THE CONSTITUTIONAL AND POLITICAL RECOGNITION OF STATELESS NATIONS IN CANADA AND THE UNITED STATES

ARTICLE

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I. Abstract

Canada and the United States both have populations in which racial and ethnic minorities, sub-state national societies, native peoples, and majority groups coexist. In this article, I contrast the United States and Canada, focusing on their contrasting political cultures, models of federation, legal nation-building mechanisms, etc., in order to evaluate these states' potential for accommodating minority nations. First, I analyze how Canada's multicultural and multinational political culture has encouraged the recognition of sub-state national societies through a decentralized model of federalism. By contrast, in the U.S., the multiple traditions that have influenced U.S. political culture have encouraged the

development of a territorial conception of federalism, which is less hospitable to the claims for recognition of minority nations in the U.S. Second, I show that both the Canadian Charter of Rights and Freedoms and the U.S. Bill of Rights had a homogenizing, pan-national, and majority-nation building effect. Third, I show that antidiscrimination constitutional provisions and federal statutes in the U.S. and Canada are ill-suited to address their minority nations' claims. In the U.S., with its territorial conception of federalism, sub-state national societies are in an especially unfavorable position to have their claims for recognition addressed. In Canada, on the other hand, the Canadian model of federation may provide avenues for addressing the constitutional aspirations of minority nations; even if at times there are tensions with individual-rights approaches.

II. Introduction

Canada and the United States both have populations in which immigrant minorities (both historical and recent); sub-state national societies, native peoples, and majority groups coexist.

In general, "sub-state national societies" are historically settled, territorially concentrated, and previously self-governing societies with distinctive socio-linguistic traits whose territory has become incorporated into a larger state. The incorporation of such societies has in some cases been through imperial domination and colonization, military conquest, or the cession of the territory by an imperial metropolis, but in some cases reflect a voluntary pact of association. These are also known as "stateless nations," "internal nations," "minority nations," or "national minorities." Such groups include the Quebecois and Puerto Ricans in the Americas, and the Flemish, Catalans, Scots, South Tyroleans, Valle d'Aostans, Corsicans, Welsh, and Basques in Europe.[1] The development of the modern notion of identity has given rise to a politics of difference, which asks us to recognize the "unique identity of this individual or group, their distinctness from everyone else. The idea is that it is precisely this distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. And this assimilation is the cardinal sin against the ideal of authenticity."[2] The differing perspectives and interests of sub-state national societies and immigrant minorities give rise to a significant conflict between the politics of recognition and the politics of antidiscrimination. For the latter, "the principle of equal respect requires that we treat people in a difference-blind fashion. . . . For the other, we have to recognize and even foster particularity. The reproach the first makes to the second is just that it violates the principle of antidiscrimination. The

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[1] Will Kymlicka, *States, Nations, and Cultures*, 19-20 (Assen: Van Gorkum, 1997); and *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

[2] Charles Taylor, *Multiculturalism: Examining the Politics of Recognition*, 39 (Princeton: Princeton University Press, 1994),

reproach the second makes to the first is that it negates identity by forcing people into a homogeneous mold that is untrue to them...The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture."[3]

I will first seek to establish the relation between political culture, multiculturalism, and federalism in the U.S. and Canada. I will show that the U.S. and Canada have differing political cultures with respect to the recognition of cultural, ethnic, and linguistic diversity. Canada's multicultural and multinational political culture has encouraged the recognition of sub-state national societies through a decentralized model of federalism, but, at the same time, there has been some tension between individual rights approaches and the tradition of recognizing national minorities through federalism. By contrast, in the U.S., the multiple traditions that have influenced U.S. political culture have encouraged the development of a territorial conception of federalism, which is less hospitable to the claims for recognition of national minorities (such as, "the Puerto Ricans and American Indians") in the U.S.[4] Second, in view of these different conceptions of federalism in the U.S. and Canada, I will seek to examine the political impact of the U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms, showing that both the Charter and the Bill of Rights had a homogenizing, pan-national, and nation-building effect. They have promoted a nation-building project that encourages the further development of the first model of citizenship, discussed above. They helped to establish a nation of individual rights-bearers, and, we will see, this may sometimes result in a subtle tension with the claims for collective rights of stateless nations. Third, I will seek to analyze how antidiscrimination constitutional provisions and federal statutes in the U.S. and Canada are premised on a notion of the good society inspired by the first model of citizenship. Minority nations make nation-like collective claims for recognition, and, thus, antidiscrimination constitutional provisions and statutes are ill-suited to address their claims, and may sometimes be in a state of tension with them. In the U.S., with its territorial conception of federalism, sub-state national societies are in an especially unfavorable position to have their claims for recognition addressed, given that antidiscrimination, individual-rights approach is not likely to be adequate to address such groups' nation-like claims, and the predominant model of federalism is inhospitable to such groups. In Canada, on the other hand, the Canadian conception of federalism may provide avenues for addressing the constitutional and political aspirations of minority nations; even if at times there are tensions with individual-rights approaches.

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[3] *Id.,* at 43.

[4] Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canad,* 30. (Toronto: Oxford U. P., 1998).

III. Political Culture and Federalism in Canada and the U.S.

Whether a multiethnic or multinational liberal state can support a polity that incorporates either of the two variants of models of citizenship examined above will generally depend on the formula for federalism it embodies, given that federalism is "a particular way of sharing political power among different peoples within a state."[5]

The traditions and ideologies that have influenced a country's political culture – with respect to the tolerance for cultural, ethnic, and linguistic diversity – help to shape the long-term development of conceptions of federalism in a state. With respect to the U.S., we should underscore the fact that U.S. politics is "best seen as expressing the interaction of multiple political traditions, including liberalism, republicanism, and ascriptive forms of Americanism, which have collectively comprised American political culture, without any constituting it as a whole."[6] In contrast to the Tocquevilian-Hartzian thesis of Lockean liberalism's hegemonic role in U.S. political culture, the "multiple traditions thesis holds that Americans share a common culture but one more complexly and multiply constituted than is usually acknowledged. . . .[The thesis] holds that the definitive feature of American political culture has not been its liberal, republican, or "ascriptive Americanist" elements but, rather this more complex pattern of apparently inconsistent combinations of the traditions, accompanied by recurring conflicts."[7] Several consequences follow: (a) on this view, purely liberal and republican conceptions of civic identity are often unsatisfying to many in the U.S.; (b) it has been typical, and not unusual, for U.S. institutions to embody strikingly opposed beliefs; (c) when older types of ascriptive inequalities have been rejected as illiberal, typically, new forms of hierarchical subordination have been adopted.[8] An example of the contradictory combination of traditions that has characterized U.S. political culture – which is pertinent for our purposes – is the special status developed for Puerto Ricans between 1898 and 1917, and thereafter. Their hybrid political and civic status "did not fully satisfy either those who believed that all U.S. citizens should have equal rights or those who thought that inferior races should be denied citizenship."[9] The multiple-traditions thesis highlights the fact that nativist and racist ideologies have not just been occasional occurrences in U.S. politics. Building on, but going beyond John Higham's work, the thesis sees "American nativism as a species of modern

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[5] Louis Baltazhar, *Quebec and the Ideal of Federalism*, in *The Annals of the American Academy of Political and Social Science* Vol. 538, 44 (1995).

[6] Rogers M. Smith, *Beyond Tocqueville, Myrdal and Hartz: The Multiple Traditions in America*, 87 American Political Science Review 3, 550. (1993).

[7] *Id.,* at 558.

[8] *Id.*

[9] *Id.,* at 560.

nationalism."[10] Higham writes that "the concept that the United States belongs in some special sense to the Anglo-Saxon "race" offered an interpretation of the source of national greatness. The idea crystallized in the early 19th century as a way of defining nationality in a positive sense. . . .[Thus, in fact] Anglo-Saxonism gave only the slightest inkling of its nativistic potentialities until the late 19th century."[11] By the 1890's, nativists "repeatedly championed the values of nationalism in a very conscious explicit way. . . .They pleaded for a reawakened sense of nationality. Sometimes in place of any specific accusation against the newcomers, they argued simply that a great nation requires a homogeneous people."[12] In the U.S., minorities that have tried to maintain their sense of worth as a distinct people and as a culture have not been accepted as equals by the larger society. As Kenneth Karst puts it, "the history of discrimination by culturally dominant Americans against people they see as cultural outsiders provides one cautionary tale after another."[13] If, according to the multiple-traditions thesis, nativist, xenophobic, and racist ideologies – such as those explored by Higham – have been an important tradition in U.S. political culture, it would seem that such ideologies are also bound to influence long-term political development and, specifically, evolving conceptions of federalism, which give shape to underlying notions of nationhood and civic identity. In the U.S., therefore, the nativist and racist ideologies cited above, which are part of the multiple traditions in U.S. political culture, have influenced the development of conceptions of federalism, given that these conceptions are inextricably tied to ideas about citizenship and nationhood.

On the other hand, the political culture of Canada reflects the fact that the Canadian sense of nationhood presupposes Canadian federalism. If anything distinguishes Canadian federalism, it is the fact that Canada is a nation in which multiple identities and loyalties flourished. Thus, the British North America Act of 1867 – which established the Canadian confederation – recognized this fact, and the "Canadian Charter of Rights and Freedoms appears to acknowledge that group rights are no less important than the rights of individuals. In these ways, the Canadian constitution not only rejects the atomizing individualism of the American constitution, but also attempts to respond to a different type of society."[14] In the U.S., the federalists and anti-federalists in 1787-89 could at least agree with one crucial assumption: that the United States was one nation. Their disagreement was about the kind of government it should have.

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[10] *Id.,*at 555.

[11] John Higham, *Strangers in the Land: Patterns of American Nativism*, 1860-1920, 9 (Rutgers Univ. Press, 1994),

[12] *Id.,* at 74-75.

[13] Kenneth Karst*, Belonging to America: Equal Citizenship and the Constitution,* 99 (New Haven: Yale University Press, 1989).

[14] Samuel LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood,* 17 (Montreal: McGill-Queen's University Press, 1996).

> "Such an assumption was precisely what Canadians could not take for granted in 1867. In his famous report of 1839, Lord Dunham had found in Canada 'a struggle not of principles, but of races [and]. . .two nations warring in the bosom of a single state'. . . .[Others] spoke of the 'great difference of nationality, which is certainly fated to play an important part in the destinies of the future Confederation."[15]

Federalism in Canada was adopted to facilitate the successful coexistence of different constituent societies. The Fathers of Confederation regarded federalism as a great concession to French Canada. They acknowledged Quebec's specificity, and relied on it as a key justification for the adoption of a federal system. On the other hand, U.S. "federalism is a conception of political federalism that assumes the essential equality of the states and a relatively homogeneous country, Canadian federalism is different, partly because of the distinctiveness of Quebec."[16] What sustains Canada is not a singular patriotism but mutual recognition, given the existence of several constituent societies. In the U.S., historically, mutual recognition was not an issue because of its ethnocultural uniformity and because of the enduring influence of nativist and racist ideologies in the U.S. political culture.

It would seem that federalism is the ideal mechanism for accommodating territorially-defined stateless nations within a multinational state. Federalism can provide meaningful self-government for a national minority, guaranteeing its ability to make decisions in key areas, without being overwhelmed by the larger society. Quebec is the prototypical example:

> "Under the federal division of powers, the province of Quebec has control over issues that are crucial to the survival of the francophone society, including education, language, and culture, as well as significant input into immigration policy. The other nine provinces too have powers, but the major impetus behind the existing division of powers, and the federal system itself, was the need to accommodate Quebec."[17] Had Quebec not been granted substantial powers, it would either not have joined Canada in 1867, or would probably have seceded sometime thereafter.

The U.S., on the other hand, presents a good example of the 'territorial' conception of federalism. Anglo-Saxon settlers were the clear majority in all of the original 13 colonies. Thus, there was no need for the original division of powers within the federal system to accommodate ethnocultural divisions. The status of minority nations became more of an issue as the U.S. began its territorial expansion to the south

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[15] *Id.,* at 35.

[16] *Id.,* at 131.

[17] Kymlicka, *supra* n. 4 at 135.

and west, and eventually into the Pacific, as the U.S. incorporated the homelands of American Indians, Chicanos, native Hawaiians, et al. However, no territory was accepted as a state unless these proto-minority nations were outnumbered within it. In short, U.S. federalism had no interest in accommodating national minorities. In the U.S., the aim was to "consolidate, then expand, a new country and to protect the equal rights of individuals within a common national community, not to recognize the rights of national minorities to self-government. Insofar as national minorities in the U.S. have achieved self-government, it has been outside – and to some extent despite – the federal system, through the various forms of 'special statuses enjoyed by the 'commonwealth' of Puerto Rico, the 'protectorate' of Guam, and the 'domestic dependent nations' of American Indians."[18]

The Canadian federation exhibits many of the hallmarks of a genuine multination federation with respect to the Quebecois, if not the Aboriginal peoples. Interestingly, though, many people in English Canada have not fully accepted a multination model of federalism. In a multination conception of federalism, since nationality-based units and region-based units serve such different functions, there is no reason to think that they should have the same powers. Nationality-based units will tend to seek more expansive powers than region-based units. Thus, in Canada the overwhelming number of Anglophone Canadians – following a purely territorial model of federalism – rejects the notion of "special status" for Quebec, while most Quebecois want an even more decentralized division of powers. This is the crux of the asymmetry debate that has been at the heart of the current constitutional impasse in Canada. "So long as English-speaking Canadians cling to [an] . . . ideal of a unitary Canadian nationality, they will never accept the asymmetry implicit in a multination conception of federalism."[19] For many in Quebec, however, to grant "equal powers to region-based units and nationality-based units is in effect to deny equality to the minority nation, by reducing its status to that of a regional division within the majority nation."[20] Thus, the demand for 'special status' is a quest not just for additional powers, but for national recognition of a sub-state national society. To sum up, the formulas for federalism in Canada and the U.S. reflect the elements of the political culture in each of these countries that are shaped by their notions of citizenship and nationhood. The model of federalism in the U.S. seems to exemplify a 'territorial' conception of federalism, while, in Canada, it exhibits many of the characteristics of a multinational federation, although Anglophones and Francophones differ in their degree of acceptance of a genuine multinational federation model.

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[18] *Id.,* at 137.

[19] *Id.,* at 143.

[20] *Id.*

IV. Constitutionalism and the Politics of Recognition in Canada

In 1867, the Canadian Fathers of Confederation requested that the British Parliament promulgate the British North America Act ("BNA Act"), creating the Dominion of Canada. The founding moment for Canada was very different from the U.S. one that took place earlier in Philadelphia. Canadians were not seeking independence (it would not happen until after World War I), but the Fathers envisioned the legal establishment of the Dominion of Canada as a continuation of a very old constitution rather than the creation of a new one.[21] For the Fathers of early Canadian constitutionalism, there was no doubt that legitimacy rested with the long-standing institution of Parliament and not directly with the people. Several Canadian constitutional scholars have maintained that the most important development in Canadian constitutional history has been the slow but steady erosion of this view of legitimacy in favor of the modern one. Developments in Canada took place at a very slow pace. For example, the Statute of Westminster, which formally acknowledged Canada's legislative sovereignty, was enacted in 1931, but the written portions of the Canadian Constitution remained in England as an act of the British Parliament until 1982. It took over 50 years to "patriate" the Constitution in part because Canadian leaders could not agree on a formula for amending the Constitution, i.e., on the distribution and balance of sovereign power in the nation they were trying to build. Public participation in these constitutional matters began to increase in the 1970's as the larger issues of human rights and Canadian identity began to come to the fore.

Until the 1960s, the Constitution was neither discussed nor considered relevant to public debate. Political culture in Quebec was constrained by a traditionalist Catholicism. "Its economic structure was dominated by Montreal anglophones; English-speakers ran the world of commerce and the French could dominate law, medicine, the church, education . . . . [Thus,] 'Psychologically the two founding peoples lived in different constitutional worlds and had different constitutional identities."[22] All of this began to change in the 1960's, "when the constitutional debate expanded beyond questions of an amending formula and into broader issues of the nature of the political community and the character of Canadian federalism itself. What precipitated this broadening was the rise of Quebec nationalism."[23] In the 1960's, Quebec's "Quiet Revolution" was the catalyst that transformed Canadian politics. It was, in essence, a Montreal-centered challenge by an emergent Francophone "new middle class" to the conservative, agrarian nationalism of

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[21] Simone Chambers, *Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis*, 26 Politics & Society 1, 143-172 (March 1998).

[22] David Thomas. *Whistling Past the Graveyard: Constitutional Abeyances, Quebec, and the Future of Canada,* 100 (Toronto: Oxford U. Press, 1997).

[23] Simone Chambers, *supra* n. 21, at 146.

traditional Quebec. "No longer willing to forego North American standards of living as part of a cultural survival strategy, new urban Francophone elites increasingly looked toward an energized Quebec state to bring French Quebec into the modern world while maintaining Francophone cultural security. Inevitably, the central theme of the Quiet Revolution – to make Francophones "*maitrez chez nous*" – politicized issues of language in Montreal."[24]

The principal thrust of the Quiet Revolution – which included an assertive and activist Francophone nationalism, clear notions of public action, and a strong mandate to support the cultural and economic interests of Francophones – helped to break with the passivity of French Canadians' traditional strategy of cultural survival (which encouraged isolation and underdevelopment as the keys to cultural survival), and directly challenged the status of English in Montreal. Before 1960, the ideology of traditional French-Canadian nationalism, *la survivance*, was a "Church-based 'defensive' strategy of cultural survival based on avoiding contamination by urban, English Montreal and maintaining French-Catholic purity in the homogeneous environments of rural and small-town Quebec."[25] The traditional model of linguistic consociationalism, which existed in Montreal, was challenged in the early 1960's by the emergence of several political groups advocating Quebecois separatism. The *Rassemblement pour l'independance nationale* ("RIN") became Montreal's first mass-based, separatist political party, and there also appeared more radical groups, such as the *Front de Libération du Quebec*.[26] The Quiet Revolution stemmed from cultural and demographic changes within the French-speaking community. By the mid-1960's, Montreal – not rural Quebec – was the center of French-Canadian culture and the place where the future of French in North America would be determined. The transition had been made from the "old conception of French Canadian belonging based on ethnicity to a new, modern civic conception of a Quebec community based on the existence of a French-language network of communications."[27]

While language policy never developed into a major political issue during the Quiet Revolution, Premier Jean Lesage's administration (1960-66) marked the first tentative involvement of the Quebec provincial government in language policy and planning. In 1961, the government established a Ministry of Cultural Affairs and an Office *de la Langue Francaise*, intended to support French language and culture in Quebec. The referenced Ministry produced a White Paper in October 1965 that contained the first call emerging from the provincial government for a systematic language policy. It called on the provincial government to make French "the priority

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[24] Marc Levine. *The Reconquest of Montreal: Language Policy and Social Change in a Bilingual City*, 40 (Philadelphia: Temple University Press, 1990).

[25] *Id.,* at 33-34.

[26] *Id.,* at 40.

[27] Balthazar, *supra* n. 5, at 44.

language in Quebec." After describing the "perilous state" of the French language in the province, the report maintained that public policy should "take all necessary measures to imprint a new orientation in Quebec society that favors, in all domains of human activity, the normal development of the French language."[28] In 1967, René Lévesque and others formed the *Mouvement Souveraineté– Association*, which became in October 1968 the *Parti Québécois*. Meanwhile, provincial politics in Quebec showed that language disputes could no longer be contained by the old pattern of elite management. Although the political economy of language in Montreal in 1969 was such that nationalists were defeated in the legislative struggles over proposed Bills 85 and 63, the language question had now been put on the agenda of mass politics.[29]

In 1968, Pierre Elliott Trudeau was elected Canada's prime minister, a post that he held (except for a nine month hiatus) until 1984. Trudeau was a strong opponent of Quebecois nationalism, viewing it as reactionary.

> "The interests of Francophones would not be served by turning inward and creating a secure French-speaking ghetto in Quebec. Rather, Trudeau's vision was of a "coast to coast" bilingual Canada, in which minority language rights would be entrenched in a constitution and in which Francophones could maintain their language and culture while becoming full participants in Canadian life."[30]

According to Louis Balthazar, a prominent Quebecois political scientist, Trudeau:

> "dedicated his career as prime minister of Canada to the struggle against the idea of a Quebec. . . [distinct] society. He always presented himself as a champion of federalism. But to him, a federal system did not imply sharing of sovereignty and allegiances. Quebec was a province like the others. . . .He repudiated provincialism; the concept of two nations or of a bi-national Canada. . . In order to unite the country and make French-speaking Quebecers feel as comfortable in all of Canada as in Quebec, he promoted bilingualism in all federal services across the Canadian 'nation'; he never doubted that Canada was one indivisible nation. He was implicitly asking his fellow Quebecers to trade their identity as a people against the promise of bilingualism."[31]

Thus, in 1969 the Trudeau Administration promulgated the Official Languages Act, which federalized French and English as Canada's two official languages,

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[28] Marc Levine, *supra* n. 24, at 54.

[29] *Id.,* at 85.

[30] *Id.,* at 90.

[31] Balthazar, *supra* n. 5, at 47.

and created bilingual districts in areas where Francophones and Anglophones both exceeded 10% of the population. Subsequently, Quebec's new premier (elected in 1970), Robert Bourassa, and his government, passed Bill 22 in 1974, which declared French as the official language of Quebec, and declared the government's intention to present French as "the ordinary language of communication" in all spheres of Quebec life. Thus, "Bill 22 proclaimed a 'French Quebec': Montreal was no longer officially bilingual, and although Bill 22 protected Anglophone privileges in a number of key areas, the 'majority psychology' of Anglophones was shattered by the bill."[32]

On November 15, 1976 the *Parti Québécois* ("PQ") scored a stunning triumph in the provincial elections. The new Premier, René Lévesque, and his government immediately set on developing a language policy. Barely nine months after the November elections, in 1977, had the new provincial government enacted Bill 101, the Charter of the French Language. Bill 101 "was unmistakably the policy of an *independantiste* party, breaking new ground on matters such as the "Quebec clause", French-only public signs, and mandating French as a language of work in local public institutions regardless of their linguistic composition."[33] The Charter of the French Language had two principal goals: franchising the economy, and reshaping public schools to protect the demographic position of the Francophone community, particularly in Montreal. Moreover, "Bill 101 accomplished the Francophone nationalist goal of turning English-language education in Montreal into a 'privilege' for a narrowly defined community of Anglophones, not a system that integrated immigrants and threatened the Anglicization of Montreal."[34]

In 1981-82, Trudeau brilliantly maneuvered to bring home Canada's Constitution from Britain – a 'patriation' representing a final act of severance. In April 1982, Queen Elizabeth proclaimed a new Canadian Constitution in Ottawa, which became known as The Constitution Act, 1982.

> "The Charter of Rights and Freedoms attached to the Constitution created a new citizenship, a new Canadianism in which the federalist principle was diluted by the recognition of individual rights and the rights of many groups. . . .The National Assembly of Quebec did not and could not ratify such a constitution. Not only did the members of the governing party, the PQ, vote against it, but so did most of the members of the Liberal opposition. . . ."[35]

The Charter was an important element of Trudeau's constitutional vision of a pan-Canadian nationalism built on the equality of individuals and provinces. The

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[32] Marc Levine, *supra* n. 24, at 107.

[33] *Id.*, at. 119.

[34] *Id*., p. 141.

[35] Balthazar, *supra* n. 5, at 48.

patriation of the Constitution without Quebec's participation produced resentment within Quebec that fostered a separatist animus. With the threat of dissolution in the air – and a new Progressive Conservative administration in power, headed by Brian Mulroney – the next round of constitutional debate was directed at bringing Quebec back into the constitutional fold. This is now known as the "Quebec round", and resulted in the Meech Lake Accord (1987).[36] On June 3, 1987, the provincial premiers and Prime Minister Mulroney signed the Meech Lake Accord. The most important feature of Meech Lake was the inclusion of a distinct society clause that stated, in relevant part, as follows: "The Constitution of Canada shall be interpreted in a manner consistent with...the recognition that Quebec constitutes within Canada a distinct society".[37] By insisting on including this clause, Quebec was rejecting Trudeau's pan-Canadian and centralized model of a nation of equal citizens whose individual rights always trump the pursuit of collective goals. Instead, Quebec was proposing a dualist vision, with Quebec as co-equal with the rest of Canada as a whole, rather than any of the individual provinces. But, the distinct society clause was never adopted, because two (out of ten) provincial legislatures failed to ratify it before a deadline of three years elapsed. Despite the fact that eight legislatures did ratify it, the agreement was very unpopular in many regions of Canada, and, within Quebec, disapproval of the agreement was seen as rejection of Quebec. The main ingredients of the Meech Lake failure were that: (a) between 1987-90 provincial governments changed, eroding support for Meech Lake; (b) Quebec passed a law requiring all outside signs to be only in French; (c) concern in Anglophone Canada about the distinct society clause; and (d) Western Canadian provinces saw that their concerns (such as Senate reform) were given secondary priority.

After the Meech Lake failure, new proposals were floated, and, by mid-1991, the federal government had produced a 28-point package to secure national unity.[38] This new round of constitutional debate was known as the "Canada Round." In addition to addressing Quebec nationalism, the Canada round was suppose to address regional (especially Western) alienation,[39] aboriginal self-government, and Canadian nationalism. Contrary to all previous constitutional debates, this round featured a considerable amount of popular consultation, open hearings, traveling

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[36] Simone Chambers, *supra* n. 21, at 148.

[37] *Id. see* Section 2 of the Agreement in Peter Hogg, *Meech Lake Constitutional Accord, Annotated*.

[38] Sue Wright (ed.). *Monolingualism and Bilingualism: Lessons from Canada and Spain,* 6 (Clevedon: Multilingual Matters Ltd., 1996).

[39] Western provinces endorsed, e.g., the Triple-E Senate: Elected, Equal , and Effective. The Canadian Senate is an appointed and not elected body. The seats in the Senate are distributed among the provinces roughly proportional to population. The Senate can delay but not veto legislation. In a Triple-E Senate, members would be elected, not appointed. Each province would have equal representation regardless of the size of the population, and the Senate would be an effective body. The Charlottetown Accord proposed a Double-E Senate: elected and equal but with no more power than the present Senate. *See* Simone Chambers, *supra* n. 21, at 169, fn. 43.

task forces, and a genuine attempt to bring out a Canada-wide consensus on constitutional issues. The feedback from these consultations was distilled in the Charlottetown Accord of 1992. However, the Charlottetown Accord was defeated in a nationwide referendum on October 26, 1992. In Quebec, 56.7% of the population voted no, and in the rest of Canada 54.3% of the population rejected the Accord.[40]

> "In spite of a vigorous campaign on the part of political leaders, the population remained unresponsive. Quebecers thought, with good reason that this accord was too little, too late. Other Canadians, especially Westerners, thought they were confronted with a bad deal, an incomplete Senate, and unacceptable guarantees for Quebec. . . ."[41]

Our review of contemporary Canadian constitutionalism and language politics has shown that the Charter of Rights and Freedoms played a central role in the debates and political struggles over Canadian nationhood in the 1980's and 1990's. In light of the failure of the Meech Lake and the Charlottetown Accords, the 1982 patriation of the Constitution and the adoption of the Charter remain the last instance of constitutional high politics in the Canadian confederation in the recent past. Understanding the Charter's political effects on the Canadian conception of nationhood is essential to understanding political development in Canada. Therefore, it will be examined in further detail below.

V. The Charter of Rights and Freedoms, Antidiscrimination Law, and Nation-Building in Canada

The phrase "Constitution of Canada" is defined in Section 52(2) of the Constitution Act, 1982 to include three categories of instruments: (a) the Canada Act, 1982, which includes the Constitution Act, 1982 (being Schedule B of the former); (b) a list of 30 Acts and orders in the schedule to the Constitution Act, 1982 (includes the Constitution Act, 1867 and its amendments, the orders in council and statutes admitting or creating new provinces, and the Statute of Westminster); and (c) the amendments that in the future may be made to any of the instruments in the first two categories.[42] The Charter of Rights and Freedoms (the "Charter") is Part I of the Constitution Act, 1982. The adoption of the Charter has now imposed upon the federal Parliament and the provincial legislatures a set of limitations on their powers to abridge civil liberties. The civil liberties protected by the Charter include freedom of religion, expression, assembly and association (s.2), voting rights (s.3), mobility rights (s.6), various procedural and other legal rights (ss. 7-14), the right

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[40] Simone Chambers, *supra* n. 21, at 149.

[41] Balthazar, *supra* n. 5, at 51.

[42] Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997).

to equal protection of the laws (ss. 15, 28) and new language rights (ss. 16-23). One notable difference between the U.S. Bill of Rights and the Charter is that Section 33 of the latter enables the Parliament or a Legislature to "override" most of the provisions of the Charter. The override provision thus preserves parliamentary supremacy over much of the Charter.[43] The notwithstanding clause (also known as the override provision) allows Parliament or a Legislature to declare "expressly" that a statute is to operate notwithstanding a Charter right. Not all Charter rights may be overridden by the use of Section 33, only the fundamental freedoms (s.2), the legal rights (ss. 7-14), and the equality rights (s.15).

Thus, among the Charter rights that may not be overridden are the language rights sections of 16-23. Express declarations are also subject to a five-year sunset clause. After the Charter came into force on April 17, 1982, Quebec's *Parti Québécois* government passed a statute that added a standard-form notwithstanding clause to each of the statutes in force in Quebec then. No other province besides Quebec has ever used the override power; nor has the federal Parliament.[44]

For our present purposes, we should highlight the following sections of the Charter. Section 7 protects due process rights, providing that "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 thereof." However, Peter Hogg has interpreted this clause as being limited to the protection of procedural due process rights, and not likely to encompass substantive due proces rights.[45] The Equal Protection Clause is Section 15(1), which provides that: "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, color, religion, sex, age, or mental or physical disability." Section 15(2) provides that Section 15(1) is not to be taken as precluding affirmative action programmes in favour of "disadvantaged individuals or groups."[46] Related to s.15, Section 28 states that "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." Sections 16-23 cover language rights. Section 16(1) states that English and French are the official languages of Canada and have equality of status in all areas of endeavor of the government of Canada. Section 23 covers minority language education. For example, it states that citizens of Canada who are members of the English-speaking minority in Quebec or the French-speaking minority in the other provinces have the right to have their children receive primary

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[43] *Id*., at 272. It should also be noted that in 1960 a Canadian Bill of Rights was enacted as an ordinary statute of the federal Parliament, and it was made applicable only to federal laws. It lost much of its importance in 1982, because most of the rights and freedoms in the Bill are now guaranteed by the Charter. However, the Bill was not repealed, and it remains in force. *Id.* at 612.

[44] Hogg, *supra* n. 42, at 732-735.

[45] Hogg, *Canada Act Annotated,* 27-29 (Toronto: Carswell, 1982).

[46] *Id*., at 50-52.

and secondary school instruction in their own language in that province. This right, which applies to denominational and non-denominational schools, is possessed by parents who fit into one of the categories established by s.23. These categories are defined by: first, the mother tongue of the parent (s. 23(1) (a)); second, the language of primary instruction in Canada of the parent (s. 23(1) (b)); and third, the language of instruction in Canada of one child of the parent (s. 23(2)).[47]

It should be noted that Sections 15 and 28 of the Charter, which constitute the antidiscrimination provisions of the Charter, are to be considered in conjunction with statutory provisions in Canada that provide for the legal protection of first-level diversity of ethnocultural immigrant groups, who lack founding people status. In Canada, such groups may generally also be referred to as Allophones (non-English or French speakers). Specifically, for example, the Canadian Multiculturalism Act of July 1988 declares that it is the policy of the Government of Canada to "ensure that all individuals receive equal treatment and equal protection under law, while respecting and valuing their diversity" and to "promote the full and equitable participation of all individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society."[48] 'Multiculturalism programs' can now be found not just throughout the federal government, but also at the provincial and municipal levels of government and in a wide range of public and private institutions, including schools and business. Among the actual or proposed policies often discussed under the rubric of multiculturalism are: (a) affirmative action programs that seek to increase the representation of visible minorities in the principal educational and economic institutions; and (2) flexible work schedules or dress-codes to accommodate the religious beliefs of immigrant groups.[49]

In view of the antidiscrimination provisions of the Charter and the Canadian statutory provisions promoting multiculturalism policies, it seems worthwhile to inquire whether such provisions that stress the rights of individual immigrant minority group persons to equal treatment can also address the claims for collective rights and recognition of sub-state national societies. In other words, the issue is whether constitutional and statutory provisions that respond to a politics of antidiscrimination can also be effective in addressing a politics of recognition. The Charter is both a nation-building as well as a rights-protecting instrument. The Charter does not just recognize individual rights, but singles out for special constitutional protection certain groups. Thus, the linguistic dualism of Canada is given special attention and protection (ss. 16-23). The Charter also instructs the judiciary to interpret it "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (Section 27). Moreover, it

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[47] Hogg, *supra* n. 42, at 1018.

[48] Kymlicka, *supra* n. 4 at 185. Note that the federal government in Canada has had an official policy of supporting multiculturalism since 1971, when Trudeau proposed it in the House of Commons. *Id.,* at 15.

[49] *Id.,* at 42.

protects "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada." (Section 25). Aboriginal people are defined in Section 35(2) of the Constitution Act, 1982 as "Indian, Inuit, and Metis peoples of Canada." Finally, the Charter provides constitutional support to particular groups in the affirmative action clause of Section 15(2).[50] In this sense, the Charter rejects the atomizing individualism of the U.S. Bill of Rights and contains elements of a group, collective, or communitarian orientation.[51] However, the overwhelming political purpose of the Charter, and its de facto effect, was to oppose the centrifugal forces of peripheral nationalism, and to tie individuals and groups more tightly to the state and to "embed them in a strengthened pan-Canadian community."[52] Thus, Alan Cairns believes that the relation between the Charter and federalism is straightforward: it was a mechanism to limit the creation of provincial diversities. "The Charter was to induce citizens to evaluate the conduct of provincial governments through the lens of a rights-oriented Canadianism. In the future, provincial policies were to apply not to distinctive provincial communities but to the provincially resident members of a national community of rights-bearers."[53] In terms of the terminology we used in our discussion above about federalism in Canada and the U.S., it would seem that the Charter encouraged a gradual distancing from a multination conception of federalism towards a conception closer to the territorialism model. Because Aboriginals in Canada do not define themselves as minorities scattered throughout a heterogeneous society, but as a "nation within a nation", with a unique identity, these peoples – especially the Assembly of First Nations – opposed the Charter. In addition, Quebec nationalist opposition to the Charter was expressed as follows: the Charter "perceives equality as having a strictly individual scope and applying uniformly across Canada. . . . The notion of a distinct Quebec society is thus understood as being a source of inequality and incompatible with the principle of equality of all Canadian citizens."[54] Quebec nationalists portrayed the Charter as an instrument that reduced the powers of the provincial polity: they, in the words of Premier René Lévesque, could never "abandon the smallest fraction of this absolutely fundamental right to protect the only French island in the English-speaking sea of the North American continent."[55]

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[50] Alan Cairns. *Reconfigurations: Canadian Citizenship and Constitutional Change*, 44 (Toronto: McClelland & Stewart, 1995).

[51] Alan Cairns. *Charter Versus Federalism: The Dilemmas of Constitutional Reform* , 80 (Montreal: McGill-Queen's University Press, 1992).

[52] *Id*., at 73.

[53] *Id.,* at 74.

[54] *Id.,* at 269. It should be noted that Quebec already had one of the most extensive Bills of Rights of any of the provinces.

[55] Alan Cairns. *Disruptions: Constitutional Struggles, from the Charter to Meech Lake,* 23 (Toronto: McClelland & Stewart, 1991).

The effect of the Charter on the claims for recognition of internal nations in Canada was to present a new pan-Canadian constitutional vision, which was inimical to their aspirations. In Quebec, for example, the Charter fueled nationalist impulses, as political leaders were able to portray the new constitutional vision as unresponsive to the nation-like aspirations of Quebec. The effect was so dramatic that the next round of debate (Meech Lake and Charlottetown Accords) was aimed at bringing Quebec back into the constitutional fold. The Charter, in effect, renewed and reinvigorated Quebecois aspirations to be recognized as a "distinct society." The Meech Lake Accord "concept of enshrining in the constitution a provision that Quebec is a distinct society is not new, but the impact of the Constitution Act, 1982, and in particular the Charter, created a sense of urgency in Quebec that was heretofore absent."[56]

Another concrete manifestation of the incompatibility between the Charter, and antidiscrimination provisions in general, and the claims for recognition by national minorities in Canada is evident if one focuses on the conflict between the Charter and the notion that the Quebecois ought to be recognized as a "distinct society" within Canada,

> "with the right to preserve and promote its distinct language and culture. To many Canadians outside Quebec, that right is inconsistent with fundamental values enshrined in the Canadian Charter of Rights and Freedoms, especially 'the equal protection and equal benefit of the law without discrimination. . .based on race, national, or ethnic origin."[57]

The cornerstone of Quebec's efforts to maintain its distinct identity is the 1977 *Charter of the French Language* (also known as Bill 101).[58] This law provides for the use of French in specific circumstances, provides for the Francization of business firms and the civil administration, and proclaims Quebec's intention to be "fair" and "respectful" to ethnic minorities, including the Amerinds, the Inuit, and the English speaking community. English minorities have the right to be educated "in their own language in specified circumstances. Legislative bills are published in English. Parties in litigation may agree to plead in English in Quebec courts," etc.[59] The security of the French language and culture in the province is seen as fundamental,

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[56] Katherine Swinton (ed.) Competing Constitutional Visions: The Meech Lake Accord, 128 (Toronto: Carswell, 1988).

[57] Ian McGilp, *The Distinct Society Clause and the Charter of Rights and Freedoms* (Ontario: Background Studies of the York U. Constitutional Reform Project No. 5, 1992).

[58] *Id.,* at 2.

[59] *Id.,* at 9-10. Bill 101, with few exceptions, regulates organizations, not people. In the field of commerce and business, it exempts small and medium sized firms from the more onerous requirements. It requires the use of the official language in written (not oral) communications. It affects individuals' working or public life, not their personal or private affairs. *Id.,* at 13.

since it has been thought to be seriously at risk, given declining birth rates in Quebec. Thus, when conflict between the Charter and Bill 101 arises over the language of education, for example, there could not be a clash on a more sensitive issue in Quebec.

Under Bill 101, parents have the right to have their children educated in English, if either parent was educated in English in a Quebec school. English-speaking persons who came to Quebec from outside the province are strongly opposed to this narrow limitation of rights. The Charter of Rights, in sections 16-23, states more broadly the right of parents of a linguistic minority, such as the English speaking people of Quebec. Thus, "it is clear that Bill 101 and the Charter are in conflict on this fundamental point."[60]

In fact, a number of cases have reached the Supreme Court of Canada that raised a conflict between a Charter right and provisions of Quebec's Bill 101 that promote cultural identity. In *Attorney-General of Quebec v. Assoc. Of Protestant School Boards* (2 S.C.R. 66 1984), the issue was whether Quebec could restrict admission to its English-language public schools to the children of persons who had been educated in English in Quebec. This was a violation of the minority language educational right of Section 23(1) (b) of the Charter, and the issue was whether this could be justified under Section 1.[61] The Court held that the Quebec statute was such a severe infringement of the Charter right that its denial could not be justified under Section 1. The statute was thus struck down and the Court did not even entertain Quebec's distinct society arguments. In *Attorney General of Quebec v. Ford* (1988), the Court encountered another one of Quebec's unique statutes, which required that public signs be solely in French. The Court held that the statute infringed freedom of expression, and that it could not be justified under Section 1. "The law was struck down, not because of any doubt as to the legitimacy of the purpose, but because the banning of English was a disproportionate impairment of the rights of English speakers."[62] These two cases dramatize the fundamental conflict between the Charter and the efforts of Canada's principal stateless nation to be recognized as a "distinct society" with the wherewithal to preserve and promote its distinct language and culture. This is, in essence, a tension between individual rights and collective identity, and between a politics of individual rights (and nondiscrimination) and a politics of recognition.

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[60] William McKercher (ed.), *The US Bill of Rights and the Canadian Charter of Rights and Freedoms,* 148 (Ontario Economic Council, 1983).

[61] Section 1 provides as follows: "[The Charter] guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demostrably justified in a free and democratic society." The Quebec government's defense was based on section 1 of the Charter — that the "Quebec clause" was a "reasonable limitation" on the education language rights of the English minority. Rainer Knopff et al. (Eds.) *Federalism and the Charter,* 620 (Ottawa: Carleton U. Press, 1989).

[62] Hogg, *supra* n. 42, at 707.

In sum, the Charter, and antidiscrimination statutes in general, seem to be ill-suited to address the claims for collective rights and recognition of sub-state national societies in Canada. The Charter promotes an individual rights– oriented pan-Canadianism that is inimical to the aspirations of sub-state national societies in Canada, despite the fact that it contains provisions that contain elements of a group orientation. The Charter had a number of concrete political effects. First, it reinvigorated Quebecois aspirations to be recognized as a distinct society, with a renewed sense of urgency. Second, concrete clashes arose between Charter rights and collective cultural identity rights in Quebec. This is most clearly seen in the Canadian Supreme Court decisions examined above that posed a conflict between Charter rights and provisions of Quebec's Charter of the French Language. In conclusion, neither the Charter, nor federal antidiscrimination provisions in general, are responsive to the Quebecois' efforts to be recognized as a "distinct society", with the power to preserve and promote their distinctive language and culture. The Meech Lake Accord and the Charlottetown Accord rounds showed that the Quebecois continue to seek recognition through Renewal of the Canadian federation, in spite of the Canadianizing effect of the individual-rights approach of the Charter.

VI. Political Culture, the Politics of Recognition, and Language Policy in the U.S.

With respect to language and culture in the U.S., although some theorists – such as Michael Walzer – maintain that the U.S. is the paradigmatic case of a liberal civic nation because of its ethnocultural neutrality, "the fact is that the American government very actively promotes a common language and societal culture. . . [Thus, all] levels of American government – federal, state, and municipal – have insisted that there is a legitimate governmental interest in promoting a common language, and the Supreme Court has repeatedly affirmed that claim in upholding laws that mandate the teaching and use of English in schools and government functions."[63] The U.S. has promoted integration into a societal culture that is based on the English language and "has encouraged citizens to view their life-chances as tied up with participation in common societal institutions that operate in the English language."[64] Moreover, as Charles Taylor has observed, the U.S. has "indeed been hostile to deep diversity and has sometimes tried to stamp it out as 'un-American."[65] As we discussed above, nativist and racist ideologies have been part of the multiple traditions that have characterized political culture in the U.S., and the influence of these ideologies on notions of nationhood and citizenship is also indelibly

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[63] Kymlicka, *supra* n. 4, at 23.

[64] *Id.,* at 24.

[65] Taylor, *supra* n. 2, at 183.

stamped in conceptions of federalism in the U.S. The multiple traditions that have contributed to U.S. political culture have also influenced U.S. attitudes towards language, ethnicity, and cultural difference.

With respect to language policy, at the broadest conceptual level, the principal contest in the U.S. has been between supporters of an assimilationist approach versus advocates of linguistic pluralism. The pluralist position took shape in the 1960's, and was part of a new political vibrancy of Latino/a communities in the U.S., and particularly by Chicanos/as in the Southwest. The focus was on linguistic and cultural discrimination, and on obtaining protections for linguistic minorities against infringements of their political and civil rights. The aim was to establish that "political and civil rights should not be denied simply because the client, citizen, or both spoke a language other than English."[66]

Assimilationists, on the other hand, generally seek to induce members of minority language groups to acculturate linguistically by adopting the "national" language as their own. Groups such as "U.S. English" and "English First" are representatives of this perspective, maintaining that "the policies of bilingual education and bilingual ballots threaten the unity of the United States, and that declaring English as the sole 'official language' is a necessary countermeasure to these wrongheaded policies."[67] This contest between assimilationists and pluralists is, on the one hand, a conflict over rights – equal access to education and government – for immigrant minorities and others who face language hurdles, and freedom of speech in the language of one's choice. From another perspective, it is a contest over national identity: "[i] t is about how much diversity a nation can tolerate, even a nation of immigrants. Should cultural pluralism extend to language if that means Americans will be less able to communicate with each other? Are we ready to discard the ideal of a common language, which has kept the melting pot simmering for so long?"[68] For our purposes, what needs to be emphasized is that the debate has been generally between advocates of the right to linguistic nondiscrimination for members of immigrant minority communities, bearers of first-level diversity, scattered throughout the United States' heterogeneous society, and opponents of that right or set of rights – who are staunch supporters of a singular and homogeneous conception of nationhood in the U.S. Nowhere in this debate, however, is there a reference to the complexities and particularities of the deep diversity that characterizes sub-state national societies in the U.S., and how to approach the problem of linguistic and cultural diversity from their perspective.

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[66] Thomas Ricento and B. Burnaby (ed.), *Language and Politics in the U.S. and Canada,* 42 (Mahwah: Lawrende Erlbaum Publ., 1998).

[67] *Id*., at 45. For a discussion of assimilationism, pluralism, and multiculturalism in the education field, see Walter Feinberg, *Common Schools/Uncommon Identities: National Unity and Cultural Difference,* 19 (New Haven: Yale University Press, 1998).

[68] James Crawford (ed.), *Language Loyalties: A Sourcebook on the Official English Controversy,* 87 (Chicago: University of Chicago Press, 1992).

VII. The Bill of Rights, Antidiscrimination Law, and Nation-Building in the U.S.

The conventional wisdom is that the original Bill of Rights of 1789 – the first ten Amendments to the 1787 Constitution –vests individuals and minorities with substantive rights against majorities and ignores the issue of the protection of the people against self-interested government. Akhil Amar argues, however, that in the original Bill of Rights what was foremost in the minds of the framers was the concern with protection of the people against a self-interested government. "The essence of the Bill of Rights was more structural than not, and more majoritarian than counter."[69] For example, Amar shows with respect to the First Amendment that, before Reconstruction, the Amendment's historical and structural core was to safeguard the rights of popular majorities against a possibly unrepresentative and self-interested Congress. Thus, when any of the first 10 amendments referred to "the people", this implies a core collective right or a popular right, "echoing the Preamble's commitment to the ultimate sovereignty of "We the People of the United States."[70] The Reconstruction Amendment transformed the nature of the original Bill of Rights, bequeathing to us something much more akin to what is understood at present. With respect to whether the 14th Amendment "incorporates" the Bill of Rights against the states, Amar adopts a "refined incorporation" approach, which is a synthesis of the heretofore principal approaches ("total incorporation", "selective incorporation", and "fundamental fairness" doctrine). The 14th Amendment altered the trajectory of the original Bill of Rights. Thus, "certain provisions may become less majoritarian and populist, and more libertarian, as they are repackaged in the Fourteenth Amendment as liberal civil rights – 'privileges or immunities' of individuals – rather than republican political 'right[s] of the people', as in the original Bill."[71] Incorporation must be considered right by right, and clause by clause. The correct question to ask with respect to each right is whether the provision guarantees a privilege or immunity of individual citizens, rather than a right of states or the public at large.

Amar's argument is that the 1789 Bill "knit together citizens' rights and states' rights; but the 1868 Amendment unraveled the fabric, vesting citizens with rights against states. The original Bill also focused centrally on empowering the people collectively against government agents following their own agenda. The 14th Amendment, by contrast, focused on protecting minorities against even responsive, representative, majoritarian government. Over and over, the 1789 Bill proclaimed "the right[s]" and "the powers" of "the people" – phrases conjuring up civic

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[69] Akhil Amar, *The Bill of Rights: Creation and Reconstruction,* XIII. (New Haven, Yale University Press, 1998).

[70] *Id.,* at 64.

[71] *Id*., at xv.

republicanism, collective political action, public rights, and positive liberty. The complementary phrase in the 1868 amendment – 'privileges or immunities of citizens' – indicates a subtle but real shift of emphasis, reflecting a vision more liberal than republican, more individualist than collectivist, more private than public, more negative than positive."[72]

For our purposes, we should underscore the fact that whether we view the original Bill of Rights – with its civic republican overtones – or we are viewing these rights transformed by the 14th Amendment – with its liberal, individualistic hues – the political effect of the Bill of Rights is that it had a nationalizing, homogenizing, pan-United States impact. The 14th Amendment's due process clause "became the major vehicle for that nationalization of individual rights; and that Amendment looks to implementation of the new guarantees through the mechanism of a national Supreme Court and Congress."[73] Thus, both the vision of rights of the 1789 Bill and the vision of rights of the 1868 Amendment had a nationalizing, homogenizing impact on the U.S. polity. A Bill of Rights can be a subtle centralizing force in a federation if it supplies a set of uniform national standards for the protection of civil liberties and political rights.[74] Political scientists Knopff and Morton state that the "American experience with their Bill of Rights, after it was applied to the states through the Fourteenth Amendment, appears to corroborate the idea that an entrenched charter can serve a nation-building purpose."[75] Moreover, "the nation building potential of the U.S. Bill of Rights dates only from the Civil War" and its centralizing effect would have been impossible prior to the 14th Amendment.[76] Thus, the Bill of Rights, especially after 1868 (and even more so in the second half of the 20th century), promotes a conception of nationhood in the U.S. that is centralizing and homogenizing. It derives also from a territorial conception of federalism in the U.S. In the end, this is not a conception of nationhood and citizenship that encourages the recognition and acceptance of sub-state national societies in the United States.

I recognize that this is a somewhat paradoxical position to take. On the one hand, through the 14th Amendment and its nationalizing influence, in the second half of the 20th century, African Americans were finally able to claim their rights to equal citizenship. I am not advocating here a reactionary yearning for the status quo ante, of course. Simply, I wish to make the observation that the original Bill and, especially the 1868 Amendment, have promoted a pan-U.S. nationalizing effect

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[72] *Id.,* at 216.

[73] Gerald Gunther, *Individual Rights in Constitutional Law* 5th Ed, 67 (Westbury: The Foundation Press, 1992).

[74] Hogg, *supra* n. 42, at 626.

[75] Knopff and Morton, *Nation Building and the Canadian Charter of Rights and Freedoms*, in Cairns and Williams (ed.), Constitutionalism, Citizenship, and Society in Canada (Toronto: University of Toronto Press, 1985), p. 137.

[76] *Id.* at 171.

– just as is the case with the Canadian charter – and this may actually have the paradoxical effect of making it more difficult for stateless nations to pursue their claim for formal recognition of their status as a distinct society, with a right to the preservation of their linguistic and cultural distinctiveness.

By the 1960's, the jurisprudence under the Equal Protection Clause ("EPC") of the 14th Amendment had established the doctrine that "race" was a "suspect classification" subject to strict scrutiny. The Warren Court developed a two-tier theory of equal protection ("suspect classifications" and "fundamental rights or interests"). The Burger Court added an intermediate level, but did not abandon the general approach.

> "Classifications . . . and interests that are not fundamental belong on the bottom tier, where the Warren Court gave them minimal scrutiny and the Burger Court applies a [rationality test]. . . . Classifications [in] the middle tier 'must serve important governmental objectives and must be substantially related to the achievement of these objectives. . . . [On the highest tier] . . . belong laws that threaten fundamental rights and classifications that are inherently suspected."[77]

As one commentator has noted, "race has been the American interpretive exemplar of a suspect classification because of our history and experience."[78] Courts have so far been unwilling to deem language minorities a quasi-suspect class for equal protection analysis when parties claim an affirmative right to governmental accommodation.[79] "However, courts have not yet confronted the question whether a language-based classification, such as a blanket Official English declaration, may be employed to force a withdrawal of existing services."[80] Some commentators have argued that an argument can be made for treating language minorities as a quasi-suspect class. Courts inquire into whether the group affected by a classification is an easily identifiable group that has suffered a history of discrimination, mistreatment, or political powerlessness. Language minorities clearly are such groups.[81] An additional indication of suspectness is the immutability of the characteristics forming the basis of the discrimination. In practice, "language might as well be an immutable

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[77] Judith Baer. *Equality Under the Constitution: Reclaiming the 14th Amendment,* 118-119 (Ithaca: Cornell University Press, 1983).. *See also* William Nelson, *The 14th Amendment: From Political Principle to Judicial Doctrine* (Cambridge: Harvard U. Press, 1988).

[78] David Richards. *Foundations of American Constitutionalism,* 275 (Oxford: Oxford University Press, 1989). *See also* Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven: Yale University Press, 1996).

[79] James Crawford, *supra* n. 68, at 275.

[80] Comment, *Official English: Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harvard Law Review 6, 1345-1362 (1987).

[81] *Id.*

characteristic like skin color, sex, or place of birth".[82] Thus, a court may reasonably find that non-English speaking people do form "discrete and insular minorities" who cannot depend on "the operation of those political processes ordinarily to be relied upon to protect minorities," in the famous words of *Carolene Products*.[83] If courts do recognize language minorities as a quasi-suspect class, the EPC will be able to protect immigrant language minorities from discriminatory classifications, but will still be inadequate to address the claim for collective rights and recognition of national minorities. The latter make very distinctive claims, which are nation-like in nature, and their claim for equality is at the level of the "nation", not at the level of individuals. National minorities' claim is, indeed, that they are differently situated – but as a people and as a "nation"– vis-à-vis the larger society that they are part of. The individual-rights approach of EPC analysis is unlikely to meet their collective needs. Their aspirations need to be addressed, rather, by creative and expansive formulas for federalism that recognize their status as constituent, distinct societies within a larger polity.

With respect to federal antidiscrimination statutes, preliminarily we should first note that the "dialogue about race discrimination in the United States has been based primarily on the black/white paradigm. A consequence is that minority groups other than African-Americans are treated as variants of blacks or neglected altogether. Does this binary paradigm of race obscure the need to examine critically the forms of discrimination that uniquely affect groups other than African Americans, such as Asian Americans, Latinos/as, and Native Americans?"[84] As Juan Perea writes, "[m]y argument is [one] against the use of paradigms of race, against orthodox attempts to understand the experiences of every racialized group by analogy to Blacks, and for the development of particularized understandings of the histories of each and every racialized group. . . . [The Black/White Binary Parading of Race must be transcended if we are to attain] a mutual understanding of the particularities of each others' condition and of the particular ways in which White racism affects members of different groups."[85] With respect to Latinos/as, for example, "viewing Latinos/as as aspiring immigrants is, in most cases, a deeply flawed view, for two reasons. First, Mexican Americans, Puerto Ricans, and United States– born Cuban Americans, are not immigrants. Mexicans occupied the Southwest long before the United States ever found them."[86] It is encouraging to see that there is an emerging countercurrent in the legal academy that is starting to open up discussion about race an ethnicity in the U.S. in ways that may facilitate

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[82] *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).

[83] *US v. Carolene Products*, 303 U.S. 144, 153 n. 4 (1938).

[84] Robert Belton and Dianne Avery, *Employment Discrimination Law: Cases and Materials on Equality in the Workplace*, 7 (6th Ed. St. Paul: West Pub., 1999).

85 Juan Perea, *The Black/White Binary Paradigm of Race: The ' Normal Science' of American Racial Thought California Law Review* 1213, 1256 (1997).

[86] *Id.,* at 1231.

serious consideration of the needs and aspirations of sub-state national societies in the United States.

The principal federal antidiscrimination statutes include the Reconstruction Era Civil Rights Legislation (42 U.S.C. Sections 1981 and 1983), Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e et seq.), Title VI of the latter, The Equal Pay Act of 1963, Title IX of the Educational Amendments of 1972, and the Immigration and Reform Control Act of 1986 (8 U.S.C. Sec. 1324B). We will focus on Title VII, which makes it unlawful for public and private employers, labor organizations, and employment agencies, to discriminate against applicants and employees on the basis of their race, color, sex, religion, and national origin.

> "The enactment of Title VII concluded a legislative process that lasted several decades, 'during which Congress considered and rejected more than 200 fair employment measures'. . . . Among the more significant amendments to Title VII are the 1972 amendments extending coverage to federal, state, and local government employees;. . . and the 1991 amendments providing for compensatory and punitive damages."[87]

The legislative history of Title VII shows that the term "national origin" means national. It means the country from which your forebears came. You may be from Poland, Czechoslovakia, England, France, or any other country" 110 Cong. Rec. 2549 (1964). The Equal Employment Opportunity Commission ("EEOC") has adopted an expansive definition of national origin discrimination: it includes the "denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural, or linguistic characteristics of a national origin group" 29 C.F.R. Sec. 1606.1 (1997). Yet, with respect to language discrimination, "the courts of appeals now uniformly deny protection under Title VII. Only one court, the U.S. Court of Appeals for the 9th Circuit, in *Gutierrez v. Municipal Court*, concluded that restrictions prohibiting employees from speaking Spanish, their primary language, violated the prohibition against "national origin" discrimination when the employer could not prove any business necessity for its language restrictions."[88] Subsequent cases involving language restrictions in the 9th Circuit have refused to follow Gutierrez. For example, the court in *Garcia v. Spun Steak Co.*, 998 F. 2d 1480 (9th Cir. 1993) held that the "bilingual employees have not made out a prima facie case and that Spun Steak has not violated Title VII in adopting an English-only rule as to them." *Id.* Thus, "most courts that have considered the question have concluded that Title VII does

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[87] Robert Belton, *supra* n. 84, at 30.

[88] Juan Perea, *Ethnicity and Prejudice: Reevaluating 'National Origin" Discrimination Under Title VII*, 35 William and Mary Law Review 3, 827 (Spring 1994).

not protect bilingual employees from discrimination because of their non-English primary languages."[89]

If non-English language use is one of the distinguishing characteristics of national minorities who exhibit deep diversity traits, then it follows that Title VII "national origin" jurisprudence is providing very little protection to language minorities. In fact, the "lack of specific protection of ethnic traits in Title VII encourages courts to reinforce a longstanding and under inclusive normative conception of American identity and traits."[90] It is not inconceivable, however, that future court decisions may side more with Gutierrez than with Spun Steak, and may provide protection under Title VII for language minorities, due to the fact that they exhibit the "linguistic characteristics of a national origin group." As in the case of EPC analysis, however, protection would then be afforded to immigrant language minorities against discriminatory employer practices. I maintain that Title VII, and other such statutes, are not likely to suitably address the unique identity and deep diversity claims of national minorities. Again, the latter make nation-like claims that have to do with equality between societies, not between individuals. Of course, it would be a step forward if EPC jurisprudence and Title VII decisions were to move in the direction of affording individual protection to individual members of a national minority when they move from the area where they constitute a regional language majority to any place in the rest of the U.S. It would be comforting to know that as individuals they would be protected against discriminatory treatment on the basis of language. Yet, antidiscrimination law is clearly ill-suited to address the nation-like claims of sub-state national societies, such as Puerto Rico.

Only creative tinkering with constitutional strategies of territorial pluralism may be able to accommodate the nation-like claims of such groups in the U.S. However, as we have note above, the political culture in the U.S. and the predominant conception of federalism have not been hospitable to national minorities. To cite the case of Puerto Rico, it should be noted that the "Commonwealth of Puerto Rico" has tried on at least three different occasions to acquire new powers and elements of increased autonomy within the U.S. conception of federalism. In 1953, a bill was filed to clarify essential elements of the relationship inaugurated the previous year. In 1959, the Fernos-Murray Bill was proposed by the Resident Commissioner to adopt "New Articles of Association", and in 1975 a bill was proposed by the Resident Commissioner to adopt a "New Compact" between the U.S. and Puerto Rico. All of these attempts "came to naught because of opposition within various branches of the U.S. government."[91] In 1989-1990, a process was initiated in Congress that would have led, for the first time since 1898, to a Congress-sponsored plebiscite on

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[89] *Id.,* at 828.

[90] *Id.,* at 850.

[91] Jorge Heine and JM García (ed) *The Puerto Rican Question*, Foreign Policy Association Headline Series No. 266, 59 (1983).

political options in Puerto Rico. This project died in Congress for several reasons, but especially because of opposition based on issues of language and nationhood, and the astronomical cost of federalism ("statehood"), if that option were to win.[92]

Thus, in the U.S., sub-state national societies are in an especially precarious position, since the dominant conception of federalism is not hospitable to their political aspirations, and antidiscrimination law – and individual rights approaches in general – are unlikely to be adequate to address the nation-like claims of these groups.

VIII. Conclusion

We have sought to explore the relationship between national Bills of Rights, antidiscrimination law, and the politics of recognition in Canada and in the United States, in view of the differing aspirations of racial and ethnic minorities and sub-state national societies (such as Quebec and Puerto Rico). Canada and the United States can be usefully compared because they exemplify contrasting notions of citizenship and nationhood, and models of federalism. Charles Taylor has succinctly articulated the basic insight I have analyzed here: "we may be 'recognized' in other senses – for example, as equal citizens, or rights bearers, or as being entitled to this or that service – and still be unrecognized in our identities." If national Bills of Rights and Equal Protection Clauses, and antidiscrimination federal statutes, seek to promote a nation-building project that is ultimately unresponsive to the unique needs and aspirations of sub-state national societies, we must seek alternative constitutional and political mechanisms – such as, constitutional strategies of territorial pluralism– that do address the concerns of such groups.

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[92] Juan Manuel García Passalacqua, *Puerto Rico y los Estados Unidos: El Proceso de Consulta y Negociación de 1989-1990* Vol. 2, 379. (Editorial Universidad de P.R., 1991).