach, but in any case, I'd like to hear what you have to say about these kinds of problems facing identity claims. Are they answered by an approach searching for commonalities between groups, such as the minority rights approach? Or do such problems mean that the assessment of identity has to embrace a difference-based approach, or at least part of it?

**AE:** I think this is an important question. There are aspects of a politics of difference that have been highly successful and important – namely, the idea that the means by which we give practical expression to considerations of justice and fairness capture and have the potential to fulfill the interests of some communities and individuals (often middle-class men belonging to the mainstream culture) better than others. Thinking about justice in terms of this difference has been generally helpful in political theory.

But, to clarify, I think it is important to distinguish between two positions that have each come to be related to a politics of difference. One position



holds that the explanation for Aboriginal oppression and subjugation is that the values and practices of European settlers are different from Aboriginal values and practices in ways that settler society doesn't fully appreciate. These differences have caused disadvantage and oppression. So alleviating oppression requires recognizing difference. I think this position distorts the cause of injustice.

The second position is that Aboriginal peoples were purposively dispossessed and subjugated by settler societies and that European policies (which obviously reflected the values and practices of particular communities, with distinctive histories, fears, and values) were committed to eliminating differences. So, the process of subjugating Aboriginal people involved undermining Aboriginal value systems, family structures, governance practices, and generally the ways of life that sustained Aboriginal communities. I think that this second position captures more accurately what happened historically in the Americas.

This second position holds that injustice is not the product of cultural differences amongst people. It might be the case that the way in which Aboriginal and settler communities think is fundamentally different along the lines that you've described. But we should resist concluding that these kinds of differences account for the injustices suffered by Aboriginal peoples at the hands of settler societies. One reason is that by focusing on cultural differences of the sort that you mention as the cause of injustice we underestimate the enormous flexibility of liberal institutions and their ability to accommodate all sorts of differences. The liberal project has always entailed dealing with peoples' differences. According to liberalism, one of the best ways in which to deal with peoples' differences is to recognize their standing as unique individuals with the freedom to believe what they want, to express whatever views they want as long as they don't cause others harm, and to join (and leave) groups as they wish. According to one version of a liberal perspective, people can think in a circular manner or a linear manner, or believe in all manner of supernatural beings, without being persecuted. That is a fairly generous approach to difference.

It is not an approach that is free of bias or that comes without trade-offs. But it is powerful. In part, what is impoverishing contemporary debates amongst political theorists is a caricatured and misleading understanding of just how ingenious and accommodating traditional and conventional liberalism is.

A second reason to resist placing too much emphasis on differences amongst people is that doing so allows us to underplay the intentionally cruel policies that have been applied to people in full knowledge of their differences and regardless of any official commitments to equality and individual well-being. Here I'm thinking about historical policies such as the residential schools and other measures of coercive assimilation that Aboriginal people have suffered in Canada and elsewhere. These policies were not the product of linear thinking or scientific rationality. Nor were they policies that reflected a respect for individualistic values over collectivist ones. These were policies of domination. They were, however, linked to liberal programs, such as efforts to 'civilize' people as a means to making them 'fit' for liberal citizenship. So they are part of liberalism's legacy even though liberals today may not take ownership of them.

Another legacy of these kinds of policies, which is often under-acknowledged within liberal scholarship, is that some minorities remain distrustful of any mainstream attempts to improve equality and inclusiveness, even when they use 'new' approaches like 'a politics of difference' 'recognition' or 'multiculturalism'. In the hands of the mainstream – i.e. Canadian institutions – some minorities argue that these alternative approaches, no matter how attractive in theory, will lead to just another set of assimilationist measures. What is required instead, is rethinking in a more wholesale way, the terms upon which relations amongst different people are approached in the first place. That project is clearly a project about equality and how to attain it. In this sense, the project is a common project. But the requirement that this project be discussed and debated solely through language of liberalism is, I think, unwise and unlikely to lead to success.

But the project of justice is also about rebuilding institutions so that they are truly inclusive and this means acknowledging that institutions, practices, rules and regulations sometimes have a different impact on different communities in regards to significant identity-related differences. The effect of mainstream institutions and practices may, in some cases, be that they disable minority communities in unreasonable ways. Coming to this conclusion and addressing it is partly what justice requires. But this process is not the same as concluding that such differences are the root cause and explanation for injustice.

I have only half answered your question about the possibility of applying a politics of difference within Canadian public institutions. On the one hand, I think it is clear that some minorities might view Canadian public institutions as too invested in the mentality of the dominant group and too committed to keeping that dominant position to be the best institutions to apply a politics of difference fairly. Whether they are correct or not about these limitations, this is a problem of legitimacy that Canada (and many other places) has to address. On the other hand, I think we can and should develop approaches within Canadian institutions to managing conflicts amongst different groups that address differences fairly, reasonably and transparently. Such approaches are already in operation in many institutions. But they are practiced unevenly, inconsistently and without the transparency that is required. In any case, the differences that exist amongst peoples are not the problem. The problem is, in the first instance, when approaches, especially those used by political institutions, fail to assess collective identities in a transparent manner and according to criteria that pass a test of fairness, and when instead public actors apply their private discretion to understand the way in which mainstream rules might impact minority groups. I have said little about what these fair criteria should include. That is another challenge.

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