So far, I have attempted to present the liberal conception of community, and explore some of its contours. But I have not made any explicit distinction between two different kinds, or different aspects, of community. On the one hand, there is the political community, within which individuals exercise the rights and responsibilities entailed by the framework of liberal justice. People who reside within the same political community are fellow citizens. On the other hand, there is the cultural community, within which individuals form and revise their aims and ambitions. People within the same cultural community share a culture, a language and history which defines their cultural membership.

Now clearly these two may simply be aspects of the same community: those people who have the same citizenship may also have the same cultural membership. A political community may be coextensive with one cultural community, as is envisaged in the 'nation-state', and this seems to be the situation implicitly assumed in most contemporary political theory. But the two forms of community may not coincide: the political community may contain two or more groups of people who have different cultures, speaking different languages, developing different cultural traditions. This is the situation in multinational, or culturally plural, states, and these form the vast majority of the world's states (Connor 1972 pp. 319–21; van den Berghe 1981b p. 62).

How should liberals respond to a situation of cultural plurality? Clearly the answer depends on the role cultural membership plays in liberal theory. But this is not a simple matter, and immediately raises a number of questions. What does it mean for people to 'belong' to a cultural community—to what extent are individuals' interests tied to, or their very sense of identity
dependent on, a particular culture? And what follows from the fact that people belong to different cultures—do people have a legitimate interest in ensuring the continuation of their own culture, even if other cultures are available in the political community? If they do have such an interest, is it an interest which needs to be given independent recognition in a theory of justice?

These are all questions which arise most pressingly in a culturally plural state, but they go to the heart of the liberal conception of the relationship between self and community. And they give rise to an important political issue: the rights of minority cultures. In the remaining chapters, I use the question of minority rights, and in particular the rights of the aboriginal population in Canada and the United States, as a focal point for exploring these questions about the role of cultural membership in liberal theory.

Aboriginal rights are a part of political life in North America, and perhaps they are the most familiar example of minority rights to the Anglo-American world. Yet they are very much at odds with some of our common self-perceptions. While the United States is often viewed as a 'melting-pot,' without permanently distinct minority cultures, this is clearly not true of the aboriginal population. There is a system of reservations for the American Indian population, within which the members of particular Indian communities have been able (to a greater or lesser degree) to protect their culture. But their ability to do so has rested on having, as a community, unusual rights and powers. The reservations form special political jurisdictions over which Indian communities have certain guaranteed powers, and within which non-Indian Americans have restricted mobility, property, and voting rights.

This scheme for the protection of a minority culture is often treated as an exception, an issue which arises prior to, or outside the bounds of, liberal theory. But it is far from unique in contemporary liberal democracies. It is similar to legislation which establishes special political and social rights for aboriginal peoples in Canada, New Zealand, and Australia as well. And these are similar to many of the special measures of political and cultural autonomy for minorities in the multicultural countries of Western Europe, such as Belgium and Switzerland. And if we look beyond Western liberal democracies to many African, or Eastern-bloc, countries, the story is very similar. On all continents, in countries of all ideological stripes, we find cultural minorities that have a distinct legal and political status. In these countries, individuals are incorporated into the state, not 'universally' (i.e. so that each individual citizen stands in the same direct relationship to the state), but 'consociationally' (i.e. through membership in one or other of the cultural communities). Under consociational modes of incorporation, the nature of people's rights, and the opportunities for exercising them, tend to vary with the particular cultural community into which they are incorporated. And the justification for these measures focuses on their role in allowing minority cultures to develop their distinct cultural life, an ability insufficiently protected by 'universal' modes of incorporation.

How should liberals respond to these kinds of measures for minority cultures? They may seem, at first glance, to be inconsistent with liberal theories of justice, and that indeed is the common presumption. But, if so, that is a serious matter, for these measures have been important to the political legitimacy, and very stability, of many multicultural countries. Wars have been fought in order to gain or protect these measures. Removing them would have a profound effect on the political culture of these countries, and on the lives of the members of the minority cultures.

It's surprising, then, that liberal theorists haven't explicitly defended, or even discussed, this implication of their theories. This is surprising even if we interpret writers like Rawls and Dworkin as writing only for the American market. Most of the conclusions they reach appeal to, or are consistent with, the provisions of the American Constitution. Removing the special constitutional status of Indians, on the other hand, is directly in conflict with the current political consensus in the United States. Yet it is never mentioned by either Rawls or Dworkin.

Why is it commonly supposed that liberals must oppose special status for minority cultures? Liberal opposition is often explained in terms of an alleged conflict between individual and collective rights. This is exhibited in recent debates concerning the constitutional definition of the special status of the aboriginal peoples of Canada (i.e. Indian, Inuit, and Métis). This special
status was recognized, but left undefined, in Section 35 of the 1982 Constitution Act. Greater specification of this status was to be reached through a series of annual constitutional conferences between government and aboriginal leaders. There was a general consensus that aboriginal peoples should be self-governing, in contrast to the paternalistic legislation under which reservation life had been regulated in detail for decades. But aboriginal leaders said that the principle of aboriginal self-government must include the recognition of certain collective rights, rights which need to be weighed alongside and balanced against more traditional individual rights. For example, self-government would include the ability of aboriginal communities to restrict the mobility, property, and voting rights of non-aboriginal people. Many government officials, on the other hand, demanded that aboriginal self-government operate in a way that leaves intact the structure of individual rights guaranteed elsewhere in the constitution. So the initial agreement soon gave way to disagreement over the relationship between individual and collective rights. (These differences have, so far, proven too great to overcome, and the constitutional rights of aboriginal peoples in Canada remain undefined.)

The accepted wisdom is that liberals must oppose any proposals for self-government which would limit individual rights in the name of collective rights. I think that is a mistake, one that has caused serious harm to the aboriginal population of North America, and to the members of minority cultures in other liberal democracies. This chapter will explore some of the reasons why liberals have opposed collective rights for minority cultures.

But before I begin, a word about terminology. I have been describing a range of schemes through which multinational states have responded to the existence of distinct minority cultures, schemes which involve some variation in the standard liberal distribution of rights and resources so as to accommodate that distinct existence. Such measures have been described with different terms by different authors—‘minority rights’, ‘special status’, ‘collective rights’, ‘group rights’, ‘consociational incorporation’, ‘minority protection’. The problem with using these as labels for the sorts of minority culture schemes I’ve been discussing is that each term is over-inclusive, and often under-inclusive as well. The term ‘minority rights’ is often used to refer to non-cultural minorities, or to rights of non-discrimination, rather than to special measures for distinct minority cultures. And many of the measures which are commonly described as ‘group rights’ (e.g. for the handicapped), or ‘collective rights’ (e.g. for unions), or ‘consociationalism’ (e.g. incorporating people into the state through membership in occupational groups), have nothing to do with cultural membership. If they are justifiable within a liberal perspective, the justification will involve different issues.

Conversely, some of the measures which might be justified in the name of the protection of minority cultures don’t have all of the features which are said to define group, collective, or minority rights. For example, on many definitions of a ‘collective right’, a measure only counts as a collective right if it specifies that the community itself exercises certain powers. But some of the measures which define the special status of aboriginal peoples in Canada do not involve such collectively-exercised rights. Instead, they simply modify and differentially distribute the rights of individuals.

So terms like ‘collective rights’, as they are usually understood, do not quite capture the set of issues I am interested in. The policies I am interested in are defined not by any shared formal feature, but by a similar rationale. They are all said, by their defenders, to be appropriate responses to the fact that people belong to different cultural communities, a fact which is not given sufficient recognition or attention in universally incorporated liberal democracies. The measures claimed by minority cultures, as we shall see, typically involve both individual and collective rights, as those terms are commonly defined. So terms like ‘collective rights’ can obscure some of the issues involved in evaluating special measures for minority cultures.

Unfortunately, there seems no way to avoid these terms. I think that ‘special status’ and ‘minority rights’ are the least confusing terms, although I shall sometimes be employing the others as well. But I emphasize that these terms are simply labels for the sorts of measure just mentioned—they do not refer to some independently established theory of rights. The question I am discussing under the label ‘minority rights’ concerns the content and grounding of people’s claims concerning cultural
membership in culturally plural countries, and this question is both narrower and wider than standard debates over 'collective rights' or 'group rights'.

What explains the common liberal opposition to such minority rights? It’s not difficult to see why liberals have opposed them. Liberalism, as I’ve presented it, is characterized both by a certain kind of individualism—that is, individuals are viewed as the ultimate units of moral worth, as having moral standing as ends in themselves, as 'self-originating sources of valid claims' (Rawls 1980 p. 543); 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 (Dworkin 1983a p. 24; Rawls 1971 p. 511). Since individuals have ultimate moral status, and since each individual is to be respected as an equal by the government, liberals have demanded that each individual have equal rights and entitlements. Liberals have disagreed amongst themselves as to what these rights should be, because they have different views about what it is to treat people with equal concern and respect. But most would accept that these rights should include rights to mobility, to personal property, and to political participation in one's community. The new Canadian Charter of Rights and Freedoms embodies these liberal principles, guaranteeing such rights to every citizen, regardless of race or sex, ethnicity or language, etc. (Asch pp. 86–7; Schwartz ch. 1).

There seems to be no room within the moral ontology of liberalism for the idea of collective rights. The community, unlike the individual, is not a 'self-originating source of valid claims'. Once individuals have been treated as equals, with the respect and concern owed them as moral beings, there is no further obligation to treat the communities to which they belong as equals. The community has no moral existence or claims of its own. It is not that community is unimportant to the liberal, but simply that it is important for what it contributes to the lives of individuals, and so cannot ultimately conflict with the claims of individuals. Individual and collective rights cannot compete for the same moral space, in liberal theory, since the value of the collective derives from its contribution to the value of individual lives.

The constitutional embodiment of these liberal principles, in

Canada and elsewhere, has played an important role in many of liberalism's greatest achievements in fighting against unjust legislation. For example, in the Brown v. Board of Education case, ([1954] 347 US 483), the Fourteenth Amendment of the American Constitution, guaranteeing equal protection of the law to all its citizens, was used to strike down legislation that segregated blacks in the American South. The 'separate but equal' doctrine which had governed racial segregation in the United States for sixty years denied blacks the equal protection of the law. That case dealt solely with segregated school facilities, but it was a major impetus behind the removal of other segregationist legislation in the 1950s, the passage of the Civil Rights and Voting Rights Acts in the 1960s, and the development of mandatory busing, 'head start', and affirmative action programmes in the 1970s; which in turn were the catalyst for similar programmes to benefit other groups—Hispanics, women, the handicapped, etc. Indeed, 'its educative and moral impact in areas other than public education and, in fact, its whole thrust toward equality and opportunity for all men has been of immeasurable importance' (Kaplan p. 228). The 'thrust' of this movement was sufficiently powerful to shape non-discrimination and equal protection legislation in countries around the world, and it provided the model for various international covenants on human rights (especially the Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly in 1965). It also underlies the prominent philosophical accounts of liberal equality.

The history of these developments is one of the high points of Western liberalism in the twentieth century, for there is a powerful ideal of equality at work here in the political morality of the community—the idea that every citizen has a right to full and equal participation in the political, economic, and cultural life of the country, without regard to race, sex, religion, physical handicap—without regard to any of the classifications which have traditionally kept people separate and behind.

The logical conclusion of these liberal principles seems to be a 'colour-blind' constitution—the removal of all legislation differentiating people in terms of their race or ethnicity (except for temporary measures, like affirmative action, which are believed necessary to reach a colour-blind society). Liberal
equality requires the 'universal' mode of incorporating citizens into the state. And this indeed has often been the conclusion drawn by courts in Canada and the United States.

This movement exercised an enormous influence on Canadian Indian policy as well (Berger 1984 p. 94). The desirability of a colour-blind constitution was the explicit motivation behind the 1969 proposals for reforming the Indian Act in Canada. In 1968 Pierre Trudeau was elected Prime Minister of Canada on a platform of social justice that was clearly influenced by the American political movements. Canada didn’t have a policy of segregating blacks, but it did have something which looked very similar. As in the United States, the native Indian population was predominately living on segregated reserves, and was subject to a complex array of legislation which treated Indians and non-Indians differentially. While every Indian had the right to live on the land of her band, there were restrictions on her ability to use the land, or dispose of her estate as she saw fit, and there was a total prohibition on any alienation of the land.

The reservation system also placed restrictions on the mobility, residence, and voting rights of non-Indians in the Indian territory; and in the case of voting rights, the restriction remained even when the non-Indian married into the Indian community. There were, in other words, two kinds of Canadian citizenship, Indian and non-Indian, with different rights and duties, differential access to public services, and different opportunities for participating in the various institutions of Canadian government.

Dismantling this system was one of the top priorities of Trudeau’s ‘Just Society’ policy, and early in 1969 the government released a White Paper on Indian Policy which recommended an end to the special constitutional status of Indians (DIAND 1969). The government proposed that the reservation system, which had protected Indian communities from assimilation, be dismantled. Indians would not, of course, be compelled to disperse and assimilate. They would be free to choose to associate with one another, and co-ordinate the way they used their resources in the market, so as to preserve their way of life. Freedom of association is one of the individual rights to be universally guaranteed in a colour-blind constitution. But they would receive no legal or constitutional help in their efforts.

Legislation discriminating against non-Indians in terms of property-rights, mobility rights, or political rights would not be allowed.

From its very conception to the choice of language in the final draft, the policy reflected the powerful influence of the ideal of racial equality which was developing in the United States and the United Nations. Paraphrasing UN human rights instruments, the authors said that the policy rested ‘upon the fundamental right of Indian people to full and equal participation in the cultural, social, economic and political life of Canada’, and this required that the legislative and constitutional bases of discrimination be removed (DIAND 1969 pp. 201–2). Echoing the Brown decision, the policy proposed that Indians no longer receive separate services from separate agencies, because ‘separate but equal services do not provide truly equal treatment’ (DIAND 1969 p. 204). Echoing Justice Harlan’s famous dictum that the American Constitution should be colour-blind, the Canadian proposal said that ‘The ultimate aim of removing the specific references to Indians from the constitution may take some time, but it is a goal to be kept constantly in view’ (DIAND 1969 p. 202). Perhaps it was the weight of all this normative authority that gave the authors such a sense of righteousness. It is, they said, ‘self-evident’ that the constitution should be colour-blind, an ‘undeniable part of equality’ that Indians should have equal access to common services; ‘There can be no argument . . . It is right’ (DIAND 1969 pp. 202–3).

It is worth emphasizing that the issue was not about temporary measures to help Indians overcome their disadvantaged position in the broader society. While not all liberals are prepared to allow even temporary measures which differentiate on the basis of race or ethnicity, the government proposal followed the more common view that measures such as affirmative action are acceptable. But they are acceptable precisely because they are viewed as appropriate or necessary means to the pursuit of the ideal of a colour-blind constitution. Affirmative action of this sort appeals to the values embodied in that ideal, not to competing values. The issue posed by the special status of Canada’s Indians, therefore, was not that of affirmative action, but ‘whether the granting of permanent political rights to a special class of citizens (rather than special rights on a temporary basis) is possible within an ideology that maintains the principle
of equality of consideration’ (Asch p. 76). And for the liberal architects of the 1969 proposal, the answer was that liberal equality was incompatible with the permanent assigning of collective rights to a minority culture.

The proposal was immediately applauded by the media, even by opposition parties, as a triumph for liberal justice. Indians, on the other hand, were furious, and after six months of bitter and occasionally violent Indian protest, the policy was withdrawn. In the words of one commentator, the policy was a response ‘to white liberal demands from the public, not to Indian demands’ (Weaver 1981 p. 196). But liberals have only reluctantly retreated from that policy, despite the almost unanimous opposition it received from the Indians themselves. Liberals fear that any deviation from the strict principle of equal individual rights would be the first step down the road to apartheid, to a system where some individuals are viewed as first-class citizens and others only second-class, in virtue of their race or ethnic affiliation. These fears are strengthened when liberals see white South African leaders invoke minority rights in defence of their system of apartheid, and compare their system of tribal homelands to our system of Indian reservations and homelands (International Herald Tribune p. 2; Toronto Star p. B3). If we allow Indians to discriminate against non-Indians in the name of their collective rights, how can we criticize white South Africans for discriminating against blacks in the name of their collective rights?

So liberals have viewed the idea of collective rights for minority cultures as both theoretically incoherent and practically dangerous. Many commentators have argued that this liberal antipathy is the biggest stumbling-block to a satisfactory settlement of aboriginal claims in Canada (Weaver 1981 pp. 55–6, 196; 1985 pp. 141–2; Ponting and Gibbins 1980 pp. 327–31; Asch pp. 75–88, 100–4; Dacks pp. 63–79), and in the United States (Svensson pp. 430–3; Van Dyke 1982 pp. 28–30; Morgan p. 41; Barsh and Henderson 1980 pp. 241–8). And Schwartz’s account of the recent constitutional conferences in Canada on aboriginal rights bears out the continued relevance of these liberal principles amongst government and court officials (Schwartz).

As I mentioned before, I believe that this is a mistaken understanding of the requirements of liberal equality, and my attempt to give a positive defence of minority rights will take up the next two chapters. But the first task is to take a closer look at the analogy between the segregation of blacks and aboriginal self-government. This analogy explains much of the liberal commitment to the idea of a colour-blind constitution. Breaking down the analogy won’t remove that commitment, but I hope it will prepare the way for the more constructive arguments of the next two chapters.

The crucial difference between blacks and the aboriginal peoples of North America is, of course, that the latter value their separation from the mainstream life and culture of North America. Separation is not always perceived as a ‘badge of inferiority’. Indeed, it is sometimes forgotten that the American Supreme Court recognized this in the Brown desegregation case. The Court did not reject the ‘separate but equal’ doctrine on any universal grounds. The Court ruled that, in the particular circumstances of contemporary American white–black relations, segregation was perceived as a ‘badge of inferiority’. The lower motivation of black children in their segregated schools was a crucial factor in their decision. But in Canada, segregation has always been viewed as a defence of a highly valued cultural heritage. It is forced integration that is perceived as a badge of inferiority by Indians, damaging their motivation. While there are no special problems about motivation on segregated reserve schools, the drop-out rate for Indians in integrated high schools was over 90 per cent, and in most areas was 100 per cent for post-secondary education (Cardinal 1977 p. 194; Gross p. 238).

Michael Gross distinguishes the cases of blacks and Indians this way:

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 law. That is what the Senate Subcommittee on Indian Education 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. (Gross p. 244)

Gross argues that the ‘integration of Indian children in white-dominated schools had the same negative educational and
emotional effects which segregation was held to have on blacks in *Brown* (Gross p. 245). Therefore, the ‘underlying principle’ which struck down legislated segregation of blacks (i.e. that racial classifications harmful to a racial minority are unconstitutional) would also strike down legislated integration of Indians (Gross p. 248). Assimilation for the Indians, like segregation for the blacks, is a badge of inferiority which, in the words of the Senate Subcommittee, fails ‘to recognize the importance and validity of the Indian community’ and which results in a ‘dismal record’ of ‘negative self-image [and] low achievement’ as the ‘classroom and the school [become] a kind of battleground where the Indian child attempts to protect his integrity and identity as an individual by defeating the purposes of the school’ (Gross p. 242). Similar situations arise when Indians have to assimilate later in life, e.g. at work.

But to say that segregation is preferred by the Indians is not to say it is, or even could be, the natural result of the interplay of preferences in the market. On the contrary, the viability of Indian communities depends on coercively restricting the mobility, residence, and political rights of both Indians and non-Indians. It is this which raises the need for the minority rights that are decried by many liberals, rights that go beyond non-discrimination and affirmative action.

These special needs are met, in Canada, by two different forms of aboriginal community arrangements (Asch ch. 7). In the reservations of southern Canada, where the population is high and land scarce, the stability of Indian communities is made possible by denying non-Indians the right to purchase or reside on Indian lands (unless given special permission). In the north, however, they are creating political arrangements for the Indian and Inuit population which would have none of these restrictions. Under these arrangements, non-aboriginal people will be free to take jobs, buy land, and reside as long as they want; the inhospitability of the environment ensures that aboriginal people are not likely to be outnumbered by non-aboriginal permanent residents. However, northern Canada is rich in resources, and development projects will often bring in huge influxes of temporary resident workers. While very few, if any, of these workers are likely to remain in the north for more than seven years, so that the aboriginal people will continue to constitute the majority of permanent residents, at any one time non-aboriginal people may well form the majority. If non-aboriginal transient workers were allowed to vote, they would probably decide to use public money to provide amenities for themselves—movie theatres, dish antennas for television reception, even a Las Vegas-styled resort. Since many aboriginal people in the north are dependent on short-term work projects due to the seasonal nature of most economic activity in the area, such a policy could force them to move into localities dominated by whites, and to work and live in another culture, in a different language. Transient residents might also use their voting power to demand that public services and education be provided in their own language, at the expense of the provision of services and education in aboriginal languages.

To guard against this, aboriginal leaders have proposed a three-to-ten-year residency requirement before one becomes eligible to vote for, or hold, public office, and a guaranteed 30 per cent aboriginal representation in the regional government, with veto power over legislation affecting crucial aboriginal interests. If this scheme proved unable to protect aboriginal communities, they would have the power to impose even greater restrictions, most likely on immigration, and thereby move closer to the southern model, which avoids the necessity of restricting voting rights by simply denying non-aboriginal people a chance to gain residence. In other words, there is a continuum of possibilities, involving greater or lesser guarantees of power for aboriginal people, and greater or lesser restrictions on the mobility and political rights of non-aboriginal people (see Bartlett, and Lyon pp. 48–65, for some of the variants). Aboriginal groups have demanded the restrictions they believe to be necessary to protect their communities.

Historically, the evidence is that when the land on which aboriginal communities are based became desirable for white settlement and development, the only thing which prevented the undesired disintegration of the community was legally entrenched non-alienability of land. Indeed the most common way of breaking open stubbornly held Indian land for white settlement was to force the Indians to take individual title to alienable land, making the pressure on some individuals to sell almost unbearable, partly because Indians were financially
deprived (and hence in need of money to meet the basic needs of the family), and also because they were culturally ill-equipped to understand the consequences of having (or selling) title to land (Sanders 1983a pp. 4–12; Kronowitz et al. pp. 530–1; MacMeekin p. 1239). Such measures to endow individual title are usually justified as giving Indians greater choice. The White Paper, for example, proclaimed that ‘full and true equality calls for Indian control and ownership of reserve land…[this] carries with it the free choice of use, of retention, or of disposition’ (DIAND 1969 p. 209). The Minister responsible for the policy said he was only trying to give Indians the same freedom to manage their own affairs as other Canadians (Bowles et al. p. 215). But Indians have as much free choice over the use of their land as the average Canadian has over her public-housing apartment. Indeed rather more, since the Indian bands are like cooperatively-managed apartment buildings. Moreover, unlike renters, Indians get a per capita share of the band’s funds if they choose to leave the reservation. The reservation system can thus combine considerable freedom of individual choice over the use of one’s resources with protection of the community from the disintegrating effects of the collective action problem that would result were the costs of maintaining the community borne individually (see Chapter 9). Whatever the motivation for the endowing of individual title, the effect has been to sacrifice the Indian community in order to protect the mobility rights of individual non-Indians.

But the reservation system causes a problem in the case of mixed marriages. Every member of an Indian band has the right to reside on the band reserve—not the right to buy land on the reserve, since that land can’t be bought or sold, but the right to be allocated a plot of land to live on. If the band population grew at a natural rate from purely intra-band marriages, there wouldn’t be a problem. But when there are a substantial number of marriages to people from outside the band, if the majority of such mixed couples prefer to live on the reserve (as they do), then there will soon be a problem of overcrowding. Unless there is the possibility of expanding the land-base, some mechanism is needed to control the membership.

In the United States, they use a blood criterion. Only those with a certain proportion of Indian blood can be full members of the band, so non-Indian spouses never acquire membership, nor do the children if they have less than the required proportion. Non-members never acquire the right to participate in band government, and should the Indian spouse die, they have no right to residence and so can be evicted; while non-member children must leave the reserve at the age of eighteen. In Canada, the obvious drawbacks of the blood criterion are replaced by a kinship system: everyone in a nuclear family has the same status. If one person in the family has membership, they all do, and so all have full non-contingent rights of residence and participation in band government. Clearly, however, not every mixed family can have membership—that would create the over-population. If some non-Indians gain membership for themselves and their children by marrying an Indian, there must also be some Indians who give up membership for themselves and their children by marrying a non-Indian. In Canada, until recently it has been Indian women who lose status upon entering into a mixed marriage.

There is an obvious trade-off here—sexual equality for family integrity. There are other models for regulating membership (Sanders 1972 pp. 83–7; Manyfingers) some of which are more equitable. But all options have this in common: if the land-base is fixed and over-population threatens, some Indians will not legally be able to marry a non-Indian and have him or her move in and become a full and equal member of the community. Again, there is a continuum of possibilities involved: some proposals allow non-Indian spouses to vote but not to hold office, others allow non-member spouses and children to remain after the death of the Indian spouse but not to vote, etc. (DIAND 1982). In all cases there are restrictions on the marriage and voting rights of both Indians and non-Indians: these are viewed as the concomitants of the reservation system needed to protect Indian cultural communities.

There are also controversial measures concerning language rights. The Charter of Rights and Freedoms guarantees to all Canadian citizens the right to a public education in either of the two official languages (English or French), and to deal with all levels of government in either of these languages, where numbers permit. Aboriginal leaders have sought exemption from this. Allowing new residents in the community to receive education
and public services in English would weaken the long-term viability of the community. Not only will new residents not have to fully integrate into the minority culture, the establishment of an anglophone infrastructure will attract new anglophone arrivals who may have no interest in even partial integration into the aboriginal community. This is a concern shared by many French-Canadians in Quebec, who want to limit access to English-language schools for people moving into the province. On the other hand, parents will demand their right to a publicly funded education in English so that their children will not be at a disadvantage if they choose to enter the historically dominant and privileged social, political, and economic life in English Canada.

This is just a partial survey of some of the aspects of the aboriginal rights question in Canada. The arrangements are not uniform across the country, and they are all in a state of flux as a result of the unfinished constitutional negotiations. But we can at least get a sense of the basic issues raised for a liberal theory of justice. The common element in all these measures is that some of the recognized rights and liberties of liberal citizenship are limited, and unequally distributed, in order to preserve a minority culture. And we could tell similar stories about the goals and effects of minority rights schemes in other countries, notwithstanding their many variations.

As we’ve seen, many liberals treat these measures as obviously unjust, and as simple disguises for the perpetuation of ethnic or racial inequality. But once we recognize the differences between these measures and the segregation of blacks, judgements of fairness become more complex, and our intuitions concerning individual and collective rights may be divided.

What underlies this conflict of intuitions? At first glance, someone might suppose that the conflict is between ‘respect for the individual’ and ‘respect for the group’. On this view, to endorse minority rights at the expense of individual rights would be to value the group over the individual. But there is another, and I believe more accurate, view of our intuitions. On this view, both sides of the dilemma concern respect for the individual. The problem is that there are two kinds of respect for individuals at stake here, both of which have intuitive force.

If we respect Indians as Indians, that is to say, as members of a distinct cultural community, then we must recognize the importance to them of their cultural heritage, and we must recognize the legitimacy of claims made by them for the protection of that culture. These claims deserve attention, even if they conflict with some of the requirements of the Charter of Rights. It may not seem right, for example, that aboriginal homelands in the north must be scrapped just because they require a few migrant workers to be temporarily disenfranchised at the local level. It doesn’t seem fair for the Indian and Inuit population to be deprived of their cultural community just because a few whites wish to exercise their mobility rights fully throughout the country. If aboriginal peoples can preserve their cultural life by extending residency requirements for non-aboriginal people, or restricting the alienability of the land-base, doesn’t that seem a fair and reasonable request? To give every Canadian equal citizenship rights without regard to race or ethnicity, given the vulnerability of aboriginal communities to the decisions of the non-aboriginal majority, does not seem to treat Indians and Inuit with equal respect. For it ignores a potentially devastating problem faced by aboriginal people, but not by English-Canadians—the loss of cultural membership. To insist that this problem be recognized and fairly dealt with hardly sounds like an insistence on racial or ethnic privilege.

Yet if we respect people as Canadians, that is to say as citizens of the common political community, then we must recognize the importance of being able to claim the rights of equal citizenship. Limitations on, and unequal distribution of, individual rights clearly impose burdens. One can readily understand the feeling of discrimination that occurs when an Indian woman is told she can’t get a publicly funded education in English for her child (or when a white man is told that he can’t vote in the community he resides in and contributes to).

There is, I think, a genuine conflict of intuitions here, and it is a conflict between two different considerations involved in showing respect for persons. People are owed respect as citizens and as members of cultural communities. In many situations, the two are perfectly compatible, and in fact may coincide. But in culturally plural societies, differential citizenship rights may be needed to protect a cultural community from unwanted
disintegration. If so, then the demands of citizenship and cultural membership pull in different directions. Both matter, and neither seems reducible to the other. (Indeed, when Charles Taylor wanted to illustrate the ultimate plurality of moral value, he chose precisely this conflict between equality for Indians qua members of a cultural community and equality for Indians qua citizens of the political community: C. Taylor 1988 p. 25.)

The special status of aboriginal people can be viewed as an acceptable, if imperfect, resolution of this conflict. Such conflicts are, in fact, endemic to the day-to-day politics of culturally plural societies, and various schemes of minority rights can be understood and evaluated in this light.

Liberalism, as commonly interpreted, doesn't recognize the legitimacy of one half of this dilemma. It gives no independent weight to our cultural membership, and hence demands equal rights of citizenship, regardless of the consequences for the existence of minority cultures. As Taylor has said: 'The modern notion of equality will suffer no differences in the field of opportunity which individuals have before them. Before they choose, individuals must be interchangeable; or alternatively put, any differences must be chosen' (C. Taylor 1979 p. 132). This conception of equality gives no recognition to individuals' cultural membership, and if it operates in a culturally plural country, then it tends to produce a single culture for the whole of the political community, and the undesired assimilation of distinct minority cultural communities. The continued existence of such communities may require restrictions on choice and differentials in opportunity. If liberal equality requires equal citizenship rights, and equal access to a common 'field of opportunity', then some minority cultures are endangered. And this, I believe, does not respond to our intuitions about the importance of our cultural membership.

If we are troubled by this failure of liberal theories to do justice to our intuitions about the importance of cultural membership, two responses are possible. One response is to say that liberals have misinterpreted the role that cultural membership can or must play in their own theory. On this view, the correct interpretation of liberalism does not require universal incorporation or a colour-blind constitution, and liberals should accept the possible legitimacy of minority rights. The other response is to accept that liberalism accords no role to cultural membership, and precludes minority rights, but then say that liberalism is incomplete, or perhaps entirely inapplicable to the case of minority rights at stake. On this view, we should seek some other moral theory or set of values which will recognize the importance of cultural membership and the legitimacy of minority rights.

Supporters of aboriginal self-government in Canada have tended to adopt this second approach, defending aboriginal rights against liberalism. Liberalism is said to be incomplete or inapplicable for a number of reasons: some claim that the aboriginal population has special rights because their ancestors were here first (Cardinal 1969; Dene Nation; Robinson and Quinney); others claim that Indians and Inuit are properly viewed as 'peoples' under international law, and so have the right of self-determination (Sanders 1983a pp. 21–5; Robinson and Quinney pp. 141–2; L. C. Green p. 346); some claim that aboriginal peoples have a different value system, emphasizing the community rather than the individual, and hence group rights rather than individual rights (Ponting and Gibbins 1986 p. 216; Little Bear, Boldt, and Long p. xvi; Svensson pp. 431–2); yet others suggest that aboriginal communities themselves have certain rights, because groups as well as individuals have legitimate moral claims (Boldt and Long 1983b pp. 343–5). These are all common ways of defending aboriginal rights against liberalism, by locating our intuitions in favour of them in some non-liberal theory of rights or values.

However, I think that the first response—the attempt to reconcile minority rights and liberal equality—is worth considering, whether one's first commitment is to liberalism, or to minority rights. For proponents of minority rights, the second approach suffers from two weaknesses. Firstly, the various non-liberal arguments are quite controversial, legally and morally, although I shall not be delving into all the issues raised by them. Secondly, they are not very strong politically, for they do not confront liberal fears about minority rights. They don't explain why minority rights aren't the first step on the road to apartheid, or what serves to prevent massive violations of individual rights in the name of the group. Opponents of liberalism may find them convincing, but they may not be the
ones who need convincing on this point. For better or worse, it is predominantly non-aboriginal judges and politicians who have the ultimate power to protect and enforce aboriginal rights, and so it is important to find a justification of them that such people can recognize and understand. Aboriginal people have their own understanding of self-government, drawn from their own experience, and that is important. But it is also important, politically, to know how non-aboriginal Canadians—Supreme Court Justices, for example—will understand aboriginal rights and relate them to their own experiences and traditions. And, as we've seen, on the standard interpretation of liberalism, aboriginal rights are viewed as matters of discrimination and/or privilege, not of equality. They will always, therefore, be viewed with the kind of suspicion that led liberals like Trudeau to advocate their abolition. Aboriginal rights, at least in their robust form, will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice.

For liberals, the first approach offers two possible benefits. Firstly, it represents an opportunity to examine the question of cultural membership, and thereby flesh out a theory of individuality and community. The failure of liberals to appeal to our basic understanding of the importance of cultural membership has been cited by some communitarians in explaining their opposition to liberal individualism (as we'll see in Chapter 12). Secondly, there are important political reasons for liberals to find a defence of minority rights. In a political or legal conflict between minority rights and liberal equality, liberalism may lose out. For example, while the Canadian Supreme Court has doubted whether a liberal justification can be found for the special status of aboriginal communities, they have also been wary of dismantling the Indian Act, which has been a fundamental part of Canadian law. And this wariness has influenced their interpretation of the right to equality before the law.

Indeed, the most important historical cases for the right to equality before the law in Canada have been Indian Act cases (Polyviou p. 148; Morton pp. 73–7). Prior to the 1982 constitutional amendments, the Canadian Supreme Court waved on whether that right was purely formal (i.e. guaranteeing impartial application of the law), or whether it gave a substantive guarantee against discrimination in the law itself. It was first interpreted in a substantive way in a 1970 case concerning liquor regulations that differentiated between Indian and non-Indian offenders (Regina v. Drybones [1970] SCR 282). The law was struck down on the grounds that racial distinctions violated equality (citing Brown v. Board of Education). Some people viewed that judgement as beginning a new age in judicial activism, which would lead to the striking down of unjust and discriminatory laws (Morton p. 73).

But when another part of the Indian Act was challenged, the Court realized that the entire structure of the Indian Act, with its protected reservations and special political status for Indians, was threatened by this colour-blind interpretation of the equality guarantee. So the Court essentially reversed its position, and retreated from a substantive interpretation in order to protect Indian special status (Attorney-General of Canada v. Lavell [1974] SCR 1349). As Morton says,

The Court's inability to reconcile the special status conferred through the Indian Act and authorized by the B.N.A. Act with a substantive definition of 'equality before the law' effectively undermined the potential for any American-style Brown v. Board equality jurisprudence under the 1960 Bill of Rights. Unwilling to adopt a definition of 'equality before the law' that would deny the validity of the Indian Act, the Court quickly abandoned the broad, substantive notion of 'equality before the law' articulated in Drybones, and returned to the procedural definition. (Morton p. 74)

This shift affected the judicial enforcement of the rights of all Canadians. Thus, a few years later, legislation which clearly discriminated against women was ruled not to violate the equality provision (Attorney-General of Canada v. Bliss [1979] 1 SCR 183). Faced with a perceived choice between protecting Canada's tradition of minority rights and promoting liberal equality, the Court protected minority rights.

The equality section (Section 15) of the 1982 Constitution Act was rewritten to clearly provide substantive guarantees against discrimination. But the new section still needs to be interpreted, and this will still involve scrutiny of various aspects of Indian
special status. If stronger interpretations of Section 15 are incompatible with the special status of aboriginal peoples and French-Canadians, then the section may be interpreted in a seriously weakened form. The fight for judicial protection against sexual and religious discrimination is, therefore, intimately linked to the question of minority rights.

So there are both political and philosophical reasons for trying to defend aboriginal rights within liberalism, not against liberalism. The current liberal hostility to minority rights is, I shall argue in the next two chapters, misguided. However, it is not the result of any simple or obvious mistake, and identifying the problem requires looking deep into the liberal view of the self and community. And even if we recognize the problem, there is no simple or obvious way to correct it within a liberal theory of justice. The issue for liberal theory is not as simple as Trudeau once suggested, in response to a question about his reasons for advancing and then withdrawing the 1969 proposal:

We had perhaps the prejudices of small 'I' liberals and white men at that who thought that equality meant the same law for everybody, and that's why as a result of this we said 'well let's abolish the Indian Act and make Indians citizens of Canada like everyone else. And let's let Indians dispose of their lands just like every other Canadian. And let's make sure that Indians can get their rights, education, health and so on, from the governments like every other Canadian'. But we learned in the process we were a bit too abstract, we were not perhaps pragmatic enough or understanding enough. (Quoted in Weaver 1981 p. 185.)

I shall argue that the problem isn't just one of pragmatism or prejudice. The idea of collective rights for minority cultures doesn't just conflict with the pre-reflective habits or prejudices of liberals. It seems in direct conflict with some of the most fundamental liberal principles, even in their most theoretically sophisticated formulations. And so the search for a liberal defence of minority rights will take us back into the heart of liberal theory. Hence the next few chapters will involve a rethinking, from a new perspective, of the liberal arguments which I defended in the first half of the book. The result will not, I hope, contradict those arguments, but will perhaps place them in a new light, and connect them to a broader and more adequate theory of the relationship between the individual and the community.

Notes

1. One terminological point concerning the specific example of minority rights or special status that I am using: the issue of minority rights is raised in many countries by the presence of aboriginal peoples who have been conquered, colonized, or simply overrun by settlers from other countries and continents. The rights of Canada's aboriginal peoples are, therefore, representative of a major class of minority rights questions. However, the term 'aboriginal rights' is sometimes used in a more restricted sense, to refer solely to those rights which flow from original occupancy of the land. Hence some writers distinguish between the 'aboriginal rights' of aboriginal peoples (e.g. land claims) and their 'national rights', 'minority rights', or 'human rights' (e.g. to cultural freedom, self-determination, language rights, etc.)—e.g. Barsh and Henderson 1982 p. 76. But this restricted usage is uncommon, and I shall be using 'aboriginal rights' to refer to the rights of aboriginal peoples, not simply to those rights which aboriginal people have because they are the original occupants of the land.

One of the most important aspects of minority rights claims concerns the ability of minority cultures to restrict the mobility or voting rights of non-members. In the context of Canada's aboriginal peoples, this is invariably phrased as a matter of whether aboriginal communities can restrict the rights of 'whites'. The historical basis for this usage is obvious, and it has become an unquestioned part of the political vocabulary of the debate over aboriginal rights. But it is important to note that 'whites' is not being used as a racial term—many people who are racially white have become members of aboriginal communities (by marriage or adoption), and Canadians who are not members of aboriginal communities have diverse racial ancestry (including aboriginal ancestry). The terms 'aboriginal' and 'white' refer to cultural membership, not race. 'White' has simply become a general label for those Canadians who are not members of aboriginal communities. Hence many of the aboriginal people who demand restrictions on the mobility of 'whites' have some white ancestry, and many of the people whose mobility is being restricted have some aboriginal (or black, or Asian, etc.) ancestry.

2. Similarly, the principles underlying the Supreme Court decisions which struck down legislation redrawing political boundaries so
as to exclude blacks from political subdivisions (e.g. *Gomillion v. Lightfoot* [1960] 364 US 339) would seem to argue against legislation to include Indians in political subdivisions which are unrepresentative and therefore harmful to their interests (Gross p. 250).

3. This is precisely what happened to the Métis in Manitoba, and to the Hispanic population in the American Southwest, during the second half of the nineteenth century. These groups formed a majority in their respective regions, and had rights to public services and education in their own languages. But once their regions became incorporated into the larger Canadian and American federations, these groups became outnumbered by anglophone settlers, who quickly proceeded to take away those rights (see J. Weinstein pp. 46–7 on the Métis; Glazer 1975 p. 25 and 1983 p. 277 on the Spanish-speaking population of the Southwest). Aboriginal self-government proposals have been designed with these dangers and historical precedents in mind (J. Weinstein p. 47; Purich p. 229).

4. I shall discuss the weakness of the last two arguments (about the different value systems of aboriginal peoples, and the moral standing of communities) in Ch. 12. I am unsure what to say about the first two, partly because they in fact have many variants, some of which contradict others. But I should say something about them, since they are important not only in Canada, but in the emerging international norms concerning aboriginal rights.

The fact of original occupancy is invoked to defend at least two different aboriginal claims. The first is 'aboriginal title' (i.e. ownership or usufructuary rights over land and natural resources), the second is sovereignty. I'll discuss sovereignty together with the self-determination argument, since they raise similar questions of international law.

The 'aboriginal title' claim, by itself, does not justify permanent special political status, unless it is further claimed that 'the ownership of the land is the fundamental concept on which other rights, including the right to self-government, are based' (Sanders 1983b pp. 328–9). This is in fact the argument amongst some aboriginal groups whose land-base is secure and legally recognized. However, the emphasis on aboriginal title raises a number of questions. Firstly, it is far from clear why it matters who first acquired a piece of land, unless one is inclined to a Nozick-like theory of justice (Lyons; McDonald 1976). Aboriginal communities were, of course, unjustly deprived of much of their land when whites settled, and those injustices have lingering effects which warrant some form of compensation. But that is not yet a reason why the ultimate goal shouldn't be some form of equality of resources for all the citizens of the country, rather than any permanent special status. Secondly, if self-government is supposed to flow from aboriginal title, then there may not be any grounds to demand that the federal government fund aboriginal self-government (Lyon pp. 13–14). Finally, it won't justify either land or self-government for some aboriginal groups, who for various (and often historically arbitrary) reasons lack recognizable title (Robinson and Quinney pp. 51, 86; Opekokew).

The sovereignty claim says that because aboriginal nations were here first, and have not officially relinquished their sovereignty, therefore, as a matter of international law, domestic Canadian law does not apply to aboriginal communities. Any relationship between the federal government and the aboriginal communities must be concluded by what are essentially state-to-state treaties. On the self-determination view, aboriginal peoples are entitled to the same right of self-determination that previously colonized peoples claim under Article 1 of the International Covenant on Civil and Political Rights. The two views often go hand in hand (e.g. Robinson and Quinney), but they are distinct, since aboriginal communities could have sovereignty even if they are not 'peoples' under international law, or they could be 'peoples' even if they do not have sovereignty under international law.

However, neither claim has heretofore been explicitly recognized in international law. Aboriginal rights have instead been viewed as coming under Article 27 of the Covenant, dealing with minority rights (see e.g. United Nations 1983 pp. 94–104), which is roughly how I have been treating them. Most aboriginal leaders have been concerned to change that pattern (see e.g. Sanders 1983b pp. 21–5; Barsh 1983 pp. 91–5, 1986 pp. 376–7; Kronowitz et al. pp. 598–600; L. C. Green p. 346; Robinson and Quinney pp. 141–2), although some people have thought Article 27 sufficient (e.g. Svensson p. 438). Aboriginal advocates rightly point out that international rulings have been quite arbitrary in limiting the recognition of sovereignty or peoplehood to overseas colonies (the 'Blue Water Thesis'), while denying it to internal groups who share many of the same historical and social features (e.g. Barsh 1983 pp. 84–91).

But since advocates of the self-determination and sovereignty views are not in fact seeking a sovereign state, it is not immediately clear what rests on the distinction between Article 1 and Article 27 rights. Article 27 has occasionally been interpreted as merely requiring non-discrimination against minorities. But the recent
Capotorti report on the international protection of minority rights decisively rejects that view, and insists that special measures for minority cultures are required for 'factual equality', and that such measures are as important as non-discrimination in 'defending fundamental human rights' (Capotorti pp. 40-1, 98-9). If the goal is not a sovereign state, then Article 27 may be as good as Article 1 in arguing for the right of minority cultures to freely develop and express their own culture. As Wirsing notes, recent changes in the interpretation of Article 27 go 'some distance towards closing the gap' between the expectations of minority cultures and the concessions of the international community (Wirsing 1980 p. 228).

And while elimination of the 'Blue Water Thesis' in regard to the definition of 'peoples' would eliminate some arbitrariness, it would also essentially eliminate the category of 'minorities' (most groups which have sought special measures under Article 27 would constitute peoples, not minorities, according to the definitions offered by some aboriginal groups—e.g. the Mi'kmaq proposal quoted in Barsh 1983 p. 94).

One worry aboriginals have about Article 27, even on an expansive reading, concerns not the content of the rights it may accord to minorities, but the question of who delegates the rights. They are aware of the vulnerability created by the American system of aboriginal rights, in which self-government 'is a gift, not a right . . . a question of policy and politics' (Kronowitz et al. pp. 533, 535; cf. Barsh 1983 p. 103). Some aboriginal leaders believe that claims to sovereignty are needed to avoid this vulnerability (see e.g. Robinson and Quinney p. 123). But others say that such claims heighten misunderstanding and prevent the negotiation of adequate guarantees: 'The maximum height on the government side is generated by the word "sovereignty"; and on the Aboriginal side, by the word "delegated". Somewhere between the two lies an area of potential agreement' (M. Dunn p. 37).

Since Article 1 has not been applied to the aboriginal peoples of North America, and since Article 27 may still be too weak, some aboriginal groups have been pressing for the recognition of a specifically aboriginal category between those of 'peoples' and 'minorities', in which self-determination is neither sovereign nor delegated (see Moore pp. 27-8; Kronowitz et al. pp. 612-20; Barsh 1986 pp. 176-8; Sanders 1983b pp. 28-9). The question of whether self-government is delegated or not is clearly important, but it is somewhat distinct from the questions I am addressing. If aboriginal rights to self-determination are not delegated, or indeed if aboriginal communities retain their legal sovereignty, then aboriginals should be able to reject the substantive provisions of a Canadian government proposal for self-government, should they view them as unjust. My question is the prior one of evaluating the justice of the provisions. And it may be that the same substantive provisions would be just whether aboriginal groups are viewed as peoples, or as minorities, or as their own third category. The different categories would affect not the justice of their claims, but their domestic and international ability to negotiate for those just claims.

Even if aboriginal peoples have substantive claims which cannot be derived from Article 27, in virtue of aboriginal title or legal sovereignty, it is still important for liberals to determine what is owed minorities under that article. Even if aboriginal peoples have special rights beyond those owed them as a minority culture, liberals should ask what they (or other minorities) are owed just in virtue of plural cultural membership. In any event, it is doubtful whether all North American aboriginal groups could qualify as sovereign or self-determining peoples under international law. So a liberal defence of minority rights, if one can be found, would be a helpful argument for many aboriginal groups, and may be the only argument available for some of the groups.
Equality for Minority Cultures

If the arguments of the preceding chapter are correct, then liberals should accord cultural membership an important role in their theories of justice. But it is not obvious how this should affect the principles of justice they endorse, or the policies they recommend. Even if cultural membership needs to be secured, why does that require anything other than a colour-blind egalitarian distribution of resources and liberties? After all, liberal equality is meant to be able to accommodate the fact that different groups value different things, including, presumably, different cultural memberships. Each person is given an equal share of resources and liberties in order to pursue the things they value. Why should the members of minority cultures, such as the aboriginal peoples of Canada, have more than an equal share to protect the cultural heritage they value?

Part of the problem in the Canadian context is that aboriginal groups don’t have an equal share of social resources. But that complaint, while certainly valid, is more about our failure to live up to the goal of a colour-blind society than about any flaw in that goal. Moreover, it would only justify temporary measures for aboriginal groups in order to raise them to an equitable level, not permanent constitutional differentiation. Liberals have no objection to such affirmative action programmes. Indeed, as we’ve seen, they were a part of the 1969 proposal which attempted to remove the special constitutional status of Canadian Indians.

Why then should aboriginal peoples have a special constitutional status that goes beyond equal rights and resources? A deeper examination of the liberal conception of equality is needed. The liberal view of justice that I discussed in Chapters 2 and 3 was founded upon the ‘abstract egalitarian plateau’—the claim that the interests of each member of the community matter, and matter equally. Rawls’s principles of justice, and Dworkin’s equality of resources scheme, are attempts to develop an attractive and persuasive spelling-out of the requirements of this notion of moral equality. And notwithstanding the differences between their theories, we can identify some important features they both take to be basic to a liberal conception of equality. For both, the interests of each citizen are given equal consideration in two social institutions or procedures: an economic market and a political process of majority government. Of course, neither of these institutions is perfect, and both can produce unjust results. But if they operate in a society with equal opportunity and equal political power, and if they are constrained by principles of justice, then they respect equality. And they do so because, in general, they make social outcomes the result of decision procedures in which each person’s choices are given equal weight. Subject to various constraints about respecting individual rights and eliminating the corrupting effects of political inequality and social prejudice, these institutions fairly translate people’s choices into social outcomes (see e.g. Dworkin 1978 pp. 128–36).

But remember the consequences of these institutions for the aboriginal population of northern Canada, discussed in Chapter 7: the effect of market and political decisions made by the majority may well be that aboriginal groups are outbid or outvoted on matters crucial to their survival as a cultural community. They may be outbid for important resources (e.g. the land or means of production on which their community depends), or outvoted on crucial policy decisions (e.g. on what language will be used, or whether public works programmes will support or conflict with aboriginal work patterns). It was in light of these possible threats that aboriginal leaders advocated restrictions on the mobility, property, and voting rights of non-aboriginal people.

This raises the conflict at the heart of minority rights claims. The proposed measures would set some people at a disadvantage in the economic and political procedures used to translate choices into outcomes. Yet this seemed to be necessary, in the case of transient workers and aboriginal communities in the Canadian North, to respect people’s cultural membership. Since cultural membership is a primary good, special rights are needed to treat aboriginal people with the respect they are owed as members.
of a cultural community. But the effect of these special rights is to compromise the fairness of political and economic decision procedures.

Now it might be thought that I've simply accepted a bad model of majoritarian decision-making, and that colour-blind liberal equality will suffice when we have a better model. Perhaps the problem for Canada's aboriginal peoples isn't particularly one of cultural membership, but rather the general problem facing all persistent political minorities—the problem of getting their fair share. Such minorities might be based on regional identification (e.g. desiring government investment in one area when the majority always votes for subsidies in another), or leisure identification (e.g. desiring opera when the majority always votes for swimming-pools), or cultural identification (e.g. aboriginal people desiring to learn and work in their own language when the majority wants English-speaking schools and leisure-resorts). If these minorities constitute 40 per cent of the population they should win 40 per cent of the time. It isn't fair that they lose every vote 60-40. But we can prevent this without relying on any idea of protecting cultural membership. We could give everyone 100 votes which they can exercise as they please. They could spend one on every issue (and probably waste it), or save them all up for the few issues that really matter to them. Thus the aboriginal people could save up all their votes to defeat the legislation which proposed construction of a Las Vegas-style resort, or which proposed to make English the language of public-school instruction. Of course, they'd lose a few other issues they have an interest in, but why shouldn't they? Why should their preferences count for more than those of non-aboriginal people even after such cyclical majorities are prevented?

Let me instead turn the question around. Why is it important that individuals not be at a disadvantage in these procedures? Why do such procedures enforce equal concern and respect in the first place? The answer may seem obvious, but deserves a more detailed account. There is a powerful view of equality at work in liberal accounts of the integrity of these decision procedures—the view, already mentioned in Chapter 3, that we are responsible for our ends, and hence for adjusting our aims and ambitions in the light of the legitimate interests of others.

The costs to others of the resources we claim should 'figure in each person's sense of what is rightly his and in each person's judgement of what life he should lead, given that command of justice' (Dworkin 1981 p. 289). We are responsible for forming our plans, including our associations and attachments, and hence

We are free to make such decisions [about our attachments] with respect to the resources that are properly assigned to us in the first instance, though not, of course, to dispose in this way of resources that have been assigned, or rather are properly assignable, to others. Equality enters our plans by teaching us what is available to us, to deploy in accordance with our attachments and other concerns. (Dworkin 1983a p. 31)

This emphasis on the responsibility for our ends helps explain the injustice of the segregation of blacks in America. Whites may wish to exclude blacks from their community. But they cannot do so, even though it would promote their chosen life-styles. Their claims are not informed by the teachings of equality. I don't mean that the shared ends of the racists get outweighed by the rights of blacks. That falsely suggests that we have a moral conflict here, that the claims of the racists have some legitimate weight, to be balanced against the rights of others. This might be the picture on a welfarist theory of equality. But in an equality of resources scheme, the claims of racists have no moral weight, since they don't respect the just claims of others. As Rawls puts it, 'The priority of justice is accounted for, in part, by holding that interests requiring the violation of justice have no value' (Rawls 1971 p. 31).

This picture of the relationship between responsibility and equality is central to the resource-based, as opposed to the welfare-based, view of equality. It is a distinctively liberal view, and I think it is an attractive one, and should play a part in any comprehensive theory of equality. This helps explain the liberal attraction to the market. Given certain background conditions, the market assesses the cost to others of my choices. Under these conditions, an efficient market distribution of resources will be a fair one (Dworkin 1981 p. 305). Liberals value the market (or something that replicates the results of the market), not because maximizing wealth or preferences is a good in itself, but because markets provide a way of measuring what is in fact equitable.
However, this emphasis on fairness in the forming and aggregating of people's choices is only half of the liberal story. It presupposes some further account of those things which are unchosen, which are a matter of people's circumstances, not their choices. The distinction between choices and circumstances is in fact absolutely central to the liberal project. Differences between people in terms of their resources may legitimately arise as a result of their choices; such variations legitimately reflect different tastes and preferences, different beliefs and attitudes that define what a successful life would be like (Dworkin 1981 p. 303). Differences that are due to people's choices are their own responsibility (assuming they are freely chosen, with adequate information about the costs and consequences of those choices etc.).

But differences which arise from people's circumstances—their social environment or natural endowments—are clearly not their own responsibility. No one chooses which class or race they are born into, or which natural talents they are born with, and no one deserves to be disadvantaged by these facts. They are, as Rawls famously put it, arbitrary from the moral point of view. No one chooses to be born into a disadvantaged social group, or with natural disabilities, and so no one should have to pay for the costs imposed by those disadvantageous circumstances. Hence liberals favour compensating people who suffer from disadvantages in social environment or natural endowment. (This defines one of the background conditions on the fair operation of the market: Rawls 1971 pp. 74–102; Dworkin 1981 part 2.)

So a liberal needs to know whether a request for special rights or resources is grounded in differential choices or unequal circumstances. Someone who cultivates a taste for expensive wine has no legitimate claim to special public subsidy, since she is responsible for the costs of her choice. Someone who needs expensive medicine due to a natural disability has a legitimate claim to special public subsidy, since she is not responsible for the costs of her disadvantageous circumstances.

Now, as we've seen, aboriginal rights entail special costs for other people, by restricting the rights and resources of non-aboriginal people. Where should we locate these rights claims on the choices—circumstances divide? If aboriginal rights were defended as promoting their chosen projects, then they would, on a liberal view, be an unfair use of political power to insulate aboriginal choices from market pressure. We can legitimately ask that aboriginal people form their plans of life with a view to the costs imposed on others, as measured by the market. Assume that aboriginal people have chosen an expensive life-style by, say, choosing a way of life that requires a large section of land, valued by many groups in society, to be set apart and left undeveloped, even though the benefits of this only accrue to themselves. In such a case, aboriginal people should have to outbid those who plan to use the land more efficiently. They should have to pool their resources, or their votes, to secure the land they desire, which will quite properly leave them with little remaining for the pursuit of other preferences (e.g. with few dollars or votes left to express their preference for swimming-pools over opera). If the land aboriginal people wish to be left undeveloped is valuable to others, then their desire is costly to others, and it is only fair that they pay for this costly desire in a diminished ability to pursue other desires that have costs for society. The existence of special political rights would mean that they don't have to pay for the costs of their desires, or base their decision of what life they should lead on considerations of its cost to others.

However, we can defend aboriginal rights as a response, not to shared choices, but to unequal circumstances. Unlike the dominant French or English cultures, the very existence of aboriginal cultural communities is vulnerable to the decisions of the non-aboriginal majority around them. They could be outbid or outvoted on resources crucial to the survival of their communities, a possibility that members of the majority cultures simply do not face. As a result, they have to spend their resources on securing the cultural membership which makes sense of their lives, something which non-aboriginal people get for free. And this is true regardless of the costs of the particular choices aboriginal or non-aboriginal individuals make.

Let us look more closely at how this inequality arises, using Dworkin's equality of resources scheme (a similar result could be shown to hold for Rawls's difference principle). In Dworkin's scheme, we are to imagine that a vessel has shipwrecked on a deserted island, and the available social resources are to be auctioned amongst the passengers, who presumably are of the
same culture. Each person begins with an equal amount of money (Dworkin imagines giving everyone 100 clam shells). The final prices of the goods will reflect the cost to others of the choices that individuals have made about how to lead their lives. And no one will prefer the bundle of resources held by any other person over their own, since each person had an equal ability to bid for the various resources (the 'envy test').

Contrast that with a case that is at once more fanciful and more realistic. Two ships, one very large and one quite small, shipwreck on the island, and to ensure a smooth auction, they proceed by entering bids into the ships' computers without ever leaving the ship (information about the nature of the resources was perhaps readily available in publications, or was gathered by a scouting party from one ship and communicated via the computer). The auction proceeds and it turns out that the passengers of the two ships are very similar in the distribution of different ways of life chosen—e.g. roughly 10 per cent from each ship bid for those resources that suit a contemplative life-style, 20 per cent bid for resources that suit an entrepreneurial life-style, and so on. Finally the resources are all bid for, but when they disembark from the ships they discover for the first time, what had been obscured by the use of a common computer language, that the two ships are of different nationalities. The members of the minority culture are now in a very undesirable position. Assuming, as is reasonable, that their resources are distributed evenly across the island, they will now be forced to try to execute their chosen life-styles in an alien culture—e.g. in their work, and, when the state superstructure is built, in the courts, schools, legislatures, etc.

Perhaps they would be allowed to demand a rerun of the auction, so as to revise their bids. But notice that the problem is not that minority members envy the bundle of social resources possessed by the majority members qua bundle of social resources. On the contrary, the bundle of resources they currently possess, qua resources, are the ones best suited to fulfilling their chosen life-style. What they envy is the fact that the majority members possess and utilize their resources within a certain context, i.e. within their own cultural community. In order to ensure that they can also live and work in their own culture, the minority members may decide, prior to the rerun of the auction, to buy resources in one area of the island, which would involve outbidding the present majority owners for resources which qua resources are less useful to their chosen way of life. They must incur this additional cost in order to secure the existence of their cultural community. This is a cost which the members of the majority culture do not incur, but which in no way reflects different choices about the good life (or about the importance of cultural membership within it).

In other words, rather than subsidizing or privileging their choices, the special measures demanded by aboriginal people serve to correct an advantage that non-aboriginal people have before anyone makes their choices. For the whites who wish to bid for resources in Northern Canada, the security of their cultural community is not in question. They are bidding solely on the basis of what is useful in pursuing the goals that they have chosen to pursue, secure in the knowledge that their context of choice is protected. For aboriginal people, on the other hand, it is necessary to outbid non-aboriginal people just to ensure that their cultural structure survives, leaving them few resources to pursue the particular goals they've chosen from within that structure.

This is an inequality that has nothing to do with the choices of aboriginal people. A two-year-old Inuit girl who has no projects faces this inequality. Without special political protection, like the restrictions on the rights of transient workers, by the time she is eighteen the existence of the cultural community in which she grew up is likely to be undermined by the decisions of people outside the community. That is true no matter what projects she decides to pursue. Conversely, an English-Canadian boy will not face that problem, no matter what choices he makes. The rectification of this inequality is the basis for a liberal defence of aboriginal rights, and of minority rights in general.

The argument here is the opposite of one of the non-liberal arguments for aboriginal rights that I mentioned at the end of Chapter 7. The point isn't that aboriginal people care more for their cultural community than others. We all care about the fate of our cultural community. French-Canadians have always been extremely sensitive to anything which threatens their existence as a distinct community, and many English-Canadians were paranoid that the bilingualism policy introduced by Trudeau
would submerge their culture beneath that of French Canada. Aboriginal fears about the fate of their cultural structure, however, are not paranoia—there are real threats. The English and French in Canada rarely have to worry about the fate of their cultural structure. They get for free what aboriginal people have to pay for: secure cultural membership. This is an important inequality, and if it is ignored, it becomes an important injustice. Special political rights, however, can correct this inequality by ensuring that aboriginal communities are as secure as non-aboriginal ones. People should have to pay for their choices, but special political rights are needed to remove inequalities in the context of choice which arise before people even make their choices.

Contemporary theories of liberal equality seek, in Dworkin's terms, to be 'endowment-insensitive' and 'ambition-sensitive'; that is, they seek to ensure that no one is penalized or disadvantaged by their natural or social endowment, but allow that people's fates vary with their choices about how to lead their lives (Dworkin 1981 p. 311). But if that is the goal, then it must be recognized that the members of minority cultures can face inequalities which are the product of their circumstances or endowment, not their choices or ambitions.4 And since this inequality would remain even if individual members of aboriginal communities no longer suffered from any deprivation of material resources, temporary affirmative action programmes are not sufficient to ensure genuine equality. Collective rights may be needed.

Hence minority rights can form an important part of a recognizably liberal theory of equality. If so, the section of the Canadian constitution guaranteeing aboriginal rights (Section 35) need not be viewed as conflicting with the Section 15.1 guarantee of equal protection of the law. The different sections can be seen as stemming from the same theory of equality. The relationship between Section 15.1 and Section 35 can be seen as analogous to the relationship between 15.1 and 15.2, which provides for affirmative action to promote the position of disadvantaged groups. Just as the provision for affirmative action can be seen as spelling out the basic right to equality guaranteed in 15.1, given the special circumstances of those disadvantaged groups (Tarnopolsky p. 259), so the guarantee of aboriginal rights can be seen as spelling out what it means to treat aboriginal people as equals, given their special circumstances. The requirement to compensate for unequal circumstances, through affirmative action and minority rights, is not in conflict with the demand that everyone have equal protection of the law. Rather, it helps instruct judges how to interpret that fundamental requirement.

Some commentators insist that minority rights claims cannot be reconciled with Section 15. Supreme Court Justices are said to face an 'impossible task', a 'philosophical contradiction', in reconciling the collective rights of French-Canadians and aboriginal peoples with the individual rights of Canadians under a 'single principle of equality' (Morton p. 81; cf. Knopff 1982 pp. 35–6; Penton; Weinfield p. 70). Indeed, minority rights are said to be a disguise for 'the traditional inegalitarian claim to rule on behalf of a particular way of life' (Knopff 1982 p. 29; cf. Knopff 1979 pp. 72–6). Minority rights are aspects of a pre-liberal politics in which 'the health of the soul is a public concern, and government actively promotes some choices about the good life (Morton pp. 80–1). But this need not be so, and these various commentators do not explain why minority rights must be a tool for promoting particular choices, rather than a response to unequal circumstances.

In fact, most of the examples which Knopff and Morton cite are responses to circumstances, not to choices. Knopff does not show why French-Canadian concern for language rights 'prescribes the kind of life [people] must lead within that language' (Knopff 1979 p. 75). And Morton does not show why aboriginal concern over the control of group membership is based on a preference for 'a distinctive "way of life"' (Morton p. 81). As I mentioned in Chapter 7, and as Morton seems to concede, aboriginal claims in this area are designed to avoid the danger of overpopulation on scarce reservation land (Morton p. 76). The minority rights for French-Canadians or aboriginal peoples which they discuss are not designed to favour one set of choices about the good life over another. They do not favour traditional practices over non-traditional life-styles, or religious over non-religious life-styles. They do not impose a particular conception of 'the health of the soul' on the members of minority cultures, or penalize dissenting conceptions. The inevitable
conflict which Morton and Knopf find between liberal equality and pre-liberal minority rights is neither theoretically established nor exhibited in their examples. On the contrary, these minority rights help ensure that the members of minority cultures have access to a secure cultural structure from which to make such choices for themselves, and thereby promote liberal equality.

All this assumes that the appropriate response to the inequality in cultural membership is to try to prevent that inequality from arising. But this is not always the way we deal with inequalities in circumstance which corrupt the market. For example, physical and mental handicaps have to be fairly dealt with before the market operates equitably. It’s unfair if people lose market power just because they are born with handicaps. The solution to this case is not to prevent the inequality from arising, but to compensate handicapped individuals according to some insurance scheme (one such scheme is described in Dworkin 1981, pp. 297–9). Likewise, we pay out insurance to the victims of natural disasters, to cover their unchosen displacement costs. We respond to unequal circumstances, not by preventing their occurrence, but by establishing some sort of insurance arrangement. Why not insure people against the costs of having to undergo cultural assimilation? We could employ a variant of the hypothetical insurance market envisaged by Dworkin, in which people, who do not yet know what cultural position they hold, decide how much insurance they would take out against the possibility that the operation of the political and economic processes of society will undermine their cultural community. We could then compensate those born into endangered minority cultures according to that insurance scheme.

But as I argued in Chapter 7, this compensation suggestion misunderstands the particular nature of the good of cultural membership. Monetary benefits are fair compensation for disadvantages due to natural handicap or natural disaster, since they compensate for undeserved limitations of the capacity to achieve one’s ends through one set of means by extending one’s capacity through another set of means. But cultural membership is not a means used in the pursuit of one’s ends. It is rather the context within which we choose our ends, and come to see their value, and this is a precondition of self-respect, of the sense that one’s ends are worth pursuing. And it affects our very sense of personal

identity and capacity. When we take cultural identity seriously, we’ll understand that asking someone to trade off her cultural identity for some amount of money is like expecting someone to trade off her self-respect for some amount of money. Having money for the pursuit of one’s ends is of little help if the price involves giving up the context within which those ends are worth pursuing. It is irrational to expect people to accept that trade-off, and it is unjust to demand that people accept it. (It is worth noting that Indians in Canada have continually rejected offers to relinquish their land claims in return for large cash sums, offers which would be similar to the paying-out of such an insurance policy.)

So merely providing compensation for the loss of culture doesn’t do justice to the importance of our membership in a particular cultural community. That doesn’t mean that minority rights can’t be viewed as a form of insurance. Insurance coverage can be aimed at preventing, as well as compensating for, hardship. In the case of natural handicaps, we get insurance to cover preventive measures, as well as compensation. We might similarly envisage an insurance scheme that enables aboriginal communities to outbid and thereby prevent community-undermining proposals for the use of their lands. But notice that it would have to be some form of collective insurance, since the insurance payments are useless to individuals by themselves. What matters is that the members of aboriginal communities as a group should have sufficient resources to outbid proposals that affect them as a community; that is what the insurance would be designed for. So any adequate insurance plan would presuppose a certain collective organization. Aboriginal people would need to receive and employ the insurance benefits collectively.

The gap between this collective insurance idea and the collective political rights currently existing in Canada is not large. Both forms of cultural protection share the same central feature: while the individual members of aboriginal communities do not have more resources at their disposal than other Canadians to pursue their individual life-plans, the community has the collective capacity to pre-empt majority decisions which undermine the community’s existence.

Theoretically, one could implement some aspects of the collective insurance scheme without using collective political
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rights. Some of the insurance could be purely monetary, provided to a non-governmental aboriginal body, enabling aboriginal people to ensure that they are not outbid on important resources, without establishing any political constraints on the market. But there would still be a need for collective rights against being outvoted on important policy issues. And even in the case of market protection, the argument for political measures is very strong. Attempts to organize a community non-politically are impractical and inefficient, and run into collective action problems, especially where the population is widely dispersed. Moreover, special political status means that aboriginal land is protected from some of the non-market vulnerabilities that attach to privately held land (e.g. expropriation). Indeed, one of the main objections to the Canadian government’s proposal to make Indian land alienable was not that individual Indians would sell the land to non-Indians, but rather that the land would now be subject to expropriation by provincial governments in a way that would destroy the community. The government would have to compensate for any expropriation, but the normal kind of compensation to individual title-holders would not ensure that the community could be relocated or re-established (Cardinal 1977 pp. 91–2, 127). To ensure that they could re-establish the community, aboriginal people would need a legal status different from that envisaged in any non-political insurance model.

So I believe that certain collective rights can be defended as appropriate measures for the rectification of an inequality in circumstances which affects aboriginal people collectively. This defence has not, however, covered all of the measures discussed in Chapter 7. In particular, the denial of putative language rights is left undefended. In a society where the members of minority cultures (e.g. Indians, francophones) could get their fair share of resources within their own cultural community, it’s not clear what would justify denying people access to publicly funded education in English. If some of the members of a minority culture choose to learn in that language, the notion of protecting the cultural context provides no grounds for denying them that opportunity. On the other hand it’s not clear why there should be rights to publicly funded education in any given language other than that of the community. Why should the members of minority cultures have a right to a public education in English, but not, say, in Greek? They should of course be free to run a school system in whatever language they choose at their own expense, but why a right to it at public expense? There are good reasons of policy for having the teaching of English available, but that’s a different matter, and anyway would only warrant teaching of English, not in English. People should have, as part of the respect owed them as members of a cultural community, the opportunity to have a public education in the language of their community; but whether they have the opportunity to have a publicly funded education in another language is perhaps a matter of policy (just as subsidizing cultural exchanges is), with people neither having a right to it nor a right to prevent it. The most troublesome aspect of the old Indian Act in Canada was the penalization of certain marriage choices, and the discriminatory way this was applied. But these problems arise unnecessarily, for they result from the fact that reservation lands are not just non-alienable, but non-expandable. An expanding population may need to occupy expanding territory, but Indians don’t usually try to establish communities outside their present reserved lands, partly because they lack the resources to do so (since they lack their fair share), but also, and perhaps more importantly, because they’d have no way of protecting the new communities from plans to develop that and nearby land in such a way as would lead to unwanted assimilation. However, I see no reason why the government shouldn’t, when overpopulation threatens existing reservations, aid in the establishing and protecting of new communities (Robinson and Quinney p. 147; M. Dunn).

One aspect of Indian policy in the United States (not present in Canada) which I haven’t discussed is the denial of religious liberty on certain reservations. Some of the American Indian bands are essentially theocracies, with an official religion. Members of other religious denominations are limited in their freedom to worship, and are sometimes subject to discrimination in housing benefits etc. (Van Dyke 1985 pp. 72–4; Weston; Svensson pp. 431–3). Now this is usually defended in terms of the special semi-sovereign status of Indian nations in the United States—that is, whether or not the restriction on religious liberty is just, we have no right to interfere. It is a sovereign act of a quasi-independent nation. Indian bands have the right to reject...
certain constitutional rights if they feel justified in doing so. It might violate the right to equal treatment guaranteed by the American Constitution, but Indian members can't appeal to that right, since the actions of sovereign Indian bands are not fully subject to that guarantee (Elk v. Wilkins [1884] 112 US 94).

This situation is, therefore, fundamentally different from the one I have been considering, in which special measures of cultural protection are defended as part of the best interpretation of political equality. Theocracies on American reserves are often defended as exemptions from, not interpretations of, the guarantee of equality. Still, it is worth examining why the restriction on religious liberty couldn't be defended by my account of minority rights. Quite simply, there is no inequality in cultural membership to which it could be viewed as a response. The ability of each member of the Pueblo reservation, for example, to live in that community is not threatened by allowing Protestant members to express their religious beliefs. Allowing religious freedom wouldn't make the Pueblo vulnerable to being outbid or outvoted on crucial issues by the non-Pueblo population (unlike allowing full voting rights for non-Inuit in the North); nor would it create internal disintegration (unlike the exposure of the Indonesian tribe to certain kinds of television).

It is true that, in the eyes of many of the Pueblo, 'violation of religious norms is viewed as literally threatening the survival of the entire community' (Svensson p. 434). But in fact the Pueblo 'would continue to exist with an organized Protestant minority as it now exists without one' (Weston p. 249). As with Devlin's claim that the acceptance of homosexuality would literally undermine the English community, the only evidence offered is the dislike the majority feels for the dissident practice. If the goal is to ensure that each person is equally able to lead their chosen life within their own cultural community, then restricting religion in no way promotes that. Were the theocracy ended, each majority member of the Pueblo would have as much ability to use and interpret their own cultural experiences as the dissident minority, or, indeed, as members of the non-Indian community. No one would be less able to lead their own lives in their own community than anyone else, and hence no one has grounds for saying that they are being treated as less than an equal with regard to cultural membership. On the contrary, as I argued in Chapter 8, supporting the intolerant character of a cultural community undermines the very reason we had to support cultural membership—that it allows for meaningful individual choice. To support the majority in an Indian reservation when it denies religious freedom to the minority is to support the imposition of gratuitous and unjust harm on others.

So nothing in my account of minority rights justifies the claim that a dominant group within a cultural minority has the right to decide how the rest of the community will use or interpret the community's culture. My theory supports, rather than compromises, the rights of individuals within the minority culture. This is not, of course, to say that the American Supreme Court should have the power to determine or enforce the religious rights of the Pueblo. Given the absolutely appalling record of the Supreme Court in respecting either the individual or collective rights of American Indians, the Pueblo might well wish to put their trust in tribal courts. If that is the consensus amongst the Pueblo, then surely it should be respected. (This was the position recently taken by the American Supreme Court in deciding that individual Indians must appeal to tribal courts for the interpretation and enforcement of the Indian Civil Rights Act (Santa Clara Pueblo v. Martinez [1978] 436 US 49).) If, on the other hand, those Pueblo most in need of court protection wish to have some form of external review, then the issue gets much cloudier. This seems to be the situation in Canada. Many of the aboriginal groups have argued against external review of aboriginal self-government. But some of the aboriginal women's groups have sought external review. It would be wrong to override a consensus on how best to entrench aboriginal rights, but there isn't a consensus, and so any solution will conflict with some aboriginal wishes. I don't see any obvious formula for dealing with this, except to encourage the development of a consensus. In any event, my concern is with what the principles being enforced ought to be—not with who ought to have the power to determine, interpret, and enforce those principles. And on a liberal theory of equality, the very reason to respect a principle affirming the importance of cultural membership to minority groups is also a reason to respect a principle affirming the rights of individual members of those groups.
So any liberal argument for the legitimacy of measures for the protection of minority cultures has built-in limits. Each person should be able to use and interpret her cultural experiences in her own chosen way. That ability requires that the cultural structure be secured from the disintegrating effects of the choices of people outside the culture, but also requires that each person within the community be free to choose what they see to be most valuable from the options provided (unless temporary restrictions are needed in exceptional circumstances of cultural vulnerability).

But what if the Pueblo community really would disintegrate without restricting religious liberty? Would that justify restricting religious liberty? If so, are there any limits on what can be done in the name of protecting cultural membership? These are difficult questions, although, as I argued in Chapter 8, they do not arise nearly as often as liberal critics of minority rights claim, nor are they unique to situations of minority cultures. There are a number of possible principles to apply in non-ideal, or 'partial compliance', situations, each of which is consistent with the argument given so far. The principle behind partial compliance measures can be to minimize violations of legitimate claims (what Nozick calls a 'utilitarianism of rights'), or to respect certain legitimate claims as inviolable even if the result is that overall claim-violations are increased (what Nozick calls 'side-constraints'). In between these, we might say that even if no individual claim is inviolable, one type of claim has absolute priority over other types: we might say that cultural membership has priority over the rights of individual members, since cultural membership provides the context of individual choice; or conversely that individual rights always have priority over cultural membership, since the value of cultural membership is in enabling individual choice. Or we could say that cultural membership sometimes takes priority over individual rights and sometimes not—depending not only on what would minimize claim-violations overall, but also on how severe, long-lasting, and equitably distributed the rights-violations would be, and what avenues exist for individual members to choose to assimilate to another culture. People who agree on ideal theory can disagree on which partial compliance principle to use, and people who disagree on ideal theory can share the same partial compliance theory.

Settling these issues would require an investigation of difficult questions both about the particular sorts of sacrifices being asked and about the general question of the relationship between ideal theory and partial compliance theory. It seems unlikely in this case that any claim or set of claims has absolute priority over others, since the conflicting values really are interdependent. Assuming that there can be some legitimate restrictions on the internal activities of minority members, where those activities would literally threaten the existence of the community, to find the precise limits would be enormously difficult, and I doubt anything useful could be achieved without reasonably detailed knowledge of particular instances. These are complex issues in which our intuitions are pulled in different directions, and I don't see how any simple formula could cover all the relevant cases.

But while the view of minority rights I am advancing leaves this question open, that should not be taken as a reason to reject cultural membership as a liberal value. On the contrary, these questions would not pose such a conflict for liberals if cultural membership were not a primary value; for there would then be nothing of moral value to oppose the legitimate demands for individual rights. But there is a real problem here, and we need a theory which recognizes the genuine conflicts. Any theory which denies that there is a conflict has missed something of great importance.

In any event, it seems that some measures of cultural protection are justified, even if their precise application is subject to variation and their outermost boundaries are undefined. Once we recognize cultural membership as an important primary good which underlies our choices, then special political rights and status for minority cultures may be required. In a homogeneous society, this context of choice, being a kind of public good, is equally available to all (at least in a just and well-ordered society without large disparities in education etc.). Recognizing cultural membership as a primary good wouldn't change the conclusions Rawls or Dworkin reach concerning equality of resources in such societies. But it does make a difference in culturally plural societies. In such societies we must view the protection of that
context of choice as a distinct source of political rights (or economic insurance). That is not to say that every culturally plural society will in fact need such rights; rather, vulnerability of the context of choice will always be a ground to which minorities can appeal in claiming rights. Whether their claim succeeds depends on many factors—e.g. whether the alleged inequality actually exists, and whether the putative rights actually serve to correct the inequality (see Chapter 13 below for a claim which doesn’t succeed on either count). As Sigler notes, developing a theory of minority rights is not likely to demand radical changes in practice; it will simply affirm the already existing practice of many culturally plural countries, practice which has arisen in the absence of theory (Sigler p. 196).

This would require a modification in Dworkin’s political morality, but he should not wish to resist the change. As I mentioned in Chapter 8, Dworkin emphasizes the importance of cultural structure, claiming that ‘we have some duty, out of simple justice, to leave that [cultural] structure at least as rich as we found it’ (Dworkin 1985 p. 233). If so, then surely it is important to protect minority cultural structures from disintegration. And since the vulnerability of minority cultures is a matter of circumstances, not choice, Dworkin’s own theory of equality requires that minority members shouldn’t bear the costs of that protection. The system of aboriginal rights in Canada can be seen as an attempt to distribute fairly the costs that arise from our recognition of the value of cultural membership.9

Notes
1. The problem of permanent political minorities is often invoked as a reason for recognizing minority rights and consociational incorporation (e.g. Boule; Sigler; McRae 1975; Lijphart; Van Dyke 1985). This raises important points about possible conflict between the democratic principle of political equality and the democratic procedure of majority rule. We have to think more imaginatively, in culturally plural countries, about forms of political representation; uncritical adoption of the Westminster or the American model of democratic rule could be inappropriate. But any sophisticated democratic theory recognizes the danger of permanent minorities. What consociationalists haven’t adequately defended, in their discussions of minority rights, is the view that minorities should have special claims, as opposed to special institutional protections for their usual claims.

2. This is not, of course, the only reason why liberals are attracted to the market. Also, and not unrelatedly, the market allows people to adjust their holdings so as to best fit their aims and ambitions (see the discussion of what Dworkin calls the ‘principle of abstraction’, and its relation to ideals of fairness, in Dworkin 1987). Both of these functions of the market could be replicated by state-run, non-market mechanisms, more or less efficiently. But a third reason for liberal support of the market is precisely that it serves as a block against such centralization of state power.

3. The claim that people are responsible for their choices has to be qualified. It is only plausible to assign beliefs and attitudes about the good life to the person, rather than to her circumstances, if she has the good fortune to have received a sufficiently broad education to be able to conceive the various options open to her, and moreover to live in a society which allows competing conceptions of the good life, and free debate amongst proponents of them. As Taylor says, the freedom ‘by which men are capable of conceiving alternatives and arriving at a definition of what they really want, as well as discerning what commands their adherence or their allegiance . . . is unavailable to one whose sympathies and horizons are so narrow that he can conceive only one way of life’ (C. Taylor 1985 p. 204). Therefore the claim that such beliefs and attitudes can be assigned to the person must be understood as part of ideal theory—as what we could hold people responsible for in an ideally just liberal society—and I follow that usage.

All sorts of interesting questions arise at the non-ideal level which I’ve left unaddressed. For example, in an ideally just liberal society, people who wanted to work in uneconomic coal mines would seem to have an expensive taste, no different from someone’s desire to play tennis all day, and if either asked for the rest of society to subsidize them, to pay the costs of their choices, then we might legitimately decline to do so. But under existing conditions, we might believe that British coal-miners (including those just now leaving school in order to take up a mining job, who can’t claim, unlike the older miners, that they didn’t know it was a costly choice when they decided) lacked full and equal access to the sorts of education and careers that would involve fewer demands on the public purse. Someone could easily argue analogously for subsidization of the inefficient hunting and trapping occupations of the traditional Indian and Inuit economies in Canada.
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These are interesting and important questions in partial-compliance theories of justice. However, like Rawls and Dworkin, I believe that these problems are best solved once we have a clear idea of what the ideal theory will look like.

4. Since the inequalities faced by members of minority cultures are unchosen, cultural membership clearly meets the criteria Rawls uses for selecting the viewpoints relevant to assessing social justice:

The primary subject of justice . . . is the basic structure of society. The reason for this is that its effects are so profound and pervasive, and present from birth. This structure favours some starting places over others in the division of the benefits of social cooperation. It is these inequalities which the two principles are to regulate. Once these principles are satisfied, other inequalities are allowed to arise from men's voluntary actions in accordance with the principle of free association . . . the relevant representative men [for judging the social system], therefore, are the representative citizen and those who stand for the various levels of well-being. Since I assume that in general other positions are entered into voluntarily, we need not consider the point of view of men in these positions in judging the basic structure. (Rawls 1971 p. 96)

Rawls uses citizenship and socio-economic status as the positions from which he assesses the justice of the basic structure because these are unchosen positions. Other positions are not considered because they are voluntarily entered into. The relevant points of view represent the sites of unchosen inequalities, especially those that are 'profound and pervasive and present from birth', since these are the ones that require compensation or removal. But if this choice—circumstances distinction is the motivation for Rawls's choice of relevant points of view, then clearly he should have included cultural membership as one of the positions used in assessing justice, at least in culturally plural countries.

5. There are various ways of rectifying this inequality without legally granting 'permanent political rights to a special class of citizens' (Asch p. 76). The government could, for example, simply pass a law prohibiting a specific economic or political development whenever it endangers aboriginal cultural patterns. This would be the equivalent of an endangered species act. The problem is that aboriginal culture is evolving, as a result of the members' choices. So what endangers it changes over time, and to entrench a particular pattern of land use, for example, would prevent aboriginal peoples from adapting to new circumstances, from having a living culture. (It might also prevent them from voluntarily extinguishing their culture and assimilating, which they should be able to do, if they so wish.) The result of such entrenchment in the case of the Salish Indians was that the special measures designed to protect traditional fishing practices 'isolated and fetishized only one element among many . . . as central to the task of guaranteeing cultural continuity'. The danger of this method is that it could 'hypostatize history and replace a living culture with a fossilized one' (Anderson p. 139). It could repeat 'The blatant paternalism of the U.S. Bureau of Indian Affairs, the Brazilian Indian Protection Service, and other similar agencies [which] made them functionally analogous to animal protection societies' (van den Berghe 1981a p. 343). Avoiding this danger would require adjusting the legislative measures so as to match the rights of minority cultures.

Somewhat differently, one can avoid naming a special class of citizens by 'indirect consociationalism'—i.e. redrawing the boundaries of political units, and redistributing powers between levels of government, so as to ensure that a minority culture controls a political unit which has sufficient powers to protect the community (Asch p. 79; van den Berghe 1981a p. 348). In federal regimes, giving rights to a provincial government which predominantly governs members of a minority culture can then be a way of ensuring minority protection (e.g. Berger 1981 p. 259). But as with the first solution, external circumstances and internal development might necessitate revising the boundaries and powers of regional units, in the light of the rights of minority cultures.

Both of these are possible ways of legally implementing minority rights. As Asch and Dacks say, 'What is important is not the details of particular models, but rather the logic which underlies all of them' (Asch and Dacks p. 51). Van den Berghe thinks that the indirect consociational solution, even if it is designed or revised for the explicit reason of protecting minority cultures, involves a 'fundamentally different' logic, since there is no legal recognition of minority groups (van den Berghe 1981a p. 348). It is one thing to define the powers and boundaries of a regional government so as to ensure the protection of a minority culture (indirect consociationalism), but quite another for the law to cite the existence of that minority as the reason for those arrangements (minority rights). But this is very peculiar. The 'fundamentally different logic' is not the distinction between intended and merely foreseen consequences, since he admits that in both cases the arrangements are designed in the light of the claims of minority cultures. Nor are there any differences in the powers being exercised.
by the regional government. The difference is simply whether the justification for the arrangements is made legally explicit or not, and it is difficult to see what moral or political significance attaches to that difference.

6. See the articles by Hanen, Braybrooke, and Davis in French 1979, all of which express scepticism about the sort of language 'rights' which would override legislation like Quebec's Bill 101 (the bill which ended publicly funded English education in Quebec for all but the children of English-Canadians).

7. American Indians are now partially covered by guarantees of equal protection in virtue of the 1968 Indian Civil Rights Act. There is a considerable amount of hypocrisy in the alleged federal government respect for Indian 'sovereignty'. The American state intervenes all the time in the affairs of the Indians. While 'sovereign', the Indian nations are also 'dependent' (Cherokee Nation v. Georgia [1831], 30 US 1). The American state appeals to the former status whenever it wishes to avoid responsibility for Indian affairs, and to the latter status whenever it wishes to control the Indian population. For a comprehensive review of the inconsistent and often unprincipled assertion and exercise of federal 'plenary power' over Indians, see Kronowitz et al. pp. 322–56 (federal encroachment on sovereignty), 561–83 (state encroachment).

8. Svensson ties the legitimacy of internal discrimination (as claimed in the Pueblo case) to the availability of exit for individuals. Individuals who are discriminated against in the name of cultural membership can, in the last resort, merge with the broader society to preserve their rights, whereas a community which is prevented from discriminating has nowhere to go to preserve cultural membership. Hence of these two possible injustices, 'the former appears to be more acceptable than the latter, since it preserves the maximum openness of opportunity to members of both dominant and dependent communities. It also preserves at least some aspects of the equality formulation which underlies classical democratic theory (Svensson p. 437). But I don't think the possibility of exit justifies any form of discrimination which might be needed to protect cultural membership. Surely justifiability also depends on other factors, such as the length, severity, and distribution of the burdens created by the discrimination.

9. My argument for minority rights has formal, as well as substantive, parallels to Dworkin's general framework for rights claims. Dworkin maintains that rights claims only make sense against a background framework of equality. For example, democratic decision-making and economic markets are background procedures which are intended to model a conception of equality. Rights enter in when these background procedures fail, in various ways, to live up to that conception of equality. This is just the sort of argument I am giving. I have tried to show that liberal-democratic background procedures are intended to ensure an endowment-insensitive and ambition-sensitive distribution, but sometimes fail to deal fairly with the unequal circumstances of minority cultures. Collective rights can serve to correct that failing. So it is not that there is a collective right to cultural membership, the denial of which creates an inequality. Rather, members of cultural minorities may face an inequality, the rectification of which may require collective rights.