Buffalo Law Review

Volume 45 | Number 1 Article 6

1-1-1997

Native Cultures in a Rights Empire Ending the Dominion

Leon E. Trakman
Dalhousie Law School

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

 Part of the Indian and Aboriginal Law Commons

Recommended Citation
Leon E. Trakman, *Native Cultures in a Rights Empire Ending the Dominion*, 45 Buff. L. Rev. 189 (1997).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol45/iss1/6

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

Native Cultures in a Rights Empire Ending the Dominion

LEON E. TRAKMAN†

CONTENTS

INTRODUCTION

Traditional Indian society understood itself as a complex of responsibilities and duties. The [Indian Civil Rights Act of the United States] merely transposed this belief into a society based on rights against gov-

---

† © B.Comm., LL.B. (Cape Town), LL.M., S.J.D. (Harvard). Professor of Law, Dalhousie Law School, Canada; Bora Laskin National Fellow. This article, on Native conceptions of justice, is part of an extensive investigation into the transformation of rights. For the philosophical and methodological aspect of this approach see LEON E. TRAKMAN & SEAN GATIEN, RIGHTS AND RESPONSIBILITIES (forthcoming 1997). For preliminary analyses, see Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899 (1995); Leon E. Trakman & Sean Gatien, *Rights and Values in the Abortion Debate: A 'Rights' Metamorphosis*, 14 THE WINDSOR YEARBOOK ON ACCESS TO JUSTICE 420 (1995). This article benefitted from comments received from Alan Brownstein, David Beatty, Patti Doyle-Bedwell, Daniel Farber, Stanley Fish, Stuart Gilby, Martin Golding and Beverly Moran and the editorial assistance of Sean Gatien, Ray Maccallum and Terrance Sheppard. Funding for this study was provided by the Social Sciences and Humanities Research Council (SSHRCC) and the Department of Justice, Canada.

ernment and eliminated any sense of responsibility that the people might have felt for one another.[1]

One mainstay of Western Liberal Society is the belief that individual rights are fundamental to our democratic way of life and that the State is duty bound to protect them. As Ronald Dworkin once remarked, "[T]he language of rights now dominates political debate in the United States."[2] Rights serve as the girders of liberal society. They protect the individual's inviolable space; they preserve her human dignity, liberty and freedom from encroachment by others.

Several implications arise from this conception of rights. One implication is that, where the rights of one individual end, the rights of another begin. Robert Bork pronounced, "what a court adds to one person's constitutional rights, it subtracts from the rights of others."[3] Another implication is that, to pro-

---

1. VINE DELORIA & CLIFFORD LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 213 (1984). *See also* The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (1994).

2. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184 (1977). Jeremy Waldron elaborates:

> The idea that political morality and social choice are to be based wholly or partly on some account of the rights of the human individual is a familiar theme in Western politics. . . . [I]f "the end in view of every political association is the preservation of the natural and imprescriptible rights of man", then governments must be set up and constitutions structured in such a way that it becomes impossible for individual rights to be pushed aside for the sake of the private interests of those in power or even in pursuit of other social goals and aspirations.

Jeremy Waldron, *Introduction* to THEORIES OF RIGHTS 1 (1984) (quoting The Declaration of the Rights of Man and the Citizen, art. II). On the liberal philosophy underlying this approach, see *infra* Part II. For critical commentary on liberal conceptions of liberty, see Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315 (1984); C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962).

3. Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 904 n.49 (1989) (quoting Linda Greenhouse, *The Bork Battle: Visions of the Constitution*, N.Y. TIMES, Oct. 4, 1987, § 4, at 1). During Robert Bork's confirmation hearings to the United States Supreme Court, Bork was asked by Senator Paul Simon whether he still believed that statement. "Well yes, Senator," Bork replied, "I think it's a matter of plain arithmetic." *Id.* Senator Simon responded to this statement as follows: "I have long thought it to be fundamental in our society that when you expand the liberty of any of us, you expand the liberty of all of us." *Id.* at 905 n.49 (quoting Linda Greenhouse, *Court Nominee Clarifies How He Differs From Bork*, N.Y. TIMES, Jan. 14, 1988, at A27). This conflict between Bork and Simon belies a divide within American political and legal thought in which Bork represents the traditional liberal view, while Simon presents a more organic and community-oriented view. Republican strands of thought in American liberalism frustrate attempts to choose between these two positions. *See, e.g.*, Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 CHI. L. REV. 131, 132 (1995).

vide each individual with her own private space, all individuals must be accorded the same space, including the same rights, such as the right to life, liberty and personal security. In effect, rights that are good for one must also be good for everyone else. As a further implication, the State is bound to accord priority to individual rights over all other social values. The assumption in a liberal society is that, in securing the greatest amount of freedom for each individual, numerous beliefs and values will flourish. Boldly summed up by Robert Nozick, "[i]ndividuals have rights, and there are things no person or group may do to them (without violating their rights)."[4] In effect, individual rights trump all other interests.

This conception of individual liberty, ingrained in Western liberal ideology, affronts people who adhere to different conceptions of freedom. Not only does this conception fail to provide all individuals with the same inviolable space, it affords little space to cultures that conceive of human dignity, freedom and justice differently. Such is the case with Native Peoples of the United States and First Nations Peoples of Canada whose conceptions of freedom and justice diverge significantly from those grounding Western Liberalism.[5]

---

4. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA at ix. (1974). Nozick continues:

> So strong and far-reaching are these rights that they raise the question of what, if anything, the state and its officials may do . . . .
>
> Our main conclusions about the state are that a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right.

Id. But see Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981) (criticizing the revival of constitutional law based upon "Grand Theory" as a method of resolving problems created when interests of different individuals or groups clash). On the place of community values within liberal legal thought, see Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992); Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992); BRUCE ACKERMAN, WE THE PEOPLE, VOL. 1, FOUNDATIONS (1991); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990); Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985).

5. The analysis underpinning this article applies as readily to cultural communities, other than Native Peoples. However, evaluating the interests of Native Peoples, often referred to as Aboriginal or First Nations Peoples in Canada, draws upon a significant cultural and political debate over the right of Native Peoples in general to self-determination. Native Peoples are defined, in Canada's Constitution Act as "includ[ing] the Indian, Inuit and Metis peoples of Canada." CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), § 35, cl. 2.

These conceptual differences become problematic when liberal conceptions of individual liberty and communal values adhered to by Native Peoples come into conflict, when governments and courts impose Western conceptions of liberty on Native Peoples, and when Native Peoples sustain a loss of cultural and political identity as a result. It is on account of conflicts between such values that liberal rights talk is most under fire today. "There can be little doubt that a marked discontent with rights and 'rights talk' is in the air."[6]

A narrow conception of rights is contrary, this article maintains, not only to the interests of Native Peoples, but to the values of liberalism *itself*. The rights of individuals are not impermeable membranes that permit the individual to regard no one's interests but her own. The liberty of the individual *is* central to the enrichment of communal life: but it is a liberty that encompasses a responsibility towards others, beyond other individuals, within that life. Such a responsibility embodies the central tenets of liberalism: the enrichment of communal life through the individual's open-mindedness and tolerance towards others. In explanatory terms, responsibilities owed to others in the exercise of rights are "the rent we pay for the privilege of living in a civilized society. They include such familiar virtues as tolerance, truthfulness, benevolence, patriotism, respect for human and civil rights, participation in the democratic process, and devotion to the common good."[7] They are owed to cultural communities whose interests are not accorded the status of individual rights.

Society is most liberal, then, when individuals are responsive to, not isolated from, the communal life of others. It is most vital when individuals are responsible to take account of the interests of *others* in the exercise of rights. It is most fair when, "[c]itizens are no longer simply rights-bearing individuals . . . . [but] rather, rights-bearing individuals with responsibilities."[8]

Eighty years ago, Wesley Hohfeld presented a structure of rights in which individuals who had rights were subject to duties toward others who had countervailing rights.[9] This article

---

6. Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994); *see also* Sherry, *supra* note 3, at 131-32.

7. Justice Dallin H. Oaks, *Rights and Responsibilities*, 36 MERCER L. REV. 427, 428 (1985).

8. Sherry, *supra* note 3, at 132. Sherry adds, "If what is important is not that one has a right to vote but that one is able to (and does) use it wisely, we have moved our vision of citizenship from rights alone to . . . rights and responsibilities." *Id.*

9. Wesley N. Hohfeld, *Rights and Jural Relations*, *in* PHILOSOPHY OF LAW 308 (Joel Feinberg & Hyman Gross eds., 3d ed. 1986) [hereinafter Hohfeld, *Rights and Jural Rela-*

maintains that Hohfeld's schema illustrates limitations within the structure of liberal rights, but without proposing modifications to it.[10]

The alternative is to develop a conception of responsibility in which individuals, cultural communities and the State all assume responsibilities to respect the adverse interests of others that are not protected by countervailing rights.[11] The goal is to demonstrate that rights are not simply legal advantages that individuals exercise, sometimes at the expense of others. Rights are also means towards social cohesion, while responsibilities facilitate that cohesion.

This conception of responsibility takes account of cultural *otherness*, because it recognizes that responsibilities owed toward others inhere in rights themselves. These responsibilities are different in nature from Hohfeld's duties not to interfere with the rights of others. Responsibilities arise because the interests of those to whom they are owed are not adequately protected in law, and because rightholders would be free to ignore them in the absence of such responsibilities.

Relating rights to responsibilities is also warranted in view of the threat that, by not according legal protection to important cultural interests, the liberty of society as a whole is undermined. The harm is a failure to realize the full potential of liberty itself.[12] Society is most harmed, for example when racists

---

tion]. *See also* Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*].

10. On Hohfeld's analysis of legal relationships, see *infra* Part II.A.

11. The conception of a *cultural interest* adopted in this article approximates, to some extent, a *cultural right*, as identified by Adeno Addis as follows:

> A cultural right is a group right, for by its very nature, culture is a communion of its members rather than the sum of the attitudes and life-projects of the various individuals within the group. . . . The argument for cultural rights cannot, therefore, be understood in terms of individual rights. It is within groups that constitutive narratives . . . are produced and through groups that sense is made of the social world.

Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 658 (1992). Contrary to Adeno Addis, however, this article maintains that the cultural identity of a group is informed to varying degrees by *individual* identity. *See generally* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (1973); E.P. THOMPSON, CUSTOMS IN COMMON (1991). Geertz maintains that "culture is public because meaning is [public]." Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, *in* THE INTERPRETATION OF CULTURES, *supra*.

12. Relating rights to responsibilities is a means of accomplishing this end. On the need for such an accommodation in societies that are "both multinational and polyethnic", see Will Kymlicka, *Liberalism and the Politicization of Ethnicity*, 4 CAN. J. LAW AND JURISPRUDENCE 239, 240 (1991). For expanding liberal conceptions of rights to take

use their speech rights to disadvantage Native Americans whose interests are not protected by countervailing rights. The targets of that speech currently are protected only if their rights impose duties upon the racist speakers, when the latter violate a duty not to defame, libel or slander identifiable Native Persons or bands.[13] The only other restriction upon such speech rights arises when the State discourages expression that threatens social interests that are not adequately protected by rights. For example, the State may constrain racist expression that is violent, or that threatens national security or public safety.[14]

The prevailing conception of rights and duties is clearly insufficient to satisfy the needs of this example. Constraining rights only in respect of interests that constitute rights fails to redress the important interests of Native Peoples that are not treated as rights. For example, hatemongers who have the duty to respect the right not to be slandered, have no duty to respect Native interests that vary from rights, such as an interest in preserving a cultural heritage. Being *external* to the hatemonger's right and not themselves being the subject of a countervailing right, those interests remain unprotected in law.

A responsibility, in contrast, imposes an *internal* restriction upon a right. The hatemonger's right *itself* renders him responsible to respect Native interests that are detrimentally affected by the exercise of that right. This is regardless of whether the cultural interests of Native Peoples are treated as liberal rights themselves. This approach can impede liberal right-holders, not limited to hatemongers, from using their rights as unfettered trump cards to usurp the cultural interests of Native Peoples. It can also insure that rights serve as instruments of social cooperation between Western liberal and Native communities. Here, responsibilities owed to Native Peoples are not only different in nature from duties not to interfere with the rights of others. They arise because the cultural interests of Native Peoples are not adequately protected in law, and because right-holders otherwise would be free to ignore those interests in the absence of such responsibilities attendant upon the exercise of rights. As

---

account of cultural diversity, see J. Jean Burnet, *Multiculturalism, Immigration and Racism: A Comment on the Canadian Immigration and Political Study*, 7 CAN. ETHNIC STUD. 35 (1975); Evelyn Kallen, *Multiculturalism, Minorities, and Motherhood: A Social Scientific Critique of Section 27, in* MULTICULTURALISM AND THE CHARTER 123-37 (Canadian Human Rights Found. ed., 1987).

13. For arguments on this duty, see Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899, 920-38 (1995).

14. For the regulation of "communist speech" in the 1950's on grounds of national security, see *id.* at 904 n.28.

Amitai Etzioni aptly suggested, adapting Western Liberalism to accommodate non-liberal values and interests "is not a call for curbing rights. On the contrary, *strong rights presume strong responsibilities.*"[15]

This article focuses on, among other issues, the rights and interests of Native Peoples in land. Serious conflict continues to brew between governments and specific Native Peoples over the division of land, sometimes leading to violent confrontation. Further conflict persists between mining, lumber and oil exploration companies, among others, and Native Peoples over the use of land.[16] Recently, some governments and corporations, conscious of past injustices towards Native Peoples in the resolution of these conflicts, have sought more creative and equitable means of accommodating the interests of Native Peoples.[17] These efforts, grounded in Western conceptions of liberty, have failed to redress important Native interests that are subordinated to liberal rights.

The call for reconceiving of Western liberal conceptions of rights in light of responsibilities does not amount to a rejection of liberal values. On the contrary, it is an entreaty for increasing the social and legal responsibilities that *are* properly attendant upon Western liberal rights. Liberal society is most robust

---

15. AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 1 (1993) (emphasis added). The thesis here is that the nature and extent of responsibilities are contingent upon the context, including the nature of the right and the interest upon which it impacts. It follows that there may be strong rights and weak responsibilities, as well as the converse. On expanding conceptions of rights to include community values, see LEON TRAKMAN, REASONING WITH THE CHARTER ch. 2 (1991); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986); Kenneth L. Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME L. REV. 183, 186-87 (1980); David Sugarman, *The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science*, 46 MOD. L. REV. 102 (1983) (reviewing RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST (1980)).

16. A current example is the large nickel deposit which Diamond Fields Resources Inc. has discovered in Voisey Bay in Northern Labrador, land the Inuit and Innu claim they have used for thousands of years. A more well-known example is the Quebec Government's proposal to build a hydroelectric project in Northern Quebec that would drain into James Bay, flooding land traditionally used by the Cree and Inuit. A final, striking example is the armed stand-off by the Mohawks in Oka, Quebec that resulted when it was proposed that a golf course be extended into lands sacred to the Mohawk people as a burial site. On this conflict at Oka, see GEOFFREY YORK & LOREEN PINDERA, PEOPLE OF THE PINES: THE WARRIORS AND THE LEGACY OF OKA (1992).

17. This accommodation of Native interests within an otherwise Western Liberal value system is evident in co-management schemes established between government and corporations on the one hand and Native communities on the other. On such schemes, see *infra* Part IV.B.

when it is expressive, not repressive of cultural difference. It is most telling when those who claim membership in it acknowledge the interests of those who traditionally have been subjugated by it.

II. LIBERAL CONCEPTIONS OF LEGAL RELATIONSHIPS

> [E]very Man hath . . . [a] Natural Freedom, without being subjected to the Will or Authority of any other Man. . . .[18]

Western liberal constitutions traditionally protect only the liberty of the individual, leaving the members of communities with no more liberty than they possess as individuals. So conceived, such constitutions allow a community of Native Peoples to have rights and liberties only when the individuals within it have those rights. The community itself has no distinct rights over and above the aggregate of individual rights. The whole community is never greater than the sum of its parts.

This individual conception of liberty is grounded in deontological and teleological theory. Deontological reasoning holds that liberty inheres in the individual as an end in itself. It is "the Kantian right of each individual to be treated as an end in himself," rather than as a means towards an end.[19] Founded upon natural law rhetoric,[20] the assumption is that individual rights speak for themselves, independently of their cultural effect.[21] Teleological reasoning assumes that the liberty of the in-

---

18. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 322 (Peter Laslett ed., 2d ed. 1967).

19. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 229, 233 (Geoffrey R. Stone et al. eds., 1992). For historical argument in support of this proposition, see Immanuel Kant, *On the Common Saying: "This May be True in Theory, But It Does Not Apply in Practice"*, *in* KANT'S POLITICAL WRITINGS 73-74, 80 (Hans S. Reiss ed. & H.B. Nisbet trans., 1970).

20. For an excellent discussion of the natural law roots of Western liberal and legal thought, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

21. In deontological reasoning, individual liberty is innate or inherent. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 31-33 (1971); RONALD DWORKIN, A MATTER OF PRINCIPLE 353-63 (1985). The moral roots of classical liberalism are that it *can* consistently be maintained that it is intrinsically wrong to repress the liberty of the individual, and that the exercise of liberty inheres in that individual, not in the State to allow at its discretion. The moral worth of individual liberty is determined *a priori*, not after the fact. On the *a priori* nature of individual liberty, see MILTON & ROSE FRIEDMAN, FREE TO CHOOSE (1980); FREEDOM IN ARMS (A.L. Morton ed., 1975); STEVEN LUKES, INDIVIDUALISM (1973); STUART HAMPSHIRE, FREEDOM OF THE INDIVIDUAL (1965); MACPHERSON, *supra* note 2. On the libertarian roots of deontological reason, see LUDWIG VON MISES, NATION, STATE, AND ECONOMY: CONTRIBUTIONS TO THE POLITICS AND HISTORY OF OUR TIME (Leland B. Yeager trans., 1983); JAMES M. BUCHANAN, THE LIMITS OF LIBERTY (1975); NOZICK, *supra* note 4;

dividual is determined by the social good, consisting of the sum of individual needs, desires and preferences. Here, individual liberty is preserved because it satisfies that good, more so than for reasons that inhere within it.[22]

Both deontological and teleological approaches conceive of liberty as transcending the interests of discrete cultures with shared attributes.[23] Their assumption is that only individuals have interests and that protection should not be accorded cultural interests that differ from those of the individual.[24] This in-

---

FRIEDRICH A. VON HAYEK, THE CONSTITUTION OF LIBERTY (1960). On the relationship between libertarian thought and liberalism generally, see THE LIBERAL TRADITION: FROM FOX TO KEYNES (Alan Bullock & Maurice Shock eds., 1956); GUIDO DE RUGGIERO, THE HISTORY OF EUROPEAN LIBERALISM (R.G. Collingwood trans., 1959) (1927); ANDREW LEVINE, LIBERAL DEMOCRACY: A CRITIQUE OF ITS THEORY (1981): LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955); HAROLD J. LASKI, THE RISE OF EUROPEAN LIBERALISM (2d ed. 1962); LEONARD T. HOBHOUSE, LIBERALISM (1911).

22. This teleological view finds its historical roots in the writings of Aristotle, notably, in political relations between individual and State. *See* ARISTOTLE, 1 THE POLITICS OF ARISTOTLE ch. 2 (J.E.C. Welldon trans., 1883); 3 THE POLITICS OF ARISTOTLE *supra* chs. 9, 11. Despite efforts to render deontological and teleological reasoning compatible, deontological reasoning ordinarily is essentialist, while teleological reasoning is contingent. The result is a potential schism between them: either individual rights are treated as good in themselves, or as good only when they favor a preferred conception of the good life. On the maturation of teleological thought in Aristotle's Ethics see MAX HAMBURGER, MORALS AND LAW: THE GROWTH OF ARISTOTLE'S LEGAL THEORY (1971); W.F.R. Hardie, *The Final Good in Aristotle's Ethics*, 40 PHIL. 277 (1965); IRIS MURDOCK, THE SOVEREIGNTY OF GOOD (1970).

23. *See, e.g.*, Paul Rich, *T.H. Green, Lord Scarman and the Issue of Ethnic Minority Rights in English Liberal Thought*, 10 ETHNIC AND RACIAL STUD. 149 (1987). For critical commentary on this practice, see Trakman, *supra* note 13, at 899.

24. According to this liberal thesis, protection is not accorded interests that arise after the fact and that are grounded in communal values. *See* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (Adamantia Pollis & Peter Schwab eds., 1979). *But see* Gillian Triggs, *The Rights of "Peoples" and Individual Rights: Conflict or Harmony? in* THE RIGHTS OF PEOPLES (J. Crawford ed., 1988); Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263 (1986). The reasoning applies to, for example, affirmative action programs that protect the pluralistic rights of individuals. This individuated philosophy applies even to historical milestones like *Brown v. Board of Educ.*, 347 U.S. 483 (1954). On the philosophical foundations of affirmative action, see Alec A. Izzo, *The Jurisprudence of Affirmative Action: Equality in Abstraction and Application*, 4 ST. THOMAS L. REV. 161 (1992); Burke Marshall, *A Comment on the Nondiscrimination Principle in a "Nation of Minorities"*, 93 YALE L.J. 1006 (1984); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L. REV. 705; Alan D. Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Alan D. Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 120-22 (1970); Martha Minow, *Pluralisms*, 21 CONN. L. REV. 965, 969-70 (1988-89); MICHAEL REICH, RACIAL INEQUALITY: A POLITICAL-ECONOMIC ANALYSIS (1981).

dividuated conception of liberty is apparent in relation to freedom of expression. Neither deontological nor teleological approaches protect the right of distinct cultural communities to be free from racist expression. Deontological reasoning rationalizes that protection on grounds that the individual's right to freedom of expression is sacred in itself.[25] Teleologic reasoning holds that such freedom promotes a marketplace in ideas.[26] Both assert that freedom of expression is preserved by protecting the individual's rights, without regard to the normative assessment of cultural interests beyond her.[27] Both subscribe to dual princi-

---

25. *See, e.g.*, Alexander Meiklejohn, *The First Amendment is an Absolute*, 1991 SUP. CT. REV. 245 (1961). Meiklejohn once wrote: "I must . . . speak not for absolutism in all its forms, but only for my own version of it." *Id.* at 246 n.4. *See generally* Fried, *supra* note 19, at 229; Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351 (1992). *But see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 36-38 (1986); THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966). On the combination of deontological and teleological arguments behind the protection of free speech, see Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95 (1990); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2361-63 (1989).

26. On this free marketplace, here, in the exchange in ideas, see Trakman, *supra* note 13, at 899; LEONARD W. LEVY, EMERGENCE OF A FREE PRESS (1985); David A. Anderson, *The Origins of the Free Press Clause*, 30 UCLA L. REV. 455 (1983).

27. This article denotes *cultural*, as distinct from *racial*, interests and communities. This is, in part, on account of the negative stereotyping that ordinarily attaches to denotations of race. Conceiving of communities in cultural, as distinct from racial or ethnic terms also shifts emphasis away from differences in racial appearance to differences in social and political values and understandings. This emphasis upon culture also challenges the false image that, despite the fact that European and Native Peoples have multitudes of appearances, appearance nevertheless determines race. The alternative is to recognize that culture serves as a condition of co-existence which unifies distinct peoples and also, serves as a backdrop against which to measure relations within and between cultural communities. Culture also allows for differences within larger non-mainstream groups themselves—such as differences within First Nations bands, for example cultural differences between the Inuit of the Eastern Arctic and the Haida of the Queen Charlotte Islands—that classifications based on race otherwise would exclude. Finally, *culture* is preferable as a means of self-identification to race, particularly among mixed cultural communities who likely would be excluded from cultural communities under a color-identification scheme. At the same time, it is important not to marginalize culture as a category of discrimination on the ground that past wrongs done by reason of culture are "unmeasurable" or otherwise are subject to a "mosaic of shifting preferences." In this respect, I am wary of denying remedial relief because this belief can be based on a conception of responsibility that is grounded in the power of government and the moral claims of the majority. Illustrative of this concern are Justice Sandra Day O'Connor's assertions in *City of Richmond v. J.A. Croson Co.*:

ples which bind everyone. First, each individual has the right to decide what is *good* for her, so long as all individuals enjoy the same right. Second, the manner in which each individual expresses her freedom are her concern in respect of which the State is neutral. As Robin West reflects:

> [N]eutrality is the shared core belief or commitment from which particular liberal positions on concrete issues, such as affirmative action or abortion, can follow. While liberals can legitimately disagree over whether the State should permit abortion or remedy racial discrimination by use of quotas, liberals cannot disagree over whether or not the State should remain neutral on the question of what sort of life is the good life. State neutrality toward the good life is held to be a necessary and perhaps sufficient condition as well of liberalism.[28]

The result is that courts avoid attributing a content to the individual's right to freedom of expression on the basis of the nature of its enjoyment, or its impact upon others, including communities of others.[29] As Herbert Wechsler elaborated: "a

---

> To accept [the City of] Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs . . . We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-99 (1989). *See also* Johnson v. Transportation Agency, 480 U.S. 616, 621 (1987); United States v. Paradise, 480 U.S. 149, 180-81 (1987); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 507 (1986). *See generally* Leon E. Trakman, *Substantive Equality in Constitutional Jurisprudence: Meaning Within Meaning*, 7 CAN. J. LAW & JURISPRUDENCE 27, 27-28 (1994); Addis, *supra* note 11, at 1219; Mary Ellen Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences in* CANADIAN PERSPECTIVES ON LEGAL THEORY 503 (Richard F. Devlin ed., 1991); Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1708 (1986) [hereinafter *Substantive Equality*]; Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 860 (1985); ALAN H. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 175-76 (1979).

28. West, *supra* note 4, at 673.

29. The unwillingness to consider the social, including humanitarian, effects of liberal rights is apparent in judicial thought, notably, among judges who claim to be "neutral" towards the substance of law. The underlying assumption behind such neutrality is the assertion that rights speak for themselves. On such principled neutrality in constitutional interpretation, see, e.g., Robert Bork, *Neutral Principles and Some First Amendments Problems*, 47 IND. L.J. 1 (1971-72) [hereinafter Bork, *Neutral Principles*]; Robert Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695. *But cf.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Joseph C. Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L. Q. 274 (1928-29).

principled decision . . . is one that rests on reasons . . . that in their generality and their neutrality transcend any immediate result that is involved."[30] To this Wechsler added, "when there is conflict among values having constitutional protection, calling for their ordering or their accommodation, I argue that the principle of resolution must be neutral in a comparable sense (both in the definition of the individual competing values and in the approach that it entails to value competition)."[31] In adhering to this liberal conception of values, both deontological and teleological schools identify a principled right in respect of which the State is neutral. According to that conception of rights, every individual has the freedom to enjoy the unfettered use of her property.[32] Deontological theorists maintain that a right to private property, in respect of which the State is neutral, is fundamental to moral development and human dignity.[33] Teleological theorists claim that it increases aggregate wealth.[34] The problem is that both conceptions of private property threaten Native interests, particularly where no individual in the affected Native community has a right that is recognized by the Western Liberal tradition.[35] For example, when a mining company wishes to

30. Herbert Wechsler, *Toward Neutral Principles, in* PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 27 (1961). In evaluating Wechsler's "neutral reasoning," John Hart Ely contends that "requirements of generality of principle and neutrality of application do not provide a source of substantive content." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 54-55 (1980). On neutral reasoning generally, see Cass Sunstein, *Neutrality in Constitutional Law*, 92 COLUM. L. REV. 1 (1992); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837; Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561 (1988); Kent Greenewalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978); Bork, *Neutral Principles*, *supra* note 29, at 47. *But see* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

31. Wechsler, *supra* note 30, at xiv.

32. For an overview of property rights in the Western liberal tradition, see L.C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS (1977); ALAN RYAN, PROPERTY AND POLITICAL THEORY (1986).

33. The philosophical foundations for this view of property come from LOCKE, *supra* note 18, and G.W.F. Hegel, *in* PHILOSOPHY OF RIGHT (1942). For a modern application, see NOZICK, *supra* note 4. For an interesting reply to Nozick, see David Lyons, *The New Indian Claims and Original Rights to Land*, 4 SOC. THEORY & PRAC. 249 (1977).

34. The philosophical foundations for this view of property come from JEREMY BENTHAM, THEORY OF LEGISLATION (1887); John Stuart Mill, *Principles of Political Economy, in* COLLECTED WORKS OF JOHN STUART MILL (1963) and ADAM SMITH, THE WEALTH OF NATIONS (1960).

35. *See, e.g.*, Native Am. Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (maintaining that the establishment clause in the First Amendment did not apply to Native tribes); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that the Indian Civil Rights Act did not give rise to a cause of action for tribal members before

mine land that is sacred as a burial site to a Native community, the property interests that are accorded legal protection are those of the property owner, the mining company. Should no individual Native Person have title to or easement over land, the interests of that community are not recognized in law. The only recourse available to the Native community is to show a legally recognizable property right. Occasionally this can be done by showing that it has a treaty or other right that is inconsistent with the proposed use of land by the mining company. Absent such a treaty right, the rights of the property owner trump the interests of Native Peoples who are treated as non-owners who lack a legal right to that property. Absent an individual Native Person with title to or an easement over land, Native cultural interests are subordinated to corporate property rights. A mining company with a right to mine on a sacred burial site, is *per se* entitled to do so. A Native band with an interest that is *not* recognizable as a right has no legal recourse.

Part of the reason why the interests of Native communities are not recognized is that modern Western liberals frame the concept of liberty in terms of the equal liberty of all. Each individual, supposedly, has the right to enjoy his liberty equally with all other individuals.[36] Each, in turn, has a duty to respect the liberty of all other individuals. Inherent within this conception of community, is the vision of a plurality of individuals, all possessed of an equal right to liberty, who champion the liberty of the whole.[37] As John Rawls asserts, "all citizens are to have an equal right to take part in, and to determine the outcome of the constitutional process that establishes the laws with which they are to comply."[38] Here, the liberal community encompasses

---

federal court). *But see* Morton v. Mancari, 417 U.S. 535, 554 (1974) (holding that hiring preference for appointment to the Bureau of Indian Affairs is granted to Indians "not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities . . .").

36. Will Kymlicka describes liberalism as "characterized both by a certain kind of *individualism*—that is, individuals are viewed as the ultimate units of moral worth . . . and by a certain kind of *egalitarianism*—that is, every individual has an equal moral status, and hence is to be treated as an equal by the government, with equal concern and respect." WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE 140 (1989) (citations omitted).

37. To some extent liberals, like Ronald Dworkin, concern themselves with a "liberal community." A "liberal community," in effect, consists of a community of habituated and self-determining individuals. However, that community also embraces the solidarity that individuals bring to one another through their mutual associations. *See, e.g.*, Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479 (1989). *But see* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); R. H. TAWNEY, EQUALITY (4th ed. 1964).

38. RAWLS, *supra* note 21, at 221.

no distinct cultural values or interests apart from the rights and duties of each individual within it. Homogeneous in nature, the equal liberty of all individuals transcends class, culture and religion.[39] Rawls' liberal community accords no distinct treatment to cultural and linguistic minorities. It passes over important social interests that are not explicated through individual rights and duties.

At the same time, Rawls maintains that[40] "many groups [are] each equally entitled to engage in civil disobedience;[41] and the "ideal solution" is to call "for a cooperative political alliance of the minorities to regulate the overall level of dissent."[42] But ultimately, for Rawls, it is the infrastructure of individual rights that renders civil society both vital and viable.[43]

Rawls' brand of methodological individualism is significantly mirrored in judicial practice. Judges treat liberty as a right that inheres equally in every citizen under the Equal Protection Clause[44] and deny that liberty may differ in light of the values and interests of discrete cultures that conceive of their rights differently. They explain their action on the grounds that courts are bound to preserve liberty indiscriminately;[45] that they are not to embroil themselves in the politics of race, empowerment and communal rights;[46] and that to do otherwise would be

---

39. *Id.* at 231-33.

40. *Id.* at 224-29.

41. *Id.* at 374.

42. *Id.* Despite the centrality of individualized rights in Rawls' *Theory of Justice*, he nevertheless envisages principles of self-determination that include "the right of a people to settle its own affairs without the intervention of foreign powers." *Id.* at 378. However, his principle is constrained by the liberty of the individual, subject only to the requirement that its exercise benefits the least advantaged in society. This is embodied in Rawls' famous "second principle of justice". *See id.* at 73.

43. *See id.* at 201-51.

44. On the Equal Protection Clause as it applies to Indian Americans in particular, see David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991). On the application of the Equal Protection Clause to cultural minorities in general, see Steven Siegel, *Race, Education and the Equal Protection Clause in the 1990's*, 74 MARQ. L. REV. 501 (1991). *But see* Christopher Steskal, *Creating Space for Racial Difference: The Case for African American Schools*, 27 HARV. C.R-C.L. L. REV. 187 (1992) in which Steskal evaluates *Garrett v. Board of Education of the Sch. Dist. of the City of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991).

45. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). There, the Court found that discrimination on the basis of wealth did not violate the equal protection of the law. In particular, it validated financing education through local property taxes, despite substantial disparities between districts in student expenditures.

46. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983). The court declared that the judiciary had no power to order the construction of housing for low and moderate income persons. It stated further that

to undermine their function within a constitutional democracy.[47]

Canadian courts adopt a comparable approach. They insist that for courts to accord special status to some groups, such as to the Native Women's Association of Canada,[48] is to intrude upon a legislative function within a constitutional democracy.[49] They also assume that cultural interests are protected only when they consist of individual rights and only when all individuals have the same rights.[50] In their unqualified support for the liberty of a plurality of individuals, these courts likely bypass the interest of cultural communities to preserve distinct values that distinguish them from the values adopted by other cultures.[51] For example, the fact that, long before recorded history,

---

courts could only strike down zoning schemes which, by their structure, denied the opportunity to construct such housing.

47. *See, e.g.*, Milliken v. Bradley 418 U.S. 717 (1974). *But see* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). On this substantive neutrality towards race, see *Substantive Equality*, *supra* note 27. Rosenfeld remarked:

> The principal function of fair equality of opportunity is to compensate for discrepancies in social, economic, and educational advantages in order to improve the prospects of those who would otherwise enjoy no more than a mere possibility of success in the competition for desirable scarce goods. Moreover, fair equality of opportunity may tend to neutralize all disparities in social condition found in the relevant set of initial circumstances, rendering eventual inequalities of result the exclusive product of differences in talent.

Id. at 1708 (footnotes omitted). *See generally* CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (1950).

48. *See* Native Women's Association of Canada v. Canada, [1994] 3 S.C.R. 627, 655-56.

49. This exclusion of interests falling short of liberal rights is apparent in relation to Native Peoples on the further ground that they are denied legal entitlements that differ from those of all other inhabitants. As Austin Abbott once observed, "the ultimate objective point to which all efforts for progress should be directed is to fix upon the Indian the same personal, legal, and political status which is common to all other inhabitants." Austin Abbott, *Indians and the Law*, 2 HARV. L. REV. 167, 174 (1888). *But see* JOAN WEIBEL-ORLANDO, INDIAN COUNTRY, L.A.: MAINTAINING ETHNIC COMMUNITY IN COMPLEX SOCIETY (1991).

50. On this judicial reluctance, see Leon E. Trakman, *The Demise of Positive Liberty? Native Women's Association of Canada v. Canada*, 6(3) CONST. F. 71 (1995).

51. This unwillingness to affirm communal, as distinct from individual, interests is especially apparent in recent cases before the Supreme Court of Canada dealing with inequality of treatment on grounds of sexual orientation, gender and marriage. *See* Egan v. Canada, [1995] 2 S.C.R. 513; Miron v. Trudel, [1995] 2 S.C.R. 418; Thibaudeau v. Canada, [1995] 2 S.C.R. 627. On this trilogy of cases, see Leon E. Trakman, *Section 15: Equality? Where?*, 6(4) CONST. F. 112 (1995). *But see* Haig v. Canada, [1993] 2 S.C.R. 995, at 1035-41. On this tradition of excluding community interests from democratic values in the history of American thought, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); ROBERT G. MCCLOSKEY, AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE, 1865-1910 (1951). Kymlicka notes that the unwillingness of liberals to affirm communal interests is seen by many commentators as the greatest impediment

a Native community valued the bark of a particular tree to construct canoes and passed down this interest in canoe-making over generations so that it became an integral part of that community's identity, means nothing in a Western liberal tradition in which a lumber company invokes its property rights to clear-cut those trees. In stressing the individual, here corporate, right to be free from State intrusion, Western liberalism does not reckon with the rights and interests of distinct communities, their cultural otherness, apart from the liberal rights of the individual. To accord a right to a Native community to continue making canoes with this bark would be, illegitimately, to treat as a right a cultural interest that does not qualify as an individual right within a liberal plurality. In insisting that the cultural interests of Native Peoples are less than individual rights, modern liberals exclude those interests that Native Peoples often hold dear. They fail to acknowledge, too, the importance of those cultural interests to the development of a more vital relationship between rights and responsibilities.[52]

The imperviousness of liberal rights-talk towards the identity of Native Peoples is most troubling when mainstream lawmakers assume that only Western liberal rights are worthy of consideration, while Native values, in varying from those rights, are treated as non-rights.[53] For example,

> [The Nishga Native peoples] were at the time of settlement a very primitive people with few of the institutions of civilized society . . . I have no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive peoples are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia.[54]

---

to a satisfactory resolution of Native issues. Kymlicka, however, believes group rights can be accommodated within liberalism. *See* KYMLICKA, *supra* note 36, at 144.

52. On the importance of Native culture to the development of a conception of community rights, see Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4(2) CAN. J. L. AND JURISPRUDENCE, 217 (1991); VERNON VAN DYKE, HUMAN RIGHTS, ETHNICITY, AND DISCRIMINATION (1985); Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self-Preservation*, 2 CAN. J. L. & JURISPRUDENCE, 19 (1989); Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

53. *See, e.g.*, Richard W. Perry, *The Logic of the Modern Nation-State and the Legal Construction of Native American Tribal Identity*, 28 IND. L. REV. 547 (1995); R. A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); Brian Slattery, *Aboriginal Sovereignty and Imperial Claims*, 29 OSGOODE HALL L.J. 681 (1991).

54. Calder v. British Columbia (A.G.), [1973] S.C.R. 313 (Davey, J.). *See also* Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on* R. v. Sparrow (1991), 29 ALTA. L. REV. 498 (1991). *But see* W.I.C. Binnie, *The Sparrow Doc-*

The result of this mainstream approach toward liberty is three seemingly uncompromising assertions: (1) that rights are extolled wholly through an adverse relationship between individual and State; (2) that all other conceptions of justice are excluded from, or at least subordinated to, that adverse relationship; and (3) that the negative rights of the individual trump all other values and interests, including those of Native communities.[55] The effect is that Native conceptions of justice are relegated to primitive curiosities.[56] Marginalized by legislation, administrative regulation and judge made law, they become subservient to a Western legal system that treats Native interests in land as primeval, or simply, unpalatable.[57] The result is an *Indian Civil Rights Act*[58] in the United States and an *Indian Act*[59] in Canada that subjugate traditional Native life,[60] Departments of Indian Affairs that ignore Native values[61] and

---

trine: Beginning of the End or End of the Beginning?, 15 QUEEN'S L.J. 217 (1990).

55. A communitarian compromise within liberalism between individual rights and collective interests is to advocate a two-order conception of rights: individual rights serve as first order rights, while communal rights operate at the second order, subordinated to the first. *See, e.g.*, Charles Taylor, *Can Canada Survive the Charter*, 30 ALTA. L. REV. 427, 438-47 (1992). *See also* Charles Taylor, *The Politics of Recognition*, *in* CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION": AN ESSAY 61 (Amy Gutman ed., 1992). The problem in Taylor's analysis is that the first order rights, liberal in nature, unavoidably trump the second order of collective rights and the *status quo* is perpetuated.

56. This intolerance towards Native Peoples is well chronicled in the American case law. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cran.) 87 (1810); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Saint Catherine's Lumber and Milling Co. v. The Queen, [1888] 14 A.C. 46 (P.C.). *See also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989). *But see* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

57. For an excellent depiction of racism endured by Native Peoples in Canada, see Patricia Monture, *Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah*, 2 C.J.W.L. 159 (1986). *See also* Freeman, *supra* note 24.

58. 25 U.S.C. §§ 1301-1303 (1994).

59. Indian Act, R.S.C. 1985, c.I-5, s.1 (1994) (Can.).

60. On U.S. law governing the rights and responsibilities of American Indians, see, e.g., David L. Burnett, Jr. *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557 (1972); NORTH AMERICAN INDIAN READER (1973); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (1945). *See also* The Indian Act, Canada, Bill C-31, June, 1985; Leslie Francis Stokes Upton, *The Origins of Canadian Indian Policy*, 8(4) J. CAN. STUD. 51 (1973); KAHN-TINETA MILLER & ROBERT G. MOORE, THE HISTORICAL DEVELOPMENT OF THE INDIAN ACT 108 (1978).

61. On the forced assimilation of Native American values within the mainstream, see Michael P. Gross, *Indian Control for Quality Indian Education*, 49 NOTRE DAME L. REV. 237, 244 (1973). Gross observes:

> Where blacks have been forcibly *excluded* (segregated) from white society by law, Indians—aboriginal peoples with their own cultures, languages, religions and territories—have been forcibly *included* (integrated) into that society by

judiciaries that treat Native interests as inconsequential in law.[62] Illustrating the primacy of Western liberal values, Title 1 of the American *Indian Civil Rights Act*[63] stipulates:

> No Indian tribe . . . in exercising powers of self-government shall . . . (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble . . . (5) take any private property for a public use without just compensation . . . (8) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.[64]

> law. That is what . . . [is] meant by coercive assimilation—the practice of compelling, through submersion, an ethnic, cultural and linguistic minority to shed its uniqueness and identity and mingle with the rest of society.

Id. at 244. This assimilation of Natives or Native Peoples and the marginalization of their historical culture evolves into a self-fulfilling system. As Harper once remarked: "It may be stated as a first principle that it is the policy of the Department [of Indian Affairs, Canada] to provide gratuitous assistance to those Indians who can provide for themselves." *See also* Duane Champagne, *Beyond Assimilation as a Strategy for National Integration: The Persistence of American Indian Political Identities*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 109 (1993); Nancy O. Lurie, *The Contemporary American Indian Scene, in* NORTH AMERICAN INDIANS IN HISTORICAL PERSPECTIVE 418, 456 (Eleanor B. Leacock & Nancy O. Lurie eds., 1971) ("there is no question that termination and related legislation [in the 1950's] were strongly endorsed by well-meaning legislators who were influenced by analogies to the Negro movement for civil rights"). On American policy towards Native peoples, see David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991); Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations* 132 U. PA. L. REV. 195 (1984); S. LYMAN TYLER, A HISTORY OF INDIAN POLICY (1973).

62. This marginalization of Indian *rights* is most apparent in courts justifying the extraction of taxes from Native Peoples. *See, e.g.,* Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214 (1995); Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993); Oklahoma Tax Comm'n v. Thlopthlocco Tribal Town of Oklahoma, 839 P.2d 180 (Okla. 1992); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Confederated Salish & Kootenai Tribes of Flathead Reservation v. Moe, 425 U.S. 463 (1976). *See also* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES (1989) (outlining the confiscation of Native lands in Oklahoma "whether by persuasion, intimidation, or fraud, but in the background was the authority to put the policy into effect without their [Indian peoples'] consent." *Id.* at 305). *See generally* Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281 (1995); Gloria Valencia-Weber, *American Indian Law and History: Instructional Mirrors*, 44 J. LEGAL EDUC. 251 (1994); ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES (1972); ANGIE DEBO, THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS (1941).

63. 25 U.S.C. §§ 1301-1303 (1994).

64. 25 U.S.C. § 1302. *See also* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887-1934 (1991); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 271-75 (1989); Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and*

The subordination of Native values within a Western liberal system is even more explicitly depicted, historically, in the remarks of a Deputy Superintendent-General of Indian Affairs, Canada: "[O]ur object [the Department of Indian Affairs] is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no question, and no Indian Department."[65] Similarly, judges have invoked Western liberal conceptions of sovereignty and title to restrict Native land claims on grounds that those claims are interests that fall short of legal rights.[66] The views of Chief Justice Marshall of the United States Supreme Court, over 150 years ago, remain starkly troubling today: "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness. . . ."[67] A more tempered, but still comparable attitude is evidenced in the more recent Canadian case of *Delgamuukw v. British Columbia*, known as the "Gitksan" case.[68] In this case, a British Columbia Court denied the Gitk-

---

Tribes in Light of Our Federation and Republican Democracy, 25 U. TOL. L. REV. 617 (1994); CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 113-14 (1987); NICHOLAS C. PEROFF, MENOMINEE DRUMS: TRIBAL TERMINATION AND RESTORATION 1954-1974 (1982); Burnett, *supra* note 60.

65. J. RICK PONTING & ROGER GIBBINS, OUT OF IRRELEVANCE: A SOCIO-POLITICAL INTRODUCTION TO INDIAN AFFAIRS IN CANADA 3-30 (1980). *See also* the Trudeau government's 1969 White Paper on Indian Policy, *A Statement of the Government of Canada on Indian Policy in* RICHARD P. BOWLES ET AL, THE INDIAN: ASSIMILATION, INTEGRATION OR SEPARATION? (1972). The purpose of the policy was to remove all legal and constitutional references to Natives (including a dismantling of the reservation system) so that Natives could be "equal" participants in the cultural, social, economic and political life of Canada. *Id.*; SALLY M. WEAVER, MAKING CANADIAN INDIAN POLICY: THE HIDDEN AGENDA 1968-1970 (1981). On the ongoing nature and effect of this policy towards Native Peoples in more recent times, see KYMLICKA, *supra* note 36, at 142-44.

66. This is also apparent in the insistence of courts that State rights outweigh Native interests for the purpose of State tax. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). *See generally* Karl J.Kramer, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989 (judicial balancing of federal and non-tribal member interests has precluded the Supreme Court from examining or giving weight to tribal interests in resolving jurisdictional issues). *Compare with* the Canadian Supreme Court decision in R. v. Derricksan, [1976] 71 D.L.R. (3d) 159.

67. *Johnson*, 21 U.S. at 590.

68. [1991] 79 D.L.R. (4th) 185 (B.C.S.C.). In *Delgamuukw*, the chiefs of the Gitksan and Wet'suwet'en Indians in the Province of British Columbia sought a declaration that they were sovereign and self-governing communities both historically and within the framework of Canadian federalism. The claim was dismissed by the Chief Justice of

san and Wet'suwet'en Peoples title to disputed land on grounds that they lacked an identifiable, civilized and ultimately, cognizable title. "It cannot be said that they [the Gitksan and Wet'suwet'en] owned and governed such vast and almost inaccessible tracts of land in any sense that would be recognized by the law. *In no sense could it be said that the Gitksan or Wet'suwet'en law or title followed these people . . .*"[69]

Invoking a Western law of nations, that Court maintained that a liberal regime of rights subordinated Native land claims to a European sovereign. "[I]t is part of the law of nations, which has become part of the common law, that discovery and occupation of the lands of this continent by European nations, or occupation and settlement, gave rise to a right of [European] sovereignty."[70] Declining to protect the distinct cultural value which the Gitksan and Wet'suwet'en Peoples have in the preservation of land, the *Delgamuukw* Court reduced their interest to a non-right, lacking in legal cognizance.[71] Central to this judicial position was the Court's conviction that ownership is the embodiment of Western liberal rights that apply regardless of their content, the nature of their enjoyment, or their impact upon others, notably, Native Peoples.[72] However widespread might have been the *original* interest of the Gitksan and Wet'suwet'en Peoples in land, the *Delgamuukw* Court marginalized that interest in favor of a Western liberal conception of ownership.[73]

British Columbia, Allan McEachern on the basis that "aboriginal customs, to the extent that could be described as laws before the creation of the colony became customs which depended upon the willingness of the community to live and abide by them, but they ceased to have any force, as laws, within the colony." *Delgamuukw*, 79 D.L.R. (4th) at 453. For further commentary on this case, see Bruce Ryder, *Aboriginal Rights and* Delgamuukw v. The Queen (British Columbia), 5 CONST. F. 43-48 (1994); DON MONET & SKANU'U (ARDYTHE WILSON), COLONIALISM ON TRIAL: INDIGENOUS LAND RIGHTS AND THE GITKSAN AND WET'SUWET'EN SOVEREIGNTY CASE (1992).

69. *Delgamuukw*, 79 D.L.R. (4th) at 451-52 (emphasis added).

70. *Id.* at 284.

71. This plight of Native Peoples is accentuated in the denial that they are entitled to any new title under the Canadian Charter. "[T]he [Canadian] Charter does not purport to confer new freedoms," *Re* Cromer, 29 D.L.R. (4th) 641, 659 (B.C.C.A., Lambert, J.). On Native conceptions of title, see Leroy Little Bear, *A Concept of Native Title*, 5 CAN. LEGAL AID BULL. 99 (1982); Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727 (1987); Menno Boldt & Anthony Long, *Tribal Philosophies and the Canadian Charter of Rights and Freedoms*, 7 ETHNIC & RACIAL STUDIES 478 (1984). *See also* Noel Lyon, *An Essay on Constitutional Interpretation*, 26 OSGOODE HALL L.J. 95 (1988).

72. On the "neutrality" of courts towards the substance of law, see *supra* notes 29-30.

73. For a comparable line of reasoning to the *Delgamuukw* case, see Sawridge Band v. Canada, [1993] 109 D.L.R. (4th) 364 (Muldoon, J.). Arguably, there is support in the *Canadian Charter of Rights and Freedoms* for subjecting rights to responsibilities in re-

The result of this liberal conception of rights is the displacement of Native stewardship over land in favor of individual ownership,[74] a disruption in cultural, linguistic and family values among Native Peoples,[75] a breakdown in relations between Native communities,[76] and ultimately, a threat to a distinct Native way of life.[77]

Not all Western courts apply liberal conceptions of rights so stringently.[78] Some judges recognize that the original title of Native Peoples are interests that warrant legal recognition. They also constrain liberal conceptions of title grounded in colonial occupation that are exercised at the expense of such interests. For example, in the famous case of *Mabo v. Queensland,*[79] the Australian High Court held that title based on the traditional laws and customs of Native and Torres Strait Islander Peoples had not been extinguished by valid acts of Imperial, Colonial, State, Territory, or Commonwealth Government.[80] The *Mabo* Court

---

spect of interests that are detrimentally affected by the exercise of those rights. One key purpose underlying the *Charter* is "securing for individuals the full benefit of the *Charter's* protection." R. v. Big M Drug Mart, [1985] 3 W.W.R. 481, 524 (S.C.C. Dickson, C.J.). The other is not "overshoot[ing] the actual purpose of the right or freedom in question". *Id.* It is in this second purpose that the responsibilities that inhere in rights are grounded.

74. *See, e.g.*, ANN FIENUP-RIORDAN, WHEN OUR BAD SEASON COMES: A CULTURAL ACCOUNT OF SUBSISTENCE HARVESTING AND HARVEST DISRUPTION ON THE YUKON DELTA 312 (Alaska Anthropological Ass'n Monograph Series No. 1, 1986).

75. *Id.* at 325-26.

76. *Id.* at 311-12.

77. *Id.* at 309-12. *See generally* Robert A. Williams, Jr., *Learning to Live Within Eurocentric Myopia: A Reply to Professor Laurence' Learning to Live With the Plenary Power of Congress Over the Indian Nations,* 30 ARIZ. L. REV. 439 (1988); Neil Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations,* 132 U. PA. L. REV. 195 (1984); Milner S. Ball, *Constitution, Court, Indian Tribes,* 1987 AM. B. FOUND. RES. J. 1; Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government,* 33 STAN. L. REV. 979 (1981); Christopher L. Dyer, *Tradition Loss as Secondary Disaster: Long-Term Cultural Impacts of the Exxon Valdez Oil Spill,* 13 SOC. SPECTRUM 65, 75 (1993).

78. Nor is Western liberalism wholly impervious to the interests of Native Peoples. *See, e.g.*, Fred Coyote, *Land Holds Families Together, in* I WILL DIE AN INDIAN 15 (1980); *See also* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS 26 (3d ed. 1993). *But see* Williams, Jr., *supra* note 77, at 447; RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980).

79. Mabo v. Queensland (No.2), [1992] 175 C.L.R. 1 (Austl.). *See also* Mabo v. Queensland, [1989] 166 C.L.R. 186 (Austl.).

80. *Mabo,* [1992] 175 C.L.R. 1. Interestingly, the conception of land as the common possession of humankind, as distinct from a purely private possession, is implicit in the Western Legal Tradition, notably in Western conceptions of international law. *See, e.g.*, CHRISTIAN WOLFF, JUS GENTIUM ON THE LAW OF NATIONS 141-43 (Joseph Drake trans., 1964).

also acknowledged limitations within a *terra nullius* doctrine, according to which land belonged to no one prior to European settlement: "A common law doctrine [*terra nullius*] founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."[81]

Some courts also recognize that, notwithstanding liberal theory, the State has a fiduciary responsibility[82] to protect the interests of Native Peoples. As the Supreme Court of Canada stated in *R. v. Sparrow*,[83] "the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples."[84] This approach, still rudimentary in nature, places a fiduciary duty of *utmost good faith* upon the State to ensure that liberal rights are not exercised in disregard of Native interests.

However paternalistic the legal protection accorded Native interests, it is apparent that Native Peoples had a valid fiduciary claim. They were the first nations to occupy this Continent; they possess distinct languages, traditions and cultures, and to deny their distinctiveness would be to undermine Western liberal values themselves. As the Federal and Provincial governments of Canada acknowledged in 1992, "[t]he Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of the three orders of government of Canada."[85] This responsibility to protect Native interests, as dis-

---

81. Mabo v. Queensland, [1992] 66 A.L.R. 422, 498. For a general analysis of the *Mabo* case, see COMMONWEALTH OF AUSTRALIA, MABO, THE HIGH COURT DECISION ON NATIVE TITLE, A DISCUSSION PAPER (1993); MABO: A JUDICIAL REVOLUTION: THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW (M.A. Stephenson & Suri Ratnapala eds., Univ. of Queensland Press 1993).

82. The more usual legal terminology is "fiduciary duty," but the relationship is better thought of as a responsibility. To be a fiduciary is to be in a relationship of trust whereby the trustee holds title for the benefit of another, the beneficiary. The equitable notion of a fiduciary relationship developed precisely because the beneficiary had no right recognized by the common law. Historically, the courts of equity began to recognize that the beneficiary had an interest worthy of protection and imposed a responsibility upon the fiduciary to recognize this. But, technically speaking, the beneficiary is still said to have an "equitable," but not a "legal" right. Even today this distinction between equitable and legal rights is made; however, the equitable rights of the beneficiary are better thought of as the responsibilities that inhere within the fiduciary's rights.

83. [1973] S.C.R. 313. *See also* RENEE DUPUIS & KENT MCNEIL, CANADA'S FIDUCIARY OBLIGATION TO ABORIGINAL PEOPLES IN THE CONTEXT OF ACCESSION TO SOVEREIGNTY BY QUEBEC (1995). Dupuis and McNeil note specifically that, "the Government of Canada has constitutional responsibility for Aboriginal people and cannot renounce that responsibility unilaterally" *Id.* at 67-68.

84. *Sparrow*, [1990] S.C.R. at 1108.

85. CONSENSUS REPORT ON THE CONSTITUTION, Part I(a), § 2(B) (1992). The Charlot-

tinct from liberal rights, is also apparent in two related demands before the American system of justice: "[r]eturn the right of decision to the tribes—restore their power to hold the dominant society at arm's length."[86]

This legal recognition accorded Native interests justifies, not the displacement of Western liberal rights, but the incorporation of different systems of value within them. This is accomplished by recognizing that Native Peoples, like the Gitskan and Wet'suwet'en, have developed alternative conceptions of rights which the liberal rights regime has failed adequately to protect. That protection arises only when liberal institutions, not limited to courts of law, defend the cultural values of distinct Peoples whose interests, traditionally, have been denied legal safeguards.[87]

The virtue of accommodating Native interests, alongside Western liberal values, is apparent in the willingness of *some*

---

tetown Agreement elaborated:

> The Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada . . . [This] right . . . should be interpreted in light of the recognition of Aboriginal governments as one of three orders of government in Canada . . . The exercise of [this] right . . . includes the authority of the duly constituted legislative bodies of Aboriginal peoples . . . (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and (b) to develop, maintain and strengthen their relationship with their lands, waters and environment . . ."

Id. at Part IV, § 41. The *Charter* defines the "aboriginal peoples of Canada" as "Indian, Inuit and Metis peoples of Canada." CAN. CONST. (Constitution Act, 1982), Pt. I (Canadian Charter of Rights and Freedoms), § 35(2). *See generally* M. E. Turpel, *The Charlottetown Discord and Aboriginal Peoples, in* THE CHARLOTTETOWN ACCORD, THE REFERENDUM AND THE FUTURE OF CANADA 117 (1993).

86. D'ARCY MCNICKLE, THEY CAME HERE FIRST: THE EPIC OF THE AMERICAN INDIAN 285 (rev. ed. 1975). *See also* Rachel San Kranowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 586, 601-02 (1987). *But see* Russel L. Barsh, *Indigenous North American and Contemporary International Law*, 62 OR. L. REV. 73 (1983); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77 (1993); Erik M. Jensen, *American Indian Tribes and Secession*, 29 TULSA L.J. 385 (1993).

87. The Canadian Charter of Rights and Freedoms expressly provides that "the guarantee . . . of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada . . ." CAN. CONST. (Constitution Act, 1982), Part I (Canadian Charter of Rights and Freedoms), § 25. Section 27 of that *Charter* provides further that: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada." *Id.* at § 27. *See also* Brian Slattery, *First Nations and the Constitution: A Quest of Trust*, 17 CAN. B. REV. 261 (1992); Thomas Isaac, *The Storm Over Aboriginal Self-Government*, 2 CAN. NATIVE L. REP. 6 (1992).

judges to accord legal status to Native interests in land. For example, in *R. v. Sparrow*,[88] the Supreme Court of Canada has extended legal protection to Native interests in the salmon fishery. It has asserted that: "the salmon fishery has always constituted an integral part of the . . . distinctive culture [of the Musqueam Peoples] . . . The Musqueam have always fished for reasons connected to their culture and physical survival."[89] This legal recognition also arises in international law where provision is made for the right of indigenous peoples to preserve a distinct way of life, along with a freedom from State intrusion.[90]

In summary, Western liberalism often has failed to grant legal recognition to the interests of Native communities on grounds that these interests are not embodied in liberal rights. Despite recent and sporadic gestures to the contrary, most judges have perpetuated the liberal infrastructure of rights, relegating cultural interests of Native Peoples in land to non-rights. An alternative is to expand upon the fiduciary responsibilities that arise from the exercise of liberal rights. This involves, among other actions, modifying liberal values to encompass the cultural interests of Native Peoples. It also means recognizing that rights are subject to continuing responsibilities, including the responsibility of the State, cultural communities and individuals alike to accord legal recognition to Native interests that are not dubbed liberal rights.

III. RECOGNIZING LEGAL RELATIONSHIPS

Liberal theory grounds rights in reciprocal legal relations. Each individual has rights and each is equally entitled to have

---

88. R. v. Sparrow, [1990] 1 S.C.R. 1075.

89. *Id.* at 1099. This case, *R. v. Sparrow*, is especially significant in jettisoning a line of cases that extinguished Native rights as a matter of State sovereignty. *See, e.g.*, R. v. Derricksan, [1976] 71 D.L.R. (3d) 159 (S.C.C.). *See generally* Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on* R. v. Sparrow, 29 ALTA. L. REV. 498 (1991). On legal debate in the United States between commercial and Native interests in fish stocks, including salmon, see Dana Johnson, *Native American Treaty Rights to Scarce Natural Resources*, 43 UCLA L. REV. 547 (1995); Mason D. Morisset, *The Legal Standards for Allocating the Fisheries Resource*, 22 IDAHO L. REV. 609 (1986).

90. *See* S. J. Anaya, *Canada's Fiduciary Obligation Towards Indigenous Peoples in Quebec under International Law in General, in* CANADA'S FIDUCIARY OBLIGATION TO ABORIGINAL PEOPLES IN THE CONTEXT OF ACCESSION TO SOVEREIGNTY BY QUEBEC 40 (Min. of Supply & Services, Ottawa, 1995). *See also* SOVEREIGN INJUSTICE, FORCIBLE INCLUSION OF THE JAMES BAY CREES AND CREE TERRITORY INTO A SOVEREIGN QUEBEC (Grand Council of the Crees, 1995); Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 INT'L & COMP. L. Q. 867 (1989).

those rights protected in law. That protection arises through each individual's duty to every other individual not to infract upon the rights of that other; and the State owes a comparable duty to all individuals equally. Relations between individual right-holders are reciprocal: no individual is entitled to exercise his rights so as to deny the rights of any other individual. Relations between the State and each individual are reciprocal too: the State has a duty to respect the rights of each individual and each individual has a duty to respect the laws (and rights) of the State.

In liberal theory, rights are also self-operating: once they have been found to exist, the manner in which they are exercised is within the discretion of those who have them. This discretion is conditional only upon limits which the State imposes to protect the rights of others or which those others assert in protecting themselves.

Finally, the lawful exercise of an individual right in liberal theory is not conditional upon the satisfaction of interests that do not constitute countervailing rights (and powers): alternatively phrased, rights are legally enforceable regardless of their impact upon the interests of another or others that do not themselves constitute rights (and powers).

This liberal conception of rights fails to reckon with Native cultural interests in several respects. First, in conceiving of rights as being conditional only upon countervailing rights (and powers), Native interests that diverge from rights are excluded. Second, in insisting that rights are exercised at the discretion of right-holders, rights produce uncertain consequences for Native Peoples. In particular, right-holders need not pay heed to Native interests: as a result, whether and to what extent a right-holder chooses to reckon with Native interests is entirely within the discretion of that right-holder. Third, in exercising these choices at their discretion, right-holders have no duty to consult with Native Peoples: in effect they are not required to determine the nature of Native interests, nor the impact of the exercise of rights upon them, nor the manner in which liberal rights might be exercised differently to redress that impact.

These liberal preconditions to the exercise of rights create a distinct dilemma for Native Peoples. Where the interests of Native Peoples do not constitute rights, Native Peoples do not acquire any reciprocal protection that is provided by rights. In supporting rights as distinct from interests, the State also does not accord legal protection to Native interests. As a result, Native Peoples are denied the legal support of the State on the basis of the exercise of property rights that has an unequal impact

upon them. As in decades past, Native Peoples are left without a legal remedy, other than political action and civil disobedience.

One response to this dilemma of Native Peoples is to expand upon legal relations to better encompass Native interests. A restricted option is to reconstitute Native interests to fall within existing categories of legal relations, as when Native interests themselves are constituted as rights. An expanded option is to develop new categories of legal relations to justify the protection of those interests.

Illustrating the restricted option is the work of Wesley Hohfeld.[91] Exemplifying the expanded option is the succeeding section of this article. The intention, here, is to discuss Hohfeld's construction of rights specifically in relation to Native Peoples and thereafter, to reconstitute those relations to better accommodate the interests of those Peoples. This will involve reckoning with legal categories beyond the reciprocal protection accorded by rights to right-holders. It will also mean attributing different qualities to these expanded legal relations, including different conditions to govern their exercise.

A. *Hohfeld's Relationships*

Wesley Hohfeld, writing eighty years ago, conceived of liberal rights as an expanded set of *basic legal relations*.[92] He did not question the liberal foundation of rights, but simply expounded upon them so as to include claims, privileges, powers and immunities. He also expanded upon liberal legal relations, by encompassing opposite and correlative relationships. In extending liberal rights to privileges, powers and immunities and in incorporating them into extended legal relations, he provided a rudimentary way in which to adapt liberal rights to the values and interests of Native Peoples.[93] Hohfeld's basic legal relations

---

91. On Hohfeld's approach, see *infra* Part II.A.

92. *See, e.g.*, Hohfeld, *Fundamental Legal Conceptions*, *supra* note 9, at 710. On Hohfeld's schema of rights in general, see Hohfeld, *Rights and Jural Relations*, *supra* note 9.

93. On the capacity to invoke Hohfeld's analysis to adapt liberal rights to Native interests, see *infra* Parts III-IV. Hohfeld's schema is useful in specifying that duties are owed to rightholders. However, his schema is deficient in not imposing responsibilities upon rightholders. This deficiency is most pronounced when individuals have interests that fall short of rights and therefore are not the subject of duties. This deficiency is most serious in relation to Native Persons whose interests are not ordinarily accorded the status of rights within liberal discourse. On the marginalization of Native interests in liberal thought, notably before courts of law, see *supra* Part I.

are expressed in the following tabular form.[94]

Basic Legal Relation	Opposite/Contradictory	Correlative
Right A's claim against B	**No - Right** A's lack of claim against B	**Duty** B's obligation to respect A's claim
Privilege A's freedom from claim of B	**Duty** A's obligation to respect claim by B	**No-right** B's lack of claim against A
Power A's affirmative control over a legal relation with B.	**Disability** A's lack of control over a legal relation with B	**Liability** B's subjection to A's control over a legal relation
Immunity A's freedom from B's power.	**Liability** A's subjection to B's control over a legal relation	**Disability** B's lack of control over a legal relation with A.

According to Hohfeld, the rights, privileges, powers and immunities of each individual are balanced against the rights, privileges, powers and immunities of everyone else. In effect, A has a right which B has the duty to respect, or a privilege in respect of which B lacks a claim against A. A also has a corresponding duty to respect B's rights, such as B's rights to personal security. In addition, A has no claim in respect of B's privileges. A and B's powers and immunities are represented similarly. A has a power in respect of which B has a disability, or an immunity in respect of which B has a liability. A has a corresponding liability in respect of B's power and a disability in respect of B's immunity.

So conceived, Hohfeld evaluates rights in relation to those who exercise or are subject to them. Illustrating a legal relationship between a right and a duty, a mining company has a right to use its property as it wishes; a Native Person has a duty to respect that right and may not interfere with its exercise. The restriction upon the mining company's right to use that property arises either by virtue of a statute or regulation, or on account of the rights of others, including Native Persons. By imposing duties upon that mining company, its rights are limited *externally* in accordance with the rights of others, including possibly, those of Native Peoples.[95]

The nature of basic legal relations is readily illustrated by analyzing the legal relationship between individuals within Na-

94. *See* Hohfeld, *Rights and Jural Relations*, *supra* note 9.

95. On responsibilities that limit rights *internally*, see *infra* Part III.

tive and Non-Native communities in two situations. In situation 1, a Native Person has a right which a Non-Native Person has a duty to respect and the State has a duty not to infringe. For example, a Native Person may have a right to hunt and fish on reserve land; a Non-Native Person and the State may have a duty to respect that right, specifically by not interfering with its exercise. The second situation is the converse of the first. A Native Person has a duty to respect the right of a Non-Native Person, while the State has a duty not to infringe that right.[96] A mining company may have a property right to mine and Native Persons and the State may have a duty to respect that right by not interfering with it. These two situations are depicted in the table below.[97]

A quasi- Hohfeldian view of the status quo		Inter-Party Dimension	
		Native Person's (A) Legal Relations	**Non-Native Person's (B) Legal Relations**
Situation 1	Native Person (A) has a right	A has a right against B or State.	B has a duty to respect the right of A.
Situation 2	Non-Native Person (B) has a right	A has a duty to respect the right of B.	B has a right against A or State.

By recognizing privileges, powers and immunities, not only rights, Hohfeld's basic legal relations can accommodate more extensive legal relations than those which ordinarily arise in liberal rights-talk. For example, Hohfeld's jural relations are capable of accommodating recent claims by Native Peoples that commercial land be transferred to them in light of their historical title and status as self-determining Peoples. These claims appropriately are conceived as privileges founded upon historical title, not simply as rights.[98] They are also fittingly viewed as immunities from intrusive State action, such as expropriation. In this respect, Hohfeld's analysis can advance Native claims within an existing legal vocabulary: *this* factor demonstrates the

96. Hohfeld does not contemplate a State within his conception of legal relations. However, conceiving of a State, with rights and duties, is consistent with his analysis of jural relations. *See supra* note 92.

97. This table extrapolates from Hohfeld's analysis. It does not exhaust the analytical possibilities that likely arise from his conception of legal relations. It also does not treat Native rights as privileges, as Hohfeld likely would have done in relation to Native claims to self-determination and to land.

98. *See, e.g., Mabo*, 175 C.L.R. at 1.

value of Hohfeld's work in helping to accord legal protection to the interests of Native Peoples.[99]

B. *Limitations in Hohfeld's Relationships*

Despite its virtue in identifying an expanded set of legal relations, Hohfeld's schema still only describes legal relations as they are: it does *not* comment upon their social, economic and political value.[100] Nor does his analysis take account of cultural values and interests that fall outside of those relations. In preserving the exclusivity of a right/duty relationship, Hohfeld's analysis does not accord legal status to interests that vary from liberal rights, unless those interests are the subject of duties external to those rights. Once a right is found to exist, everyone—including Native Persons—has a duty to respect it. No corresponding protection is accorded Native interests that are unprotected in law because they are construed as being less than rights, privileges, powers and immunities.[101] For example, according to his analysis, Native interests in hunting and fishing would not be the subject of legal relations because they do not constitute legal rights, privileges, powers or immunities. In contrast, Hohfeld's analysis would protect the right of a corporation to strip-mine on land occupied by Native Peoples when that right forms part of a legal relationship involving rights, power, privileges, or immunities. His analysis would also impose a duty upon Native Peoples to respect those mining rights, at the expense of their traditions, when Native interests fall short of liberal rights. The result under a Hohfeldian analysis that reaffirms liberal values would be inequitable. Strip mining companies, in freely exercising their mining rights, would *lack* a corresponding duty not to intrude upon the interests of Native Peoples in the land. The harm to Native Peoples would be the

---

99. In the interests of simplicity, all Native claims will be treated as *rights* claims. However, rights will be conceived of more expansively than Hohfeld's conception of rights. In particular, they will be viewed as encompassing responsibilities. *See infra* Part III.

100. In this respect Hohfeld's analysis does not respond to objections directed at *a priori* conceptions of liberty. *See supra* Part I.

101. The fact that the interests of Native Peoples are not protected in Hohfeld's schema is complicated by the further liberal assumption that everyone has comparable rights. *See supra* Part I. This ignores the different manner in which rights come into being, as well as imbalances in the nature and function of correlatives and opposites in relation to those rights. *See generally* GERHARD N. LENSKI, POWER AND PRIVILEGE: A THEORY OF SOCIAL STRATIFICATION (1966).

depletion of their traditional hunting and fishing grounds,[102] their continued commercial exploitation and the lack of harmony in relations affecting them.[103]

IV. TRANSFORMING LEGAL RELATIONSHIPS

> When we discover that there are several cultures instead of just one and consequently at the time when we acknowledge the end of a sort of cultural monopoly, be it illusory or real, we are threatened with the destruction of our own discovery. Suddenly it becomes possible that there are just others, that we ourselves are an "other" among others.[104]

Hohfeld's neutrality towards the content of rights is not a defect in his analysis. After all, his aim was not to reconstitute liberal rights, only to expound upon their nature and content. The value of Hohfeld's work lies in identifying an expanded set of legal relationships involving rights. However, in declining to recognize that responsibilities inhere in rights, his analysis fails to respond to fundamental deficiencies in the liberal structuring of rights. Extending legal relations beyond Hohfeld's analysis to encompass responsibilities, as is proposed in this article, does not itself eradicate the threat of marginalizing Native culture. But accepting responsibilities as an inherent part of rights does take account of cultural interests that liberal rights talk traditionally ignored. Legal relations that impose responsibilities upon rightholders to respect cultural *otherness* focuses upon the interest of Native Peoples in that *otherness*. It also highlights the social and political conditions that would have prevailed in

---

102. On the denial of legal status to Native fishing interests, see Shelley D. Turner, *The Native American's Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact, and the Continuing Fight to Observe a Way of Life*, 19 N.M. L. REV. 377 (1989); Monroe E. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 UCLA-ALASKA L. REV. 89 (1979). *See also* Stuart Gilby, *The Aboriginal Right to a Commercial Fishery*, 4 DALHOUSIE J. LEGAL STUD. 231 (1995); POLICY FOR THE MANAGEMENT OF ABORIGINAL FISHING, DEPARTMENT OF FISHERIES AND OCEANS (Ottawa: Department of Fisheries and Oceans, 1991).

103. On the appreciation of this inequitable treatment which the law accords Native Peoples, see Note, *Towards a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 ALASKA L. REV. 295 (1995); Kevin J. Worten, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Entities*, 71 N.C. L. REV. 595 (1993); Randy Kapashesit & Murray Klippenstein, *Aboriginal Group Rights and Environmental Protection*, 36 MCGILL L. J. 925 (1991); David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective" Voice?*, 60 U. COLO. L. REV. 1009 (1989).

104. PAUL RICOEUR, HISTORY AND TRUTH 278 (Charles A. Kelbey trans., 1965).

the absence of such responsibilities. This evaluation of rights in light of responsibilities is developed in the section below.

A. *Reformulating Legal Relationships*

Transforming legal relations involves shifting from a conception of rights limited only *externally* by the rights of others to a conception of rights limited *internally* by responsibilities that inhere in the values underlying those rights. A duty is an *external* restriction upon a right in that it requires that others, not limited to the State, respect that right. A responsibility is an *internal* restriction upon a right in stipulating that the rightholder respect the interests of others who are detrimentally affected by the exercise of that right.[105]

Illustrating a legal relationship between a right and a duty, a mining company has a right to use its property as it wishes; a Native Person has a duty to respect that right in that she may not interfere with its exercise. The restriction upon the mining company's right to use that property arises either by statute or on account of the rights of others, including Native Persons. In imposing duties upon a mining company, its rights are limited *externally* in accordance with the rights of those others.

A legal relationship arises between a right and a responsibility when a right is subject to a responsibility for its impact upon the interests of others. For example, a right to use one's property to mine is restricted by responsibilities towards Native Persons whose interests are detrimentally affected by the exercise of that right. This restriction is *internal* to the right: it derives, not from duties of the mining company that are contingent upon the rights of others, but from the assertion of the mining right itself.[106]

The recognition that a responsibility is *internal* to a right aims at averting the use of a right to secure a benefit, while giving nothing in return. In effect, a right should not be used to obtain a "free lunch." For example, a mining company should not receive a "free lunch" in receiving value from land, while giving nothing to Native Persons whose interests are detrimentally affected by its use of that land. Eradicating its "free lunch" arises

---

105. *See supra* Part II.

106. While reference here is made to the property rights of corporations to fish, mine and cut timber, in Hohfeldian terms, such corporations more often exercise a privilege. That privilege ordinarily arises as a matter of status, for example, in terms of legislation or administrative regulation allowing for the exercise of that right, subject to satisfying pertinent administrative requirements. On the relationship between rights and privileges in the Hohfeldian schema, see *supra* Part II.A.

variously, by denying it the benefit of land that has incommensurable value to Native Peoples, by permitting it to use that land only on condition that it not destroy, erode, or otherwise undermine the value of that land to Native Peoples, or by requiring that it compensate Native Persons for the loss in land value to them.

Conceiving of rights and responsibilities in this way allows a different balance to be struck among competing cultural interests than those that are possible under Hohfeld's analysis. In particular, it extends Hohfeld's legal relations by encompassing the cultural, including property interests of Native Peoples that are not themselves recognized as rights. For example, it limits the rights of a mining company in light of its responsibilities not to infringe the interests of Native Peoples in land, that are not treated formally as rights.[107] This reformulation of basic legal relations occurs when a mining company's right to use its property at will is internally restricted by a responsibility to preserve wildlife stocks in favor of Native interests that are deemed not to constitute liberal rights. In this way, Native interests are accorded legal recognition, even though they do not constitute rights, privileges, powers or immunities.[108] Similarly, the exercise of Non-Native rights are subject to Native interests that are neither rights, nor the subject of statutory duties.

Placing the *internal* restriction of a responsibility upon a right modifies Hohfeld's basic relations in different respects. First, Non-Native Persons are responsible to respect Native interests that are not represented by Hohfeldian rights, privileges, powers, or immunities. These interests range from preserving a distinct Native language to protecting a particular forest from commercial defoliation.[109] Second, the responsibility that attaches to a right is intended to protect underrepresented or unrepresented interests, such as cultural interests that are not limited to the rights of a plurality of individuals. For example, the responsibility of a mining company not to exercise its rights in a manner that damages the environment is directed at,

---

107. This restricts B's rights, notwithstanding the fact that B's rights are not limited by A's rights, nor by any duty which B owes A. *See supra* Table p. 216.

108. It is true that legislation subjects corporate rights to the environmental interests of others. However, unlike responsibilities, that result is contingent upon governmental action that is *external* to those corporate rights.

109. On the relationship between individual and community rights or interests in respect of distinct cultural communities, see ETZIONI, *supra* note 15; Leon E. Trakman, *Group Rights: A Canadian Perspective*, 24 N.Y. J. INT'L L. & POL. 1579 (1992); TRAKMAN, *supra* note 15, ch. 3; McDonald, *supra* note 52; Johnston, *supra* note 52; Van Dyke, *supra* note 52.

among other concerns, preserving a traditional way of life of Native Peoples, that includes bands, clans and individual members.[110] Third, the nature and strength of this responsibility varies in accordance with the rightholder's foresight of the detrimental effect of the exercise of his right upon the interests of others. For example, the responsibility of a company engaged in forestry expands for persistently devastating forest land upon which Native Peoples depend for their survival or sustenance.[111] Fourth, the nature of the responsibilities owed are affected by the communal context that surrounds the exercise of rights. Included in this context, for instance, is a history of conquest, economic exploitation and cultural assimilation of Native Peoples.[112] Finally, responsibilities influence the attributes and quality of life within a cultural community. For example, a Native communities' interests are adversely affected by the exercise of mining rights on their traditional hunting grounds. The band constitutes a community that is united by a shared interest in traditional hunting and also, by the responsibilities which the mining company owes them collectively on account of those interests.

Responsibilities are aspects of rights that take account of the cultural conditions under which those rights are exercised. For example, the rights of a Non-Native mining company to strip-mine may take into account Native values, such as those relating to a traditional way of life on land that is adversely affected by that strip-mining. Similarly, Non-Native interests may be the object of responsibilities arising on account of the exercise of Native rights that have a detrimental impact upon these commercial interests.[113] For instance, the extent of protection accorded commercial interests in hunting and fishing may depend, in part, upon the nature of Native rights in that land and the detrimental effect from the exercise of rights upon those interests.

The extent of protection accorded Native interests that are the object of responsibilities hinges upon the ability of legisla-

---

110. Responsibilities attach to powers and immunities as well. However, the goal here is not to identify the full spectrum of legal relations, but to decide how rights like the Native interest in land, ought to be construed. On powers and immunities within Hohfeld's schema, see *supra* p. 215.

111. For illustrations of the responsibilities of industry towards Native Peoples in particular, see *infra* Part IV.B.

112. On the problems of political denial and cultural assimilation of Native Peoples, see GARY ORFIELD, A STUDY OF THE TERMINATION POLICY ch. 6 (1965). *See also supra* Part I.

113. On the virtue of orienting rights around a social context that includes responsibilities, see Trakman, *supra* note 13.

tors, courts and administrators to take account of the cultural *otherness* of Native Peoples. It also depends upon a willingness of lawmakers to acknowledge that the historical treatment accorded such Peoples often justifies endorsing stronger Native interests and weaker Native responsibilities. This is especially so given the capacity of Non-Native Persons to further empower themselves through their rights at the expense of Native Peoples. This need to promote Native interests also stems from a *living history* in which Native interests have been largely excluded from a liberal rights discourse that affirms tolerance towards others,[114] while denying its own constitutional roots as a "living tree"[115] that is tolerant of cultural differences.

This requirement that legal right-holders recognize interests such as the interests of Native Peoples which do not constitute rights, is depicted in the table below:

Basic Legal Relation		Opposite	Correlative
Right A's claim against B	**Responsibility** A's responsibility to respect B's (and others') interest in the exercise of A's right	**No-Right** A's lack of claim against B	**Duty** B's obligation to respect A's claim
Privilege A's freedom from claim of B	**Responsibility** A's responsibility to respect B's (and others') interest in the exercise of A's freedom	**Duty** A's obligation to respect B's claim	**No-right** B's lack of claim against A

Regarding basic legal relations, A has a right or claim against B. Internal to A's right is her responsibility to respect the interests of B, for instance a Native Person, in the exercise of her right. A's privilege consists of her freedom from B's claim. Internal to A's privilege is her responsibility to respect the interests of B and others like B in the exercise of her freedom.

---

114. The assumption, here, is that decision-makers will recognize that the interests of Native Peoples historically were not treated as rights, or that, while Native interests were accorded the status of rights, these rights were construed restrictively in practice.

115. The conception of constitutional law as a "living tree" stresses that the legal system should evolve in light of changing social values, including the values accorded to human rights. For a detailed application of the "living tree" doctrine to the political rights of women in Canadian Law, see Henrietta Muir Edwards v. Attorney General for Canada [1930] A.C. 124 (P.C.) [hereinafter the "Persons Case"].

B. *Extending the Application of Legal Relationships*

Basic legal relations, as is evident in Hohfeld's analysis, arise only when social interests constitute rights, privileges, responsibilities and no-rights, or their opposites and correlatives.[116] These basic relations fail to reckon with the conflict and subordination of Native interests that arises when their cultural *otherness* is excluded from such basic relations. In effect, "[t]he cultural framework for collective rights claims is predisposed to insensitivity to the cultural system which Native Peoples believe in and live by."[117]

The alternative is to identify the subordinating effect that liberal rights have had upon Native interests, to evaluate the nature of the interests affected and to construct legal responsibilities that mitigate that subordinating effect. One illustration of a court according weight to the historical interests of Native Peoples is the recent decision of the Nova Scotia Supreme Court, in *R. v. Denny*.[118] There, the Court stated:

> The salmon fishery is entitled to be protected so that it may continue to thrive and prosper for the benefit of all who fish the waters salmon inhabit. This includes the right to license and to prohibit unsavory practices in the manner by which fish are caught. It includes as well, the right to require native Indians to be licensed to fish for food in waters adjacent to Reserve lands . . . Reasonable regulation for these purposes suggested in this paragraph will not be inconsistent with those rights but rather will achieve valid objectives that are in the interests of the native people and the preservation and enhancement of the fishery.[119]

Extending the Court's reasoning to encompass the modified analysis proposed here, both Native and Non-native Peoples have the right to exploit the salmon fishery. Both are responsible not to exercise those rights in a manner that adversely impacts upon the other. However, given the subordinating effect of salmon fishing rights upon Native Peoples in general, those claiming a commercial right to fish for salmon have a greater responsibility to avert that adverse impact upon Native Peoples.

---

116. On such basic relations, see *supra* Part II.

117. Mary E. Turpel, *Aboriginal Peoples and the Canadian Charter*, 6 CAN. HUMAN RIGHTS YEARBOOK 4, 12 (1989-90).

118. [1990] 94 N.S.R. (2d) 253 (N.S.C.A.).

119. *Id.* at 268. The reasoning in this case found approval with the Supreme Court of Canada in *R. v. Sparrow* [1990] 1 S.C.R. 1075. While the Court in *Denny* draws attention to Native *rights* and Non-Native *interests*, rather than *vice versa*, it did extend liberal conceptions of rights to encompass the Mi'kmaq's historical right to exploit the fishery. On the extension of liberal values to Native Peoples, see Turpel *supra* note 117.

The State, in turn, has the responsibility to ensure that such responsibilities are defined and fulfilled in a reasonable manner through regulations and prohibitions, notably, through the grant, denial and regulation of fishing licenses. In developing these regulations, the State ideally should work with Native Peoples and others having interests in the resource, rather than develop regulations in isolation and then impose them on the parties.[120]

In requiring both the State and corporate right-holders to exercise their rights responsibly, Native Peoples acquire a legal remedy not previously available to them under traditional liberal rights. The manner in which reconstituted rights can provide Native Peoples with such a legal remedy is set out in the table below, dealing with fishing rights arising in the case of *R. v. Denny*:

Illustration: *R. v. Denny* using the reconstructive approach		Inter-Party Dimension	
		Native (A) Legal Relations	**Non-Native (B) Legal Relations**
Situation 1	Native individual or group (A) exercises traditional salmon fishing right	responsibility to exercise right in regard of B's claim/interest in salmon fishery	duty to respect A's right
Situation 2	Non-Native individual or group (B) exercises right to catch salmon commercially	duty to respect B's right	responsibility to exercise right in regard of A's claim/interest in salmon fishery

In situation 1, individuals or groups of Native Peoples enjoy traditional fishing rights and Non-Native Peoples have a duty to respect the exercise of those rights. This reflects a liberal right/duty relationship between them. However, Native Peoples have a responsibility to pay due respect to the claim or interest of Non-Native communities in that fishery in the exercise of their rights. This extends their legal relationship. In situation 2, Non-Native individuals or groups have a right to catch salmon commercially and Native Peoples have a duty to respect that right. However, Non-Natives have a responsibility to exercise their

120. This does not infer that all responsibilities towards Native Peoples should be subject to governmental regulation from the outset. It does infer that governments should be responsible to ensure that responsibilities towards Native Peoples are fulfilled in a reasonable manner. For further discussion, see *infra* Part IV.A.

fishing rights with due regard to the interests of Native Peoples.[121]

An extended legal relationship also arises between the State and Native and Non-Native Peoples. The State has the right to enact and apply regulations directed at preserving and enhancing the fishery.[122] The State is also responsible to ensure that its regulations are reasonable in nature. This includes ensuring their even-handed effect upon Native and Non-Native Peoples respectively. Both Native and Non-Native Peoples, in turn, are legally bound to comply with these regulations.

This approach offers several distinct benefits: it grounds the exercise of rights in the context of specific relations. It allows for variable, as distinct from all-or-nothing remedies; and it ensures that responsibilities change according to whether they are directed at emerging or receding interests.[123] For example, determining that a commercial fishing fleet has acted *irresponsibly* in relation to Native Peoples may give rise to flexible rather than all-or-nothing remedies. Fishing rights may be suspended rather than revoked, a fishing operation may be subject to a temporary rather than a permanent injunction, etc. Responsibilities may also be based upon the specific nature of different relationships. For example, the State may impose responsibilities upon the commercial fishing industry in general, or upon a specific commercial fishery, according to the detrimental effect of the right exercised by each. Responsibilities may also diverge according to whether they are owed to Native Peoples as a whole, or to Native bands or particular individuals.[124] For example, recognition may be accorded to Native property interests in general, or to the property claims of specific Native bands or Peoples. Responsibilities may vary further according to whether they are directed at emerging or receding property interests.[125] For example, responsibilities may be reduced in the face of the receding

121. For convenience, we refer to the "right" of Native Peoples in the fishery. However, the "right" to fish traditionally is more properly referred to as a "privilege," in Hohfeld's terminology. *See supra* Part II.A.

122. For convenience, we refer to the "right" of the State, although the State's right is more accurately referred to as a "power." *See supra* Part II.A.

123. Emerging interests encompass interests that are deemed to be evolving and often, progressive, in the cultural community in which they arise. An emerging interest, for example, may encompass the desire of Native Peoples to develop innovative methods of fishing. A receding, but not necessarily regressive interest, may include the interest in preserving a traditional Native method of hunting or fishing.

124. *See supra* Part III.A.

125. *See supra* note 123.

interests of Native Peoples in the fishery and expanded in the presence of their emerging interests.[126] Finally, rights and responsibilities may be exercised with the cooperation and support of rightholders themselves.[127] For example, oil companies like Syncrude Canada may invite Native Peoples to participate in corporate decision-making; it may fund the economic renewal programs of Native bands; it may also develop programs aimed at educating its employees in the traditions, customs and practices of particular Native Peoples.[128] This modified approach towards rights may allow for the development of innovative ways in which the State, Native and Non-Native Peoples contribute to the enjoyment of their distinct ways of life. A further benefit may be the growing acceptance of responsibilities that are owed to Native Peoples in consequence of the State's *right* to govern and also, to offset the privileges it has granted to industry historically.[129] Yet another benefit may be to redress the dissatisfaction among Native Peoples, aggravated by secessionism, that liberal rights have effectively marginalized their interest in economic, social and political self-determination.[130] Most impor-

---

126. This introduces a tension among different conceptions of interest, but it also allows those conceptions to be explored in a manner that liberal conceptions of rights, formulated in disregard of interests varying from rights, do not. To avoid the impact of liberal patriarchy in determining whether the interests of Native Peoples are emerging or receding, such determinations may be derived from the perspective of Native communities themselves, rather than be imputed to them by fiat.

127. Attempts to conciliate between short and longer term interests in land, as among other resources, is common in economic libertarian thought, notably within conservative economic theory. One can question, however, the extent to which this conservative school of thought identifies and weighs economic interests selectively, on the basis of its libertarian values. *See generally* Alan Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization,* AMER. ECON. REV. 52 (1972); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations,* 22 J. L. & ECON. 233 (1979); Ronald H. Coase, *The Nature of the Firm,* 4 ECONOMICA 386. *But see* PETR A. KROPOTKIN, MUTUAL AID AS A FACTOR IN EVOLUTION (1989).

128. *See, e.g.,* SYNCRUDE CANADA, LTD., A REPORT ON THE RELATIONSHIP BETWEEN SYNCRUDE CANADA LTD. AND THE ABORIGINAL PEOPLE OF NORTHEASTERN ALBERTA, ABORIGINAL REV. 1, 28 (1994).

129. The emphasis, here, upon responsibilities the State owes to individuals is intended to stress that interests which are not treated as rights should be the subject of responsibilities, regardless of whether those interests attach to individuals or a cultural community. *See supra* Part III.A.

130. On the claims of cultural minorities to secede from the State, see, e.g., SOVEREIGN INJUSTICE, FORCIBLE INCLUSION OF THE JAMES BAY CREES AND CREE TERRITORY INTO A SOVEREIGN QUEBEC (Grand Council of the Crees, 1995); ROBERT YOUNG, THE SECESSION OF QUEBEC AND THE FUTURE OF CANADA (1995); MILICA Z. BOOKMAN, THE ECONOMICS OF SECESSION (1992); Allen Buchanan, *Self-Determination and the Right to Secede,* 45 J. INT'L AFF. 347 (1992); Cass R. Sunstein, *Constitutionalism and Secession,* 58 U. CHI. L. REV.

tantly, this approach may lead to the shared realization that, in place of an untrammelled right to consume the resources of the earth at will, the State, corporations and Native Peoples alike have a shared responsibility towards one another for the use of that earth. That responsibility is fulfilled by reconstituting rights in response to that realization.[131]

A particular challenge to this modified conception of rights may arise when the interests of Native Peoples are fragmented, when Native Peoples disagree as to the value of their traditions and when they vary as to the manner in which those traditions should be reconciled with Non-Native interests. This is especially problematic in the face of an intersection of difference between the interests of individuals and sub-communities of Native Peoples. For example, some individuals within a band may insist upon a traditional right to fish; others may argue for commercial fishing. Some may forsake their traditional interests in return for compensation; others may decline to do so.

This problem of the intersection of different Native interests is especially evident in family and personal property cases. One illustration revolves around the adoption of Native children into Non-Native families. For example, in the Mi'kmaq culture of North Eastern United States and Eastern Canada, a grandmother plays an important role both as an individual and as a pivotal member of the family. If there is a conflict over the adoption of a Mi'kmaq child between a Mi'kmaq mother living within the Mi'kmaq community, a Mi'kmaq grandmother living outside of that community and a Non-Native father, the responsibilities of each derives from balancing the competing personal and property interests of groups and individuals.[132] The problem is that

---

633 (1991); Allen Buchanan, *Towards A Theory of Secession*, 1991 ETHICS 362 (1991); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991); GREGORY CRAVEN, SECESSION: THE ULTIMATE STATES RIGHT (1986); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978).

131. In attempting to modify the structures of liberalism, this approach is post-structural in nature. For a general attempt to transform liberalism along post-modern, more than post-structural, lines, see Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583 (1983). While neo-modern liberals have invoked pragmatism to justify individual rights directed at excluding the State, post-modernists like Rorty have used pragmatism to advance a non-individualist structure of rights aimed at recognition of community interests. *Id.* On Rorty's critique of liberalism generally, see RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989).

132. The Non-Native father may very well have his own conceptions of child-rearing

neither Western liberal rights, nor the recognition of responsibilities within rights provide a clear solution on their face. Applying a liberal conception of rights, the mother's "right", for example, to give her children up to adoption, is limited to her individual right as a mother, as distinct from her personal and property interest as a member of a band, tribe, or People. Her cultural interest, the cultural interest of the band and the grandmother are all excluded on grounds that they constitute interests that vary from liberal rights.[133]

Imposing responsibilities upon rightholders for interests that are detrimentally affected by the exercise of rights does not, in itself, resolve this dilemma. The existence of a responsibility limiting a right does not determine which personal or property interests ought to prevail, nor how they ought to relate to interests that are conceived as rights. For example, the existence of responsibilities accords recognition to the personal interests of the mother, grandmother and band in child-rearing; but it does not provide a means of resolving conflicts among such personal interests. Nor does it resolve conflicts between the right of the mother and these different personal interests in child-rearing.

One solution is to require rights to be evaluated in light of the nature of interests which those rights affect. This can permit consideration of the values and interests of different cultural groups. It can also provide for a range of possible responsibilities, depending upon the nature of those interests, the character of the rights that impinge upon them and the responsibilities that arise on account of them. For example, a personal or property interest affected by a right could give rise to, among other remedies, the expectation that a Native child adopted into

---

that are at odds with those of the Mi'kmaq Peoples. The mother, as well as other members of her community, may have a strong interest in seeing the child raised within the community in the traditional way. Finally, the grandmother may share many of the values of fellow Mi'kmaq Peoples, but may have her own conceptions as to how to raise the child in respect to her role in child-rearing.

133. *See generally* BILLY JOE JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN (1995); Denise L. Stiffarm, *The Indian Child Welfare Act: The Determination of Good Cause to Depart from the Statutory Placement Preferences*, 70 WASH. L. REV. 1151 (1995). For a creative approach towards the treatment of Indian children in Canada, see, e.g., Mooswa v. Minister of Social Services [1976] 30 R.F.L. 101, 102 (Sask. Q.B.). *But see* Erik W. Aamot-Snapp, Note, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167 (1995).

a Non-Native family not lose her traditional tribal, family and property benefits.[134] This could justify imposing responsibilities upon adoptive parents to expose that child to tribal traditions through visitation rights, while rendering the band responsible to provide that child with band benefits. It could also warrant giving different weights to interests in light of discrete cultural relations, such as the relationship between grandmother and grandchildren in Mi'kmaq society.[135] It could justify, as well, giving consideration to interpersonal relations, such as among birth mother, adoptive parent, child and tribe.

Envisaging rights and responsibilities in this way recognizes that, what is in the best interests of the child, is contingent upon the intersection of different community values which themselves may be in conflict. This warrants giving consideration to different personal and property interests in light of that intersection of difference. It also justifies paying regard to rights, such as the mother's right to give a child up for adoption. This analysis of rights and responsibilities is unfolded below.

V. Implementing Transformed Relationships

One problem arising in the reconstruction of rights is a conflict between rights and interests. For example, a corporation's right to use land for industrial purposes potentially conflicts with the interest of Native Peoples in preserving that land for traditional use. The problem is neither approach leads to a satisfying result from the perspective of the other. Applying a liberal conception of rights likely leads to the triumph of industrial use of land over its preservation. Applying an expansive conception of responsibility likely leads to preserving that land at the expense of its industrial use.

A neo-Hohfeldian construction of rights regards the preservation of Native burial sites as sufficiently important to constitute rights. This is justified on two grounds. First, according rights to Native Peoples still imposes responsibilities upon them to respect the interests of others, including other Native Peoples who are interested in industrial expansion on affected land.[136] Second, Native interests in the industrial use of land may con-

134. The word "property," here, includes the interests of Native Peoples in the use and enjoyment of the fruits of the land, including its preservation for the use and enjoyment of future generations.

135. *See, e.g.*, Isaac v. Denny, [1993] 47 R.F.L. (3d) 164 (N.S.C.A.), where the court allowed testimony of the role of the grandmother in Mi'kmaq culture.

136. For a methodology recording that accommodation, see *infra* Part IV.A.

stitute rights; and as such, they are already the subject of legal protection.

A reconstructive solution is to subject rights in land to responsibilities and further, to render those rights contingent upon the nature of affected interests. This warrants providing for a range of possible responsibilities, depending upon the nature of the interests involved, the character of the rights that impinge upon those interests and the responsibilities that arise on account of them. It also justifies paying regard to different conceptions of rights and interests adhered to by mainstream and Native Peoples alike. This analysis of rights and responsibilities is developed below.[137]

A. *A Transformative Methodology*

Key to the development of modified legal relations is the need to determine the nature of relations between rights and responsibilities, the intersection of differences among those relations and their application in specific cases. The intention is first, to identify the processes that govern the relationship between rights and responsibilities and second, to apply those processes to an illustration, here, Native land claims. In this illustration, a company threatens to exploit resources at the expense of Native interests in the affected land. This arises, for example, when a lumber company clear-cuts trees, a mining company strip-mines land, or a commercial fishery depletes fish stocks.[138] As preliminary matters, rights are grounded in norms that are attributed content prior to their being applied to particular situations. In contrast, responsibilities acquire their content from the values that arise in the exercise or application of rights. This means that, while a right has an *a priori* content, the nature of a responsibility derives from empirical experience. This experience, in turn, is acquired from studying past practice with rights and applying that practice to new situations. Consistent with common law reasoning and judicial precedent, a re-

---

137. This analysis can be applied in various contexts. While it is applied here primarily to rights and responsibilities appertaining to land claims, it can be applied to all rights and freedoms, including the personal liberties of Native Peoples. On a Mi'Kmaq illustration of such personal liberties, see *supra* Part III.B.

138. This analysis can be applied in various contexts. While it is applied here to rights and responsibilities relating to the land claims of Native Peoples, it can be applied to all rights and freedoms. An extensive analysis into the philosophical underpinnings and application of rights and responsibilities, encompassing such topics as reproductive choice, free speech and environmental protection, is developed in LEON TRAKMAN & SEAN GATIEN, RIGHTS AND RESPONSIBILITIES (forthcoming 1997).

sponsibility is determined in virtue of a relationship among specific actors functioning within a particular environment. Operating within a dynamic legal framework, the nature of those responsibilities hinges upon the variable values and interests, as distinct from values fixed in a pre-existing legal structure.[139]

These principles ground the relationship between rights and responsibilities. Responsibilities are contingent upon rights: therefore, it is necessary to determine the nature of those rights, the consequences that derive from that exercise and the values and interests that are affected by their exercise. In the event that the values and interests not treated as rights are inadequately protected in law, it is necessary to determine the nature of the responsibilities that are owed on account of that inadequacy. This determination is arrived at by comparing the values underlying rights to the values and interests that are inadequately protected in law in consequence of the exercise of those rights. The final step is to give legal effect to responsibilities, *inter alia*, through legislation, judicial interpretation, or agreement between the parties.[140] This relationship between rights and responsibilities is outlined in more detail below.

I. Determining relationships: who and what has rights

   A. identifying the primary parties
   B. identifying the affected parties

II. Determining the legal issues, including the content of rights

   A. their formal, legal content
   B. their substantive content, including the reason why a party asserts rights and interests

III. Determining the content of responsibilities, including

   A. the substantive and contingent values and interests that are affected by the assertion of rights
   B. the values and interests that mitigate against rights

---

139. This empirical experience is most apparent in the development and application of equitable doctrines in the common law. *See generally* JILL E. MARTIN, MODERN EQUITY 3-45 (1993).

140. The methodology can be applied in practice in two different ways: descriptively, as the way a decision-maker applies it in practice, regardless of the normative virtue of that application; and by attributing idealized norms to the practice. As an example of the latter, it may be idealized that the legislature or courts would support imposing particular types of responsibilities upon the State in favor of Native Peoples. *See infra* Part IV.B.

IV. Determining the weight to be accorded to rights in light of

A. the values and interests at stake
B. the urgency and other means that are available to further these values and interests

V. Determining the weight to be accorded to responsibilities in light of

A. the values and interests at stake
B. the urgency and other means that are available to further those values and interests.

VI. Determining how the values and interests in IV and V are represented in the modified legal framework with a view to establishing

A. the adequacy of rights and duties
B. the adequacy of responsibilities

VII. Determining how rights, duties and responsibilities ought to be construed in law in light of

A. statute
B. judicial action, including statutory interpretation
C. administrative action
D. political convention or negotiated settlement
E. custom, usage and practice
F. moral suasion

This methodology is applied to rights, duties and responsibilities affecting Native land claims. Two issues arise for consideration: determining the nature of Native interests in a hypothetical land claim; and determining the responsibility owed in consequence of the exercise of property rights that intrude upon Native interests in that land.

As the schema above outlines, it is necessary first, to identify the parties to whom rights and responsibilities attach in consequence of the Native land claim. The primary parties to the hypothetical relationship are an oil exploration company and a Native band. The affected parties with rights, duties and responsibilities are, among others, the State, provincial and territorial governments, Native Persons who are not affiliated with Native bands[141] and Non-Native Persons.[142]

---

141. "Non-status Indians", for example, are not ordinarily affiliated with "Status Indians" and therefore enjoy a different legal status, notably in Canada. *See, e.g.*, William Pentley, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982: Part I—The Interpretive Prism of Section 35*, 22 U.B.C.L. REV. 21 (1988); *Part II—Section*

The assertion of rights and responsibilities ordinarily works as follows. An oil exploration company claims a property right to explore for oil on specified land and Native Peoples claim an historical interest in the preservation and use of that land. The oil company grounds its claim in a Western liberal conception of rights. Native Peoples frame their interest in that land on an historical title and also on a claim to self-determination.[143]

Second, it is necessary to determine the formal legal and substantive content of the rights claimed by the oil company. This includes establishing the nature of its legal title, and the formal conditions governing the exercise of its property rights.

Third, it is necessary to evaluate the responsibilities owed to Native Peoples on account of the oil company's right to explore for oil. This may include, as a formal claim, Native Peoples asserting an historical interest in land taken from them by conquest, occupation or cession.[144] It may also include, as a substantive claim, their interest in self-determination in furtherance of their particular ways of life.[145]

Fourth, it is necessary to determine the weight to be accorded to the property rights of the oil company in accordance

---

35: The Substantive Guarantee, 22 U.B.C.L. REV. 207 (1988); Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada's Native Indians*, *in* THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS 333, 333-46 (Menno Boldt & J. Anthony Long eds., 1985) [hereinafter QUEST FOR JUSTICE]; DIAMOND JENNESS, THE INDIANS OF CANADA (1963).

142. Such as mining and lumber corporations engaged in commercial and industrial activities on land otherwise occupied or used by Native Peoples. For illustrations of cooperative schemes among the State, Native Peoples and corporations, see *infra* Part IV.B.

143. On the *interest* of Native Peoples in self-determination, see Brian Slattery, *The Paradoxes of National Self-Determination*, 32 OSGOODE HALL L.J. 703 (1995); Khayyam Zev Paltiel, *Group Rights in the Canadian Constitution and Aboriginal Claims to Self-Determination*, *in* ROBERT J. JACKSON, CONTEMPORARY CANADIAN POLITICS: READINGS AND NOTES (1987); Evelyn Kallen, *Ethnicity and Collective Rights in Canada*, *in* ETHNIC CANADA 318, 318-36 (Leo Driedger ed., 1987); JOHN WEINSTEIN, ABORIGINAL SELF-DETERMINATION OF A LAND BASE (1986).

144. For example, formal recognition within a United Nations convention that a particular Native Nation is self-determining might partially ground the responsibility of the oil company in the exercise of its rights.

145. This substantive aspect of the right to self-determination is very controversial, especially because it gives rise to claims by Native Peoples for the redistribution of wealth from the Nation State to self-determining Native Nations. *See* Gudmundur Alfredsson, *The Right of Self-Determination and Indigenous Peoples*, *in* MODERN LAW OF SELF-DETERMINATION 41, 41-54 (Christian Tomuschat ed., 1993); S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993); Guyora Binder, *The Case for Self-Determination*, 29 STAN. J. INT'L L. 223 (1993); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L LAW 539 (1992); Buchanan, *supra* note 130.

with the values and interests that support them. The values at stake for that company are generally commercial: increased profit and economic prosperity. The urgency with which it asserts its commercial interests depends upon its economic situation and the likely impact of imposing responsibilities upon it.

Fifth, it is necessary to determine the weight to be accorded to responsibilities owed to Native Peoples in accordance with the values and interests that support their interests in the affected land. The values at stake for Native communities are cultural and implicitly, commercial: maintaining a traditional way of life and benefitting from economic development on that land. These values may be the subject of conflicting interests. Some Native Peoples may resist oil exploration as a threat to their traditional way of life. Others may accommodate it in return for a share of profits. Still others may favor it only when their traditional way of life is safeguarded. The urgency underlying these interests depends upon, among other issues, the actual and perceived threat of oil exploration to a traditional way of life and economic conditions among Native Peoples.

Sixth, it is necessary to determine how the values and interests of the oil company and Native Peoples can be accommodated within a modified legal framework. This requires evaluating the adequacy of their rights and duties and failing that, the adequacy of responsibilities owed by and to Native Peoples. This inquiry includes assessing, in sequence, whether Native Peoples have rights, whether the oil exploration company has a duty to respect those rights, and the extent to which the oil company's duties adequately accommodate the values and interests of Native Peoples. For example, Native Peoples may have rights in land earmarked for oil drilling and the company may have a duty to respect those rights. In the event that Native values and interests are adequately protected in law by such means, it may be unnecessary to continue with the analysis. In the event that those values and interests are *not* adequately protected, when Native Peoples lack legal title to land, it is necessary to determine the responsibilities owed by the oil company to Native Peoples arising from the exercise of its rights. This may include determining the extent to which it is responsible to consult with Native Peoples, assess the impact of oil exploration upon them, modify its practices in light of that impact and compensate them on account of that impact.[146]

146. On collaborative schemes involving government, Native Peoples and industry, see *infra* Part IV.B.

Seventh, it is necessary to determine how a modified conception of rights, duties and responsibilities should be constituted in legal practice. Rights and duties, set out in statute, contract and case law, may be modified to accommodate responsibilities within reconstituted legal relations. Such relations, in turn, may accord varying degrees of recognition to interests not protected by rights. For example, some form of recognition may be accorded to Native land claims. Determining the nature and extent of that recognition, in turn, will depend upon the social and legal context in which both function.[147]

B. *A Transformative Illustration*

There are a few examples of this transformative methodology being practiced.[148] One way in which to accommodate values that are detrimentally affected by the exercise of rights is to determine that those values themselves constitute rights, as distinct from interests. The rationale is that the values underlying the interests are sufficiently important and the countervailing exercise of rights sufficiently harmful to those values, to constitute those values as rights. One example in which Native interests have been reconstituted as rights arose in a recent negotiated settlement between the McLeod Lake Indian Band and the Federal Government of Canada.[149] There, a 372 member band and the Federal Government entered into negotiations that gave rise to a variety of benefits for the McLeod Lake Band under a treaty concluded in 1899, known as Treaty Eight.[150] Central to the argument of the Band was its historical *title* in the land and

147. This methodology requires developing ways in which to weigh interests. For example, Native interests that are detrimentally affected by rights may be weighted on the basis of evidence of their social worth, such as according to evidence of harm arising from exploring for oil on traditional tribal land. They may also be weighted according to normative values, such as the value of a traditional way of life. While different methods of evaluating interests are likely to arise in practice, Native interests are most likely to be weighted normatively. This is because the final determinant of a responsibility rests on the belief that it ought to have value. Just as one can claim that there ought to be a right, one can also claim that there ought to be a responsibility.

148. The examples below include: the agreement negotiated between the McLeod Lake Indian Band and the Federal Government of Canada and Co-Management Schemes in general. Both are discussed *infra* in this Part.

149. These cooperative measures between government and Native Peoples ordinarily include, among others, negotiation, joint ventures and co-management agreements. *See, e.g.*, PETER DOUGLAS ELIAS, DEVELOPMENT OF ABORIGINAL PEOPLE'S COMMUNITIES (1995).

150. On the history and significance of Treaty Eight, see DENNIS MADILL, TREATY RESEARCH REPORT: TREATY EIGHT (1986); Richard Daniel, *The Spirit and Terms of Treaty Eight, in* THE SPIRIT OF THE ALBERTA INDIAN TREATIES (Richard Price ed., 1979).

the extent to which that *title* had been eroded by State sponsored industry, notably by clear-cutting the forests. As a result, the McLeod Lake Band negotiation provided for co-management of some of the land and also, for a negotiated settlement in which each band member was to receive approximately 52 hectares of land out of 19,000 hectares.[151] The Band as a whole also received a $9 million settlement. In return, the Band assumed a responsibility to share in the cost of settlement with the Federal Government and the Province of British Columbia.[152] In that case the historical *title* of the Band was deemed to be so valuable and the effect of commercial forestry so harmful to its interests, that it was accorded rights beyond interests. Given that a co-management agreement was reached between both Federal Government and the McLeod Lake Band, both assumed responsibilities for the implementation of that agreement towards Native and Non-Native interest alike.[153]

Co-management schemes, such as the one above, readily illustrate the modified rights discourse developed in this article.[154] Each party to the co-management scheme, in asserting rights,

---

151. One hectare is equal to approximately 2.47 acres.

152. For a discussion about the McLeod Lake Indian Band Settlement, see TIMES COLONIST, May 11, 1995.

153. An alternative and less drastic solution, under our modified schema, would be to recognize the interest of the Band as sufficiently important to constrain the exercise of commercial forestry rights and further, to statutorily protect the exercise of traditional forestry practices on the affected land. This alternative, however, does not appropriately recognize the historical interest of the Band in the forestry and the importance of constituting its interest as a right, as distinct from an interest.

154. A co-management scheme is defined as:

> a multi-party administrative arrangement in which decisionmaking powers are shared between government agencies and local community decisionmaking bodies. It is a form of public sector, third party decisionmaking in which the state partially relinquishes it's control over public policy making, in exchange for a new contractual relationship between itself, an existing user group and an established or emerging third party.

See UNDERSTANDING CO-MANAGEMENT AS IT EXISTS IN THE DEPARTMENT OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT: THE FIRST STEP, PREPARED BY POLICY RESEARCH AND ANALYSIS DIRECTORATE 14 (Apr. 1993) *in* SEARCHING FOR COMMON GROUND: FIRST NATIONS AND THE MANAGEMENT OF NATURAL RESOURCES IN SASKATCHEWAN (Oct. 1995). *See also* UNDERSTANDING CO-MANAGEMENT, *supra*, Appendix VIII, for a summary of diand-funded co-management proposals in Saskatchewan (as of September 1995); SASKATCHEWAN ENVIRONMENT AND RESOURCE MANAGEMENT PUBLIC INVOLVEMENT WORKING GROUP, A POLICY FRAMEWORK; PUBLIC INVOLVEMENT IN THE MANAGEMENT OF SASKATCHEWAN'S ENVIRONMENT AND NATURAL RESOURCES (Jan. 1995) *in* UNDERSTANDING CO-MANAGEMENT, *supra*, Appendix X. *See also* Evelyn Pinkerton, *Attaining Better Fisheries Management Through Co-management: Prospects, Problems and Propositions*, *in* EVELYN PINKERTON, CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES: NEW DIRECTIONS FOR IMPROVED MANAGEMENT AND COMMUNITY DEVELOPMENT (1989).

assumes responsibilities not to disrupt the interests of others, or in the event of doing so, to co-manage the risk of loss or harm arising from that disruption. For example, a forestry or strip-mining company may assume a responsibility to co-manage its activities with a Native band residing in the area. This may involve the affected Native Band in management decisions, directed at both the avoidance and resolution of disputes.

Co-operative schemes, not limited to co-management, provide parties with the opportunity to reconstitute their rights in light of affected interests. They also enable the parties to do so in a manner that reflects their particular relations, as distinct from having values and interests imposed upon them. One benefit is that parties to such relations can agree upon the nature and limits of their respective rights and responsibilities in a principled manner. Another is their capacity to avoid the influence of patriarchy upon the parties, as when the State imposes rights, duties and responsibilities upon them. A further benefit is that the parties can rely upon a comprehensible method of determining the nature of their respective rights and responsibilities.

Seeking to arrive at co-managed solutions can also help to develop legal processes which incorporate the cultural values and interests of Native Peoples. For example, it may involve resort to a talking circle in order to gauge the intensity of belief in the detrimental impact of a forestry or strip-mining practice upon Native life and to arrive at an accommodation which offsets that impact. This may still give rise to a Western style method of negotiation, but that method may incorporate Native values in the settlement process.

Co-operative schemes may enrich the quality of liberal society by helping to manage the delicate balance between commercial enterprise and traditional ways of life. They may also help to protect the interests of sub-classes of persons, such as Native women, whose interests differ from those of Native men.[155] However politically motivated they may be, corporations, too, may acknowledge that, to exercise property rights in disregard of Native interests, can undermine the value of those rights. Illustrating this corporate view:

> . . . we [Syncrude] understand the role our Aboriginal neighbors play as stewards of the land. We too believe the land must remain safe, healthy and enjoyable for future generations. It's a belief inspired by uniting the

155. For a discussion on the capacity of this modified analysis to take account of the intersection of difference, including gender and racial difference, see *supra* Part III.B.

viewpoints of industry together with those of aboriginal society. It's a belief in a common direction that benefits everyone.[156]

The result may be a growing appreciation that Native interests are linked to the exercise of rights, not peripheral to them. The benefit may be a greater appreciation of the role that "aboriginal neighbors play as stewards of the land"[157] in the interest of society at large.

The success of co-operative schemes ultimately depends upon the seriousness with which the State, free enterprise corporations and Native Peoples assume responsibilities on account of the detrimental impact of rights upon the important interests of others.[158]

CONCLUSION

[R]espect for the autonomy of the members of minority cultures requires respect for their cultural structure, and that in turn may require special linguistic, educational and even political rights for minority cultures.[159]

---

156. *See* SYNCRUDE CANADA, LTD., A REPORT ON THE RELATIONSHIP BETWEEN SYNCRUDE CANADA LTD. AND THE ABORIGINAL PEOPLE OF NORTHEASTERN ALBERTA, *supra* note 128, at 28.

157. *Id.* at 28.

158. This does not deny the "responsibility" to explain one's culture to those *others* on the assumption that barriers to understanding *otherness* often are best resolved through the participation of those who adhere to another culture. However, this responsibility is a means by which the interests of cultural others may be elucidated upon in arriving at a cooperative result between those with rights and those with interests not recognized as rights. It is a not a responsibility that inheres within the right itself.

159. Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 ETHICS 883, 903 (1989). *See also* Will Kymlicka, *Liberalism and the Politicization of Ethnicity*, 4 CAN. J. L. & JURISPRUDENCE 239 (1991). Appreciation of the virtue of political and cultural self-determination among Native Peoples is readily apparent in the public reaction to the *Charlottetown Accord*, reached between the Federal and Provincial Governments of Canada on Aug. 28, 1992 in Charlottetown, Prince Edward Island, Canada's birthplace. One issue highlighted in that Accord was recognition of the right to Native self-government. Opinion polls taken at that time indicated that the majority of Canadians were in favor of acceding Native Canadians this right. Unfortunately, the Accord was a "package" referendum which failed. The results of the failed national referendum on that Accord, moving from the eastern to the western Provinces of Canada are: (1) Newfoundland: 62.9% yes, 36.5% no. (2) Prince Edward Island: 73.6% yes, 25.9% no. (3) Nova Scotia: 48.5% yes, 51.1% no. (4) New Brunswick: 61.3% yes, 38.0% no. (5) Quebec: 42.4% yes, 55.4% no. (6) Ontario: 49.9% yes, 49.6% no. (7) Manitoba: 37.9% yes, 61.7% no. (8) Saskatchewan: 44.5% yes, 55.1% no. (9) Alberta: 39.6% yes, 67.8% no. (10) British Columbia: 31.9% yes, 67.8% no. *See* Anthony Wilson Smith, et. al, *What Happens Next*, MACLEAN'S, Nov. 2, 1992, at 12-14.

Exposed to a real contest between deontological and teleological conceptions of liberty, the modern liberal response is to assert the *a priori* rights of the individual and impose duties upon all others to respect them. This approach fails to protect the interests of cultural communities that are not manifest as individual rights. The result is a liberty that is no different from the sum of the individual rights that constitute it.

A rights culture is more accommodating when it imposes responsibilities upon those who exercise rights not to undermine the cultural interests of others upon whom those rights impact. It is more reconciliatory when those rights are not only self-regarding, but also regarding of others. It is more vital when relating rights to responsibilities advances the interests of a plural society itself. These goals are satisfied within a revitalized rights regime in which cultural values and interests occupy central legal stage, in place of lasting subordination.[160]

Society is truly *liberal* when it takes cognizance of the impact of individual rights upon the traditions, customs and practices of cultural communities. That liberty is meaningful precisely because it requires that the individual contribute to the enrichment of a society of which she is an integral part. This incorporation of the individual into the whole, however, does not lead to her subordination: individual liberty remains salient to the expression and renewal of cultural values, spawning new values and invigorating distinct cultures. Liberty is also most just when it fosters the dynamic expression of values, including the interests of *both* cultural communities *and* individuals.

Arriving at an expansive liberty requires that rights take account of cultural *otherness* through responsibilities toward those others, not limited to Native Peoples. Such responsibilities are quite different from the duty to respect the rights of another. Responsibilities are owed because the interests of those who need to benefit from them are not sufficiently acknowledged in law. They are justified on grounds that, absent legal recogni-

---

160. *See, e.g.*, Michael McDonald, *Should Communities Have Rights? Reflections on Liberal Individualism*, 4 CAN. J. L. & JURISPRUDENCE 217 (1991); Michael Hartney, *Some Confusions Concerning Collective Rights*, 4 CAN. J. L. & JURISPRUDENCE 293 (1991). *See also* COMMISSION OF INQUIRY ON THE POSITION OF THE FRENCH LANGUAGE AND ON LANGUAGE RIGHTS IN QUEBEC (1972) [hereinafter "GENDRON COMMISSION REPORT"]. The Commission, appointed by the Government of Quebec, expressed its "faith in over-all community good-will and . . . in the readiness of a heretofore socially and economically privileged 'Anglo-Saxon' minority to co-operate with good heart in the community recognition of legitimate social and economic aspirations of the French-speaking majority of the Province." *Id.* at 85.

tion of them, the liberty of society as a whole is detrimentally affected.

This article's aim has been to promote solidarity between Western liberal and Native conceptions of liberty by conciliating among their different values and interests. Its guiding motivation has been to conceive of rights in light of responsibilities that take account of cultural distinctiveness. Its conviction has been that different peoples share this earth, each embodies its own cultural values, and the values of none ought summarily to trump the values of others. In not having an exclusive place on this earth, no culture has an irreversible right to everything it happens to find here. None, too, has the unrestricted right to determine the *common good* wholly as it deems right, at the expense of the interests of others. "[W]e have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfill its responsibility under the law of the Creator."[161]

However much Native Peoples can benefit from Western technology in advancing their interests, Western Liberals have much to learn from Native Peoples about preserving the earth in the exercise of liberal rights. After all, it is Native Peoples who have taught, for centuries, that the benefit of a safer and healthier world inures to the benefit of all who occupy it, not some who exploit it in disregard of the interest of all others.

161. Oren Lyons, *Traditional Native Philosophies Relating to Aboriginal Rights*, *in* QUEST FOR JUSTICE, *supra* note 141, at 19-20.