Culture and Community: Reorienting the Accommodation Debate

by

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Abstract

This paper examines the “cultural thesis,” a normative account of why culturally diverse polities should recognize and accommodate minority and indigenous claims for cultural protection, and addresses the “anti-essentialist” critique of the cultural thesis. The anti-essentialist critique holds that key arguments for the cultural thesis, such as those advanced by Charles Taylor and Will Kymlicka, support problematic, essentialist concepts of culture. This paper argues that the anti-essentialist critique overlooks key parts of the cultural thesis but does, nevertheless, illuminate the need for an approach to practical claims to culture. Two approaches are presented—the “unbounded approach” and the “shifting boundaries approach”—both of which are developed in contemporary political theory writings. The paper argues that the shifting boundaries approach, which asks us to consider the role that a claimed cultural practice or activity plays in enhancing community integrity, provides a better framework for understanding the claims advanced by minorities and indigenous peoples. Both the drawbacks of the unbounded approach and the advantages of the shifting boundaries approach are discussed in relation to the Aboriginal rights case R v. Van der Peet.
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Introduction

The uneasy relationship between modern liberal democratic states and cultural minorities has attracted a considerable amount of attention from political theorists in recent years. Interest in the topic of “multiculturalism” has grown especially since the late 1980s as this period witnessed “the end of the cold war, the opening up of markets and societies, considerable growth in population movement, acceleration of trade, communication and capital flows across the globe, coupled with rediscovery of older idiosyncratic nationality, ethnic and religious affiliations.”¹ The political problems raised by the existence of multiple national and cultural affiliations in a single liberal state have, in particular, garnered the attention of thinkers who are well-versed in debates about the ontological presuppositions of liberalism, and the issue of whether liberalism sufficiently accounts for the role that communities play in shaping individual conceptions of the good. Charles Taylor and Will Kymlicka are two of these thinkers. Their contributions to the topic of multiculturalism inform what I will refer to as the “cultural thesis.”²

The cultural thesis holds that polities should support minority and indigenous cultures rather than suppress that diversity, as has usually happened throughout the modern era. According to the thesis, the vitality of a culture significantly affects the well-being of its individual members; that is, the thesis appeals to the reasons why individuals suffer when their cultural beliefs, symbols and values are lost, either to concerted assimilation efforts, or to more subtle means of exclusion, such as laws and policies that make it difficult for these to be passed on to succeeding generations. Because the cultural thesis highlights a link between culture and individual well-being, it emphasizes the need

² Throughout this paper I avoid using the term “multiculturalism” as it often refers to the make-up of polity’s population and state policies, as well as to a normative political doctrine.
for politics to not only refrain from imposing the majority’s norms and values on minorities and indigenous peoples, but also to actively recognize and accommodate elements of minority and indigenous cultures.

Of the many critiques first leveled against the cultural thesis, the “anti-essentialist” critique circulates most widely in political theory today.3 Formulations of anti-essentialist critique generally consist of two parts. First, that arguments for the cultural thesis exhibit support for essentialist views of culture. Second, that the essentialist views of culture supported by the thesis can influence practical attempts to recognize and accommodate minority cultures, and in turn can threaten the autonomy of individual group members.

This paper argues that while anti-essentialist critiques tend to overlook or mischaracterize key parts of the cultural thesis, they do bring to the fore the need for a different kind of approach to practical minority and indigenous claims to culture. As I see it, anti-essentialist critiques of the cultural thesis illuminate the need for an approach that accounts for not only the links between individual well-being and cultural continuity and group difference, but for the way in which groups and individuals must challenge and transform culture in order to be self-defining. In other words, anti-essentialist critiques of the thesis reveal the need for a “transformative” approach to culture claims.

In this paper I will examine two transformative approaches, which I will call the “unbounded approach” and the “shifting boundaries approach.” In contrast with the

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3 Kymlicka (1999, 112) points out that criticisms from a traditional liberal perspective—challenging that liberal states are obliged to overlook citizens’ ascribed differences—are uncommon today. For examples of the anti-essentialist critique see Abu-Laban 2002; Benhabib 2002; Markell 2003; Scott 2003; Phillips 2007. Few of these authors label their critiques “anti-essentialist,” however, each challenges that proponents of the cultural thesis work with oversimplified views of culture.
cultural thesis, both of these approaches de-emphasize the importance that cultural continuity and group difference hold for individuals. When either approach is applied to practical claims to culture, it asks us to consider how acts of recognition and accommodation stake out metaphorical boundaries around groups, and what impact these boundaries have on individuals.

The unbounded approach derives its name from the critical light it sheds on the metaphorical boundaries delineated around groups by acts of cultural recognition and accommodation. The approach highlights the potential for boundaries to hinder individual self-definition, first, by distancing group members from the socioeconomic goods they need to define their own lives, and second, by increasing the susceptibility of group members to forms of discrimination. Overall, the unbounded approach is oriented away from actively recognizing and accommodating the particular elements of cultures, and it emphasizes the benefits that group members derive when the boundaries separating them from the wider society are destabilized.

Using the unbounded approach as a framework for interpreting claims to culture helps to avoid some of the pitfalls associated with cultural recognition and accommodation. However, the approach is unsuited for certain claims, particularly those advanced by groups whose members rely on relationships with one another to help them to self-define, such as indigenous and other ethnic and religious communities. While the claims advanced by these communities require a transformative approach, the unbounded approach is an unsuitable option because it neglects the role that boundaries play in securing meaningful relationships within communities, and in turn, why there are many cases in which particular cultural elements should be recognized and accommodated.
The shifting boundaries approach resembles the unbounded approach in a few important respects, mainly in its orientation away from the direct impact of cultural continuity and group difference on individual well-being. In contrast with the unbounded approach, however, the shifting boundaries approach highlights the way in which stable community relationships facilitate individual self-definition. Because boundaries expel some of the external pressures that threaten community relationships, the shifting boundaries approach accepts that certain acts of cultural recognition and accommodation are vital for the well-being of individuals. Thus, when it is used a framework for understanding claims to culture, the shifting boundaries approach asks us to consider if the boundaries established by an act of recognition or accommodation would contribute to the integrity of the community advancing the claim. The approach draws attention to community integrity (and away from questions related to the cultural authenticity or centrality of a claimed practice or activity) because the strength of community has a significant effect on the quality of its members' relationships.

In Chapter One of this essay, I present a synopsis of the cultural thesis, drawing on the work of two of its key proponents, Charles Taylor and Will Kymlicka. I then present the anti-essentialist critique of the cultural thesis. I focus in particular on Seyla Benhabib's and Anne Phillips's statements of this critique and their presentation of cultural holism and cultural determinism—two ways in which minorities and indigenous peoples are harmed by attempts to recognize and accommodate culture.

In Chapter Two I draw attention to problems in Benhabib's and Phillips's critiques, and more specifically to the way in which they overlook or mischaracterize key parts of the arguments that Taylor and Kymlicka advance. One aim of this chapter is to
show that the cultural thesis does not support the essentialist notions about culture that give rise to problems such as cultural holism and cultural determinism. A second aim of Chapter Two is show that while the cultural thesis does not support essentialist views of culture, it still does not provide a suitable framework for understanding practical claims to culture. This is because the thesis is designed to meet the objections of exponents of difference-blind liberalism, and thus it strongly values cultural continuity and the preservation of group difference. The normative weight that the cultural thesis places on these two goods—cultural continuity and group difference—renders it a problematic framework for understanding practical dilemmas of accommodation and recognition because groups and individuals also require other cultural goods, including the ability to challenge norms and values, and to modify practices to meet present day demands. Thus, I argue that the normative weight that the cultural thesis places on cultural continuity and group difference creates the need for a different, more transformative approach to culture claims.

In Chapter Three I compare the two approaches discussed above, the unbounded approach and the shifting boundaries approach, and argue in favour of the latter. Finally, in Chapter Four I focus on a case study—R. v. Van der Peet—to show the advantages of the shifting boundaries approach over the unbounded approach. This is an Aboriginal rights case in which the Supreme Court of Canada overvalued cultural continuity and difference, to the detriment of members of the Sto:lo First Nation. After applying both approaches to this case, I argue that only the shifting boundaries approach illuminates the reasons why the Sto:lo’s claim did merit recognition.
Chapter One: The Cultural Thesis and its Critics

Introduction

This chapter begins by outlining and comparing two well-known cases for the cultural thesis, Charles Taylor’s in “The Politics of Recognition” and Will Kymlicka’s in Multicultural Citizenship. Next, I move on to consider a serious criticism of the cultural thesis. This criticism holds that the thesis lends support to essentialist views of culture, views that can, when they influence practical acts of cultural recognition and accommodation, limit minority rights to self-expression and self-definition. The political theorists Seyla Benhabib and Anne Phillips are key proponents of this criticism. In recent writings, they aim both to identify support for essentialist views of culture in the arguments of Taylor and Kymlicka, and to shed light on the harmful, practical implications of these views for minorities. Benhabib and Phillips argue that two problems—cultural holism and cultural determinism—commonly proceed from attempts to recognize and accommodate the particular cultural attributes of groups.

Taylor, Kymlicka and Liberalism

The adjective “postliberal” aptly describes the political thought of both Charles Taylor and Will Kymlicka. To be a postliberal thinker, according to Ruth Abbey, one must seek to “both go beyond and conserve the liberal tradition” or challenge particular approaches to liberalism using different strands of the same tradition.⁴ Sifting through different approaches to liberalism to locate those best suited to meet the demands of the present day is a task that Kymlicka and Taylor undertake. But what types of demands do these

⁴ Abbey 2002, 151.
authors seek to address? In “The Politics of Recognition” and *Multicultural Citizenship*, Taylor and Kymlicka respond to similar political impetuses prevalent in Canadian politics throughout the late 1980s to the mid 1990s. During this period, indigenous and minority ethnic and cultural identities took on great salience as their holders sought recognition in the Canadian constitutional order.⁵

An important feature common to both Taylor’s and Kymlicka’s writings is an awareness that contemporary, dominant forms of liberalism are in certain ways ill-equipped to meet present day demands. In response, neither author repudiates liberalism, but rather, both seek to illuminate its true scope, revealing that certain state practices or policies assumed to conflict with the fundamental premises of liberalism in reality conflict only with a certain strand of the tradition.

Taylor, for example, suggests that seemingly intractable political debates in Canada, and especially those focused on language laws in the predominantly French-speaking province of Quebec, tend to appear irresolvable because of the priority that one particular strand of liberalism, namely that modelled on the thought of Immanuel Kant, has assumed over all others. Kantian liberals define a liberal society as one that does not endorse any particular view of the good life. Instead, a liberal state must ensure that all citizens have equal opportunities to determine their own ends. One of Taylor’s key purposes in “The Politics of Recognition” is to argue that national minorities such as the Québeccois can endorse a collective view of the good (by protecting the French language) and remain liberal.⁶

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⁵ For discussion on how ethnic and indigenous identity-related demands were sparked by the arrival of the *Canadian Charter of Rights and Freedoms* and *Constitution Act, 1982* see Cairns 1991, 167–80.
⁶ Taylor 1992, 58.
Kymlicka also taps the liberal tradition for intellectual resources that might be used to address the claims arising in association with cultural and national plurality in a single polity. He refers to the political thought of Lord Acton as one such resource. In contrast with a stream of liberalism modelled on the thought of John Stuart Mill, who viewed a common nationality as a precondition for effective democracy—a stream that Kymlicka sees as having been widely embraced by liberal thinkers after the Second World War—Acton’s thought sheds light on why polities must peacefully resolve competing claims to culture: because national diversity benefits democracy by keeping state power in check.7

The value of culture

The views of Taylor and Kymlicka converge with respect to why minority claims seeking recognition or protection for “culture” warrant the consideration of political theorists and state actors. For Taylor, minority claims to culture are significant because of the links between culture, recognition and the health of individual identities.8 Following Hegel, Taylor proposes that an individual’s self-understanding becomes distorted in crucial respects when she is not perceived as an equal by those around her.9 Taylor then presses the question of what exactly it means to treat someone as an equal, and submits that today, this requires taking account of those personal attributes that make her a unique being, or in other words, acknowledging her differences. Following Herder, Taylor also

7 Ibid., 53.
8 The links between culture, recognition and identity constitute the core of Taylor’s argument in “The Politics of Recognition”; elsewhere, however, Taylor is in some ways uncomfortable discussing the value of culture for the individual. Taylor (1995, 137) discusses culture as a “shared good,” or something that takes on meaning only when it is experienced in common with others. When culture is approached as a shared good, claims for the protection of certain aspects of it, such as language, take on significance because they relate to the bonds between those who experience that culture in concert with one another.
accepts that people express originality on two levels: as individuals and as members of a culture. Thus differences must be acknowledged on both these levels in order for individual identities to form properly. Polities cannot dismiss minority demands for cultural recognition or protection because “misrecognition” harms individuals by suppressing their identities, or as Taylor puts it, by imposing a false homogeneity upon them.

For Kymlicka, cultures have little moral status in and of themselves, but they are valuable and ought to be protected because they contribute to the more basic human interest in freedom. To be free, Kymlicka suggests, individuals must be able to make choices about how they will live. Individuals must also be able to choose from options that reflect their own beliefs and values, and not those of others. Freedom, therefore, hinges on the ability to choose from meaningful options. Culture and individual freedom are connected in that cultures provide their members with a context for individual choice; that is, cultures, which give shape to individual values or beliefs, also provide individuals with a range of options that reflect those values and beliefs. Because membership in a particular culture shapes individual conceptions of the good, individuals rarely consider the options associated with other cultures to be as meaningful as those made available to them by their own culture. Thus, although a new culture or linguistic context may offer individuals a full set of rights, forcing individuals into that context nevertheless attenuates their freedom by reducing their ability to make decisions that they consider meaningful.

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10 Ibid., 31.
11 Ibid., 43.
12 Kymlicka 1995, 83; Johnson 2000, 408.
13 Kymlicka (1995, 126) writes: “Deciding how to lead our lives is, in the first instance, a matter of exploring the possibilities made available by our culture.”
In sum, Kymlicka argues that access to culture is essential for individual freedom because it enables individuals to make meaningful choices about how to live their lives. Taylor, on the other hand, argues that cultural differences, and the recognition and respect shown to these differences, partly constitute individual identities.

Culture and state neutrality

The notion that cultural membership benefits individuals is a rather uncontroversial aspect of the cultural thesis. Even ardent liberal opponents of the thesis such as Brian Barry acknowledge that many people have a basic interest in maintaining ongoing connections with cultural groups. Where the thought of Taylor and Kymlicka sharply diverges from that of liberals such as Barry is on the question of how well mainstream or “difference-blind” liberal norms and common citizenship rights are able to accommodate people’s cultural differences.¹⁴ Taylor and Kymlicka refute the effectiveness of common citizenship rights for accommodating cultural diversity by questioning the coherence of the idea of state “neutrality.”

Kymlicka characterizes “neutrality” as the “view that the state should not reward or penalize particular conceptions of the good life but, rather, should provide a neutral framework within which different and potentially conflicting conceptions of the good can be pursued.”¹⁵ It is a commitment to this ideal that causes many liberals to protest giving political recognition or support to minority cultures, because in so doing, that state would be promoting a particular way of life. Kymlicka uses the term “benign neglect” to describe the way in which some liberals think that culturally diverse states can remain

¹⁴ Barry (2000, 71) argues that although group and national membership is significant to people, liberal states must avoid creating group-specific public policies.
¹⁵ Kymlicka 1989, 883.
neutral. In pursuing benign neglect, states accord the same rights to all citizens while seeking to avoid either interfering with minority cultures or distributing public benefits or state powers to make it easier for specific groups to preserve their cultures.\textsuperscript{16}

According to Kymlicka, the idea that states marked by cultural diversity can remain neutral with respect to culture, or that they can avoid recognizing and promoting some cultures over others is "incoherent." What makes this an incoherent idea is that states must make certain decisions that lend support to particular cultures, and typically to the majority culture. Decisions that unavoidably benefit certain cultures are those that pertain to official languages, political boundaries, and the division of powers.\textsuperscript{17} State symbols and public holidays also tend to support the majority culture. Thus, for Kymlicka, because states unavoidably support majority cultures and place minority cultures at a disadvantage, the allocation of identical rights to the members of both only perpetuates an unequal arrangement.

Taylor questions the coherence of state neutrality somewhat differently, although his critique arrives at much the same conclusion as Kymlicka's, that in striving to deal with all individuals and groups equally by according them identical treatment, liberal states end up putting the member of minority cultures at a disadvantage. Taylor would largely agree with Kymlicka's argument that government policy can privilege certain ways of life. However, he also focuses on the wider conceptual framework of liberal rights and freedoms, a conceptual framework that is perceived by some as free from values and ideas about the best way to live. Taylor criticizes the Canadian Charter of Rights of Freedoms, and specifically the individual rights and guarantees for equal

\textsuperscript{16} Kymlicka 1995, 112.
\textsuperscript{17} Ibid., 113.
treatment of all citizens. These are not bad things in and of themselves. However, the priority of these rights over all other "goods" (such as the collective aim of preserving a language) is, in Taylor's view, a reflection of a particular conception of the good life. Thus, polities contradict themselves by claiming to be neutral while at the same time insisting that groups' collective aims can never overrule individual rights.

In questioning the notion that states can avoid supporting particular conceptions of the good life, Taylor and Kymlicka confront a key assumption underlying dominant forms of liberalism: that common citizenship rights sufficiently accommodate cultural diversity. Both argue that uniform rules do not address the real disadvantages that the members of minority cultures face in view of the support provided to majority cultures in liberal democracies such as Canada.

**Collective and group-differentiated rights**

Taylor and Kymlicka argue that states should give political recognition and support to minority cultures so that their members might have the same access to meaningful choices and support for their identities that members of the majority enjoy. Taylor and Kymlicka discuss political recognition and support for minority cultures in terms of collective and group-differentiated rights.

Taylor argues that a liberal democracy such as Canada can treat cultural minorities more equitably by "weighing the importance of certain forms of uniform treatment against the importance of cultural survival, and opting sometimes for the latter." Although certain "fundamental rights," such as *habeas corpus*, must be

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19 Ibid., 61.
guaranteed, Taylor argues that once a polity has decided to preserve the integrity of a culture, collective rights will sometimes have to override individual rights.

Kymlicka defends “group-differentiated rights” rather than “collective rights” because, as he explains, the phrase “collective rights” is too broad and suggests a false dichotomy with individual rights.²⁰ For Kymlicka, group-differentiated rights should not override individual rights. Instead, “minority rights are limited by principles of individual liberty, democracy, and social justice.”²¹ Kymlicka thus rejects the view (espoused by Taylor) that polities must, in certain cases, opt either to protect culture or individual rights, and offers a different way of thinking about minority and indigenous claims to culture. The key to determining if a claim to a group-differentiated right or an exemption from a common rule is warranted, according to Kymlicka, is to consider whether that right or exemption would help to promote fairness between groups, or whether it would limit the abilities of group members to question traditional authorities and practices.²² In cases where intergroup fairness would be promoted, Kymlicka suggests that the claim may well merit accommodation as an “external protection.” Claims with the potential to restrict the rights of individual group members—Kymlicka calls these “internal restrictions”—are unacceptable because, even though such claims may be made in the name of cultural traditions, they ultimately threaten to violate individual autonomy and create inequalities within the group.²³

The arguments that Taylor and Kymlicka make for the cultural thesis differ in a number of respects, but both authors defend a similar basic premise: that indigenous and

²⁰ Kymlicka 1995, 45.
²¹ Ibid., 6.
²² Ibid., 37.
minority claims to culture often warrant accommodation because of the links between individual well-being and culture. Of course, by no means does either author suggest that all practices that play or once played a part in a group’s way of life should automatically be accommodated. Rather, at the core of their arguments lies the idea that culture is as important as other goods, or makes other fundamental goods available, and therefore claims to it cannot be dismissed out of hand in a society wishing to call itself liberal.

The anti-essentialist critique

Unlike liberal critics of the cultural thesis, such as Barry, who believe strongly in difference-blind rules and institutions, Benhabib and Phillips contend that the thesis itself is insensitive to difference because it gives support to problematic, essentialist views of culture. The term “essentialist,” which gained currency in third wave feminist writings, remains difficult to define as it “subtends a number of related assumptions.” Tariq Modood defines an essentialist view of culture as one that conceives of cultures as “discrete, frozen in time, impervious to external influences, homogenous and without internal dissent.” Modood further points out that because few would ever consciously adopt an essentialist position on culture, the term is fundamentally a tool of critique. Thus, in their anti-essentialist critiques of the cultural thesis, neither Phillips or Benhabib suggests that Taylor and Kymlicka intentionally support essentialist positions on culture. Rather, Benhabib and Phillips contend that the arguments made by Taylor and Kymlicka are logically bound to essentialist views of culture—even though Taylor and Kymlicka

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would disagree. Benhabib and Phillips are concerned with two essentialist errors in particular. The first is that culture holds greater importance for minorities than it does for members of the majority. The second is there is little diversity within cultures, and little overlap between them.

Phillips argues that the arguments of Taylor, Kymlicka and other proponents of the cultural thesis support the notion that culture plays a more significant role in the lives of members of minorities than it does in the lives of members of the majority. As she writes, one consequence of the way in which Taylor, Kymlicka and others treat culture in their arguments “is that culture comes to be seen as something primarily associated with non-Western or minority cultural groups.” The notion that minorities relate to culture differently than do members of the majority is cause for concern because it is linked to the idea that the actions of individual minorities are often determined by their cultural beliefs and values. This last point is discussed in more detail below, but for now I consider how, according to Phillips, Taylor and Kymlicka inadvertently exaggerate the significance of culture for minorities.

Phillips argues that by basing their arguments for cultural recognition and accommodation on the importance that people attach to their cultural identities, but then focusing almost exclusively on how the members of minorities suffer at the loss of their culture, proponents of the cultural thesis inadvertently lend support to the idea that there is a fundamental difference between the ways members of cultural minorities and

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27 Referring specifically to Kymlicka, Benhabib (2002, 61) contends that he makes certain arguments that cause him to “fall into the culturalist essentialism.” This is similar to a criticism that Brian Barry makes of Iris Young, another proponent of the cultural thesis. Barry (2002, 286) argues that although Young explicitly rejects essentialist views of social groups, “the logic of [her] proposal for group representation seems to require an essentialized and naturalized conception of groups as internally homogenous.”

majors relate to their cultures. That is, although Taylor and Kymlicka argue that culture is basic to the well-being of all people (not only to the well-being of minorities), their arguments stress the need to recognize, accommodate and ultimately preserve minority cultures. Thus, it seems that culture plays an especially important role in the lives of minorities, as it is only minority cultural beliefs, values and traditions that warrant special rights and protection. Summarizing the way in which arguments for the cultural thesis exaggerate the importance of culture for minorities, Phillips writes: “In popular thinking, culture has become almost synonymous with minority or non-Western culture. Much the same seems to be happening in normative political theory.”

Benhabib makes an argument similar to that of Phillips (though much more in-depth) about how Taylor and Kymlicka unintentionally support flawed, essentialist views of culture. Benhabib focuses in particular on how the arguments for the cultural thesis support two essentialist views of culture: first, that group members always agree on which practices and traditions ought to define the group’s shared cultural identity, and second, that cultures are discrete entities that are fixed over time.

First, Benhabib contends that the argument advanced by Taylor in “The Politics of Recognition” supports the flawed notion that group members always agree on how to define their shared identity. According to Benhabib, Taylor unintentionally endorses this problematic idea by “conflating individual claims to authentic self-expression with collective aspirations to cultural recognition.” In other words, Taylor overlooks the

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29 Ibid. Phillips writes: “As the political case for multiculturalism comes to rest, in part, on the importance people attach to their cultural identities, the hold that “culture” exerts over people is highlighted and exaggerated, and culture is thereby exoticised. Culture comes to be represented as something of enormous importance to the individual.”

30 Ibid., 19.

31 Benhabib 2002, 52–53.
extent to which individual identity-related claims often come into sharp conflict with
group struggles to preserve particular cultural attributes or to be self-determining.

Taylor establishes a strong link between individual and collective claims,
particularly when comparing what he calls the politics of equal dignity to politics of
difference. Whereas the former is guided by the normative principle that every individual
is worthy of respect because all possess universal human potential to live lives according
to certain principles, the politics of difference rests on the universal potential to define
our own identities, as individuals and also as cultures. Taylor advocates the politics of
difference because, as discussed earlier, he believes there is a strong connection between
individual identity and culture.

Scrutinizing Taylor’s argument, Benhabib points out that because individual
identities are shaped by a variety of commitments, the members of a given group will
disagree about how to define a shared cultural identity, and about which norms and
principles they ought to drawn upon. For example, female group members might protest
using gender-biased practices to define the group’s shared cultural identity.\[^{32}\] In the face
of such irreducible conflicts between group and individual identities, Benhabib finds it
strange that Taylor’s theory lacks a means of resolving these conflicts in advance via
ordered principles that determine what kind of claims should take priority.\[^{33}\]

Taylor’s reaction to the controversy over commercial signage laws in Quebec
illustrates Benhabib’s point. In the late 1980’s, controversy grew around part of the
Charter of the French Language (Bill 101) which, when it was first introduced in 1977,

\[^{32}\] Ayelet Shachar (2000, 74) points out that female members are often made to shoulder a disproportionate
amount of the burden associated with distinguishing the group’s own culture from the world outside. This
relates to the way in which a group’s family law traditions—which can tend to burden women—“often
stand at the very core center of a group’s sense of its cultural uniqueness.”

\[^{33}\] Ibid., 53.
made it illegal for businesses to display English on exterior commercial signs. In 1988, under the Canadian Charter of Rights and Freedoms and the Quebec Charter of Human Rights, the Supreme Court of Canada ruled it unconstitutional for the Quebec government to refuse the right to display English on commercial signs, since the rule violated the freedom of expression.\textsuperscript{34} Taylor does not state explicitly what he thinks the outcome of this decision should have been. He does, however, refute the notion that individual rights should take priority in every such conflict, but also adds the caveat that fundamental liberties (those recognized from the very beginning of the liberal tradition: life, liberty, due process, free speech, freedom of religion) must be distinguished from those “privileges and immunities that are important, but can be revoked or restricted for reasons of public policy” provided that there is a strong reason to do so.\textsuperscript{35}

Thus, Taylor’s endorsement of cultural accommodation lacks a determinate means of resolving conflicts between collective claims that do not violate fundamental individual rights and individual claims to authentic self-expression. Benhabib suggests that without such a determinate means of resolving conflicts, Taylor’s theory implies that conflicts between collective and individual claims are uncommon. For, as Benhabib argues, theories that fully account for the possibility of conflict between collective and individual claims must establish ordering principles.\textsuperscript{36} Theories such as Taylor’s, which preclude a procedural means of adjudicating conflicts between collective and individual

\textsuperscript{34} The Supreme Court did, however, rule that the Quebec could require French to have greater visibility. See \textit{Ford v. Quebec (Attorney General)}, (1988), 2 S.C.R. 712.
\textsuperscript{35} Taylor 1992, 59.
\textsuperscript{36} Benhabib 2002, 55. The order of Benhabib’s principles is clear: in cases when collective demands conflict with individual claims to self-expression, individual claims should be given priority. She writes (2002, 19): “An individual’s group membership must permit the most extensive forms of self-ascription and self-identification possible. There will be many cases when such self-identifications may be contested, but the state should not simply grant the right to define and control membership to the group at the expense of the individual.
identity-related claims, present an idealistic and misleading picture of individual and group demands fused together in a “seamless web of interlocution.”

Benhabib launches a similar critique of Will Kymlicka’s articulation of the cultural thesis. It, too, ends up endorsing an essentialist view of culture, the view that cultures are discrete entities that are fixed over time. Benhabib argues that Kymlicka supports this view by drawing a distinction between “national minorities” and “immigrant minorities”—two sources of cultural diversity in modern states—on the basis of the concept of “societal culture.” According to Kymlicka’s definition, the members of a societal culture share a common language and ancestral connections to a particular territory. Societal cultures also provide members with “meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.”

Importantly, Kymlicka regards national minorities as having societal cultures, which their members have maintained over time, despite their conquest and involuntary incorporation into a single state. For Kymlicka, because national minorities such as indigenous peoples and the Quebecois have maintained a distinct status throughout Canada’s history and wish for that status to continue, they presently warrant strong forms of differentiated rights to protect their societal cultures. These include rights to political autonomy or territorial jurisdiction, in other words, to strong external protections.

Immigrant minorities, on the other hand, are not eligible for the same sorts of rights. According to Kymlicka, immigrant minorities are not immersed in their own distinct sets of societal institutions, but rather are striving to integrate into the institutions

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37 Ibid., 57.
38 Kymlicka 1995, 76.
39 Kymlicka 1995, 10-11, 27.
of another culture. Immigrant minorities are therefore viewed as particularly vulnerable to a form of cultural oppression different from that which threatens national minorities. That is, immigrant minorities are not threatened with the loss of a comprehensive cultural context, but rather with unfair, assimilative terms of integration which force them to discard aspects of their cultural difference in order to fully participate in the wider society’s institutions. Immigrant minorities are thus viewed as requiring a different sort of differentiated rights—polyethnic rights—which allow individuals to express cultural particularity and pride as they integrate in the wider society on fair terms.\(^{40}\)

Benhabib argues that Kymlicka’s distinction between national and immigrant minorities, and the concept of “societal culture” on which this distinction is based, support the view that cultures can remain discrete and fixed over time. According to Benhabib, by drawing a clear-cut distinction between national and immigrant minorities, Kymlicka’s argument obscures the way in which all human societies rely on a multiplicity of social structures, systems and practices that have originated from a variety of historic and cultural locations: “There is never a single culture, one coherent system of beliefs, significations, symbolizations, and practices, that extend across the full range of human activities.”\(^{41}\) This is to say, there is a considerable amount of overlap between cultures; national and immigrant minorities oftentimes share similar cultural materials among themselves and also with national majorities. As Benhabib points out, any culture, whether it is that of an immigrant minority, a national minority, or a national majority, incorporates materials from other locations; however, Kymlicka’s argument seems to eschew this reality by allocating special rights to national minorities to help them

\(^{41}\) Benhabib 2002, 60.
preserve single, coherent cultures. Thus, according to Benhabib, Kymlicka’s argument for extending stronger differentiated rights to national minorities than to immigrant minorities (so that national minorities can preserve their societal cultures), supports the view that cultures can remain discrete and impervious to change.

**Cultural holism and cultural determinism**

In explaining Benhabib’s and Phillips’s anti-essentialist critiques of cultural thesis, I have discussed how the thesis is understood to support essentialist views of culture: the view that minorities relate to culture differently than do members of the majority, that cultural group members agree on how to define a shared identity, and that cultures remain discrete and fixed over time. In no way do Benhabib and Phillips suggest that proponents of the cultural thesis such as Taylor and Kymlicka intend to endorse these views. Rather, aspects of Taylor’s and Kymlicka’s arguments are said to commit them to conclusions about culture that they would otherwise reject.

There is also another dimension to the anti-essentialist critiques of the cultural thesis advanced by Benhabib and Phillips; that is, the essentialist views of culture that the thesis lends support to constitute real threats to the autonomy of individual group members when practical attempts to recognize and accommodate culture are made. In other words, decisions to recognize and accommodate culture can harm individuals when they are based in part on essentialist notions, such as the idea that minorities relate to culture differently than do members of the majority. Benhabib and Phillips identify two ways in which group members can be harmed by such decisions: cultural holism, the
view that group members agree about the meaning and significance of cultural traditions and practices, and cultural determinism, the view that the actions of minority individuals are determined by culture. Benhabib and Phillips refer to actual cases in which cultural holism and cultural determinism emerged.

Prior to explaining the critiques of Benhabib and Phillips, I would first like to clarify what it is that they are arguing. To be clear, they treat cultural holism and cultural determinism as the practical consequences of essentialist views of culture which Taylor’s and Kymlicka’s arguments partly sustain. Benhabib and Phillips do not suggest that Taylor and Kymlicka view cultures as wholes or as the determinants of individual actions, nor do they suggest that Taylor and Kymlicka think that such views should play any part in decisions related to cultural recognition and accommodation. Rather, the idea is that these problems often do occur when cultural recognition and accommodation goes awry, and that Taylor’s and Kymlicka’s theories can inadvertently contribute to these mistakes.

_Cultural holism_

Benhabib’s critique of the cultural thesis focuses on the way in which individuals are harmed when practical acts of recognition and accommodation are influenced by the assumption that group members generally agree on how to define the group’s cultural identity. In particular, Benhabib considers the implications of assuming that group members attribute the same meaning to cultural practices and traditions, or to put it in her
terms, the implications of treating cultures as ‘wholes.’ Cultural holism endangers individuals mainly because cultural elites are often the ones empowered to speak on behalf of the group, or to forward demands onto the wider society, and elite conceptions of the meaning of cultural practices often differ significantly from those of the group’s less powerful members. In certain cases, elites may consider a particular practice to be definitive of the group’s cultural identity, not because the practice is widely used or respected within the group, but because it helps them to control group members and maintain their dominant status. Because cultural holism entails the idea that group members attribute the same meaning to practices, it can lead those involved in deciding whether and how to recognize and accommodate a minority’s cultural practice to quickly accept elite accounts of the role that that practice plays in the group’s way of life. In this way, cultural holism works to the detriment of individual group members. Benhabib discusses two cases where this took place.

The way in which sati came to be regarded as a central Indian tradition provides a stark, though exceptional illustration of the problem of cultural holism. Sati, a practice marginal to many Hindu communities, entails the immolation of a widow on the funeral pyre of her husband. Relying on Uma Narayan’s famous account of the topic, Benhabib explains that sati gained an emblematic status that it did not previously possess after British colonials attempted to understand its religious significance. In order to understand the religious significance of sati, British colonials consulted only with local Indian elites who described it as a central and authentic Indian tradition that symbolizes an honourable

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42 Benhabib 2002, 102-4. Throughout The Claims of Culture Benhabib rarely uses the phrase “cultural holism.” She does, however, repeatedly problematize treating cultures as “unified, harmonious, seamless wholes that speak with one narrative voice.”

43 Benhabib 2002, 5.
female’s devotion to her family.\textsuperscript{44} British colonials accepted elite accounts of the meaning and significance of sati; that is, they assumed that elites and other group members see it the same, and thus began, in their discussions of the topic, to discursively construct sati as central to all Hindus. Hence, although British colonials did not try to accommodate the practice of sati, they nevertheless ‘recognized’ the practice as having a particular meaning, and thus helped to solidify that meaning. As Narayan notes, the British colonials’ recognition of sati as a central Indian tradition (the result of cultural holism) has had a detrimental impact on women’s struggles to dispel thinking that sati has any role in their culture.\textsuperscript{45}

Benhabib points out a second example of cultural holism in the U.S. Supreme Court’s refusal to intervene in the affairs of the Santa Clara Pueblo’s indigenous tribal council. The issue arose after a suit that was filed by a female member, Julia Martinez, whose daughter was denied membership by the Pueblo despite having grown up in the community. The Pueblo tribal council prohibited Martinez’s daughter from gaining membership and the rights associated with membership because her father was not a member of the community, and the Pueblo have a rule that only men can pass on their membership status to their children. Martinez argued that tribal council’s rule was discriminatory because, whereas women who married outside the group could not pass on their membership status to their children, out-marrying men could. The U.S. Supreme Court ruled that it could not hear her equal protection claim on the grounds that that it did not have jurisdiction over matters of tribal membership.\textsuperscript{46}

\textsuperscript{44} Ibid., 7; Narayan 1998, 92–93.
\textsuperscript{45} Narayan 1998, 94.
\textsuperscript{46} Benhabib 2002, 205; Song 2005.
The Supreme Court’s decision has received different interpretations from other theorists. However, Benhabib sees it as the outcome of a distorted, holistic approach to indigenous culture. By refusing to intervene on behalf a female member who married outside of the group (and her daughter), and by recognizing the Pueblo’s exclusive powers to rule in this area, the Court privileged particular ideas about what boundaries individual members cannot cross, namely those imposed by leaders. This privileging of elite conceptions of the group’s boundaries eschews important counter-evidence provided by members’ own lived experiences: in this case, that one can form a deep bond with someone from outside of the Pueblo community while maintaining a strong connection to the community. Thus, while the Court was clearly aware of Martinez’s critical view of her community’s rules, its decision can be interpreted a sign of cultural holism because it assumed that the Pueblo community followed its elites in not considering Martinez’s daughter, and to some extent Martinez herself, as members, because their cultural identities supposedly challenged the community’s rules and traditions. Benhabib argues that such identities deserve no less respect than those that stay inside the perimeters delineated by the powerful.\footnote{See for example Avigail Eisenberg’s (2003, 61) argument that the decision “focuses on one of the crucial identity-related interests of any minority group, namely, its ability to maintain itself as a culturally and politically distinct entity by maintaining the legitimacy of its institutions.” See also Sarah Song’s (2005, 479) argument that the Court’s decision did not reflect respect for cultural difference or concerns about tribal sovereignty as much as it did congruence of gender biased traditions across cultures.}

Cultural holism, which is central to the anti-essentialist critique of the cultural thesis, entails recognizing or accommodating a cultural practice as if all the group’s members valued that practice in the same way. As Benhabib argues and illustrates with case studies, cultural holism can feature in official acts of cultural recognition and...
accommodation. In these cases, some members of the group whose culture receives recognition—particularly its female members—experience this not as courtesy owed to them, but as an affliction that further entrenches their already subordinate status.

*Cultural Determinism*

Phillips' critique of the cultural thesis focuses on the way in which individuals are harmed when acts of cultural recognition and accommodation are influenced by the assumption that minority individuals relate to culture differently than do members of the majority. Phillips looks specifically at the idea that minorities' actions are determined by culture in ways that the actions of members of the majority are not; that is, she considers the problem of cultural determinism. Cultural determinism threatens the autonomy of the individual members of minorities in at least two ways. First, it leads criminal trial judges to accept what has become known as a "cultural defence," and grant exceptionally light sentences to minorities and recent immigrants who claim that cultural norms or beliefs drove them to commit crimes.49 Here, one implication is that individuals from certain cultural backgrounds may be offered an excuse for inflicting crimes on others, who are typically of the same cultural background. Phillips also points to a second negative consequence of cultural determinism: the reinforcement of cultural stereotypes.

Pronouncements that culture caused an individual to do something may strengthen already existing assumptions that certain attitudes or beliefs are prevalent among group members. In turn this may (as in Benhabib's *sati* example) impede other group members' efforts to subvert cultural stereotypes. As Phillips writes, "the claim that an action was

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49 The cultural defense is considered a defense strategy—it is not a formal defense. Renteln (2004, 7) explains, "defendants may seek to introduce cultural evidence at trial to negate a required element of a crime, to secure an acquittal, or to support an established defense such as insanity or provocation."
culturally driven does a deep disservice to other members of that cultural community, whose beliefs and practices are being misrepresented to explain behaviour they would never support.”

Phillips points to one example of cultural determinism in a criminal case involving a minority defendant; this is the case of Dong-lu Chen. Chen, a Chinese immigrant living in New York, killed his wife weeks after discovering that she was having an affair. Chen later confessed that he had killed his wife because her infidelity had dishonoured him. This case has garnered a great deal of attention from theorists because it seems that by invoking culture, Chen received a significantly more lenient sentence than he otherwise would have: he was convicted of second degree manslaughter and sentenced to 5 years in jail before probation. Of interest to Phillips in this case is a reference that the judge made to “traditional Chinese values about adultery and loss of manhood.” This serves as an indication that the judge understood Chen’s actions to be driven by culture more than other motives such as jealousy. In commenting on this case, Phillips suggests that the court’s affirmation of Chen’s own claim—that violence against women plays a part in Chinese culture—creates harmful consequences for women of Chinese descent by making patriarchal violence seem a regrettable but “normal” part of their culture.

Phillips refers to another criminal case involving cultural determinism, that of Kong Pheng Moua, a Hmong immigrant who abducted and raped a Laotian American

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50 Phillips 2005, 123.
woman. In this case the defendant claimed that he was acting in accordance with a traditional Hmong practice, that of “marriage by capture.” As in the Chen case, Kong Pheng Moua was given a considerably light sentence—120 days in jail and a fine—because, as Phillips argues, the Court interpreted his actions as being motivated by culture, rather than by a licentious disregard for the personal autonomy of the victim. For Phillips, this decision and the Chen case are troubling not only because they do injustices to the victims of violent crimes, but also because they strengthen the stereotype that violence against women is an acceptable part of certain minority cultures. This support for stereotypes hinders the efforts of group members trying to undermine idea that their cultures sanction violence against women.

Cultural determinism, which is central to anti-essentialist critiques of the cultural thesis, entails basing acts of cultural recognition and accommodation on the view that, unlike members of the majority, “the members of non-Western cultural groups have little choice but to obey the dictates of their culture.” As Phillips points out, key implications of cultural determinism include the denial of justice for minority victims of violent crimes (or for the families of victims), and second, the reinforcement of pernicious stereotypes about minority cultures.

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55 Ibid., 25.
Conclusion

The cultural thesis holds that polities are today obliged to respect and help preserve minority cultures because of the fundamental links that exist between individual freedom, identity and culture. This thesis has been attacked from a variety of angles, but some of the most serious criticisms of it have come from theorists who are themselves firmly committed to promoting respect for difference. Thus, Benhabib and Phillips—two theorists whose political writings demonstrate a concern for difference—argue that the thesis supports essentialist views of culture, views that create tangible harms for the individual group members when they influence practical acts of cultural recognition and accommodation. In the following chapter, I take a closer look at Benhabib’s and Phillips’ critiques of the cultural thesis, and I argue that these critiques misconstrue the reasons why the thesis is a problematic framework for understanding practical claims to culture.
Chapter Two: Reevaluating problems with the cultural thesis

Introduction

This chapter argues that the cultural thesis is a problematic framework for understanding practical claims to culture, but not because it supports essentialist views of culture, contrary to what Benhabib and Phillips suggest. Here I contend that parts of the arguments that Taylor and Kymlicka make for the recognition and accommodation of minority cultures are either overlooked or mischaracterized by Benhabib and Phillips in their anti-essentialist critiques of the cultural thesis. By bringing into focus key parts of the arguments that Taylor and Kymlicka advance, I aim to show that the link between the cultural thesis and essentialist views of culture is far more tenuous than Benhabib and Phillips argue.

The anti-essentialist critiques that Benhabib and Phillips make do, however, shed light on serious problems that can beset attempts to recognize and accommodate culture: cultural holism and cultural determinism. Here I argue that the cultural thesis does not lead to cultural holism and cultural determinism, but at the same time, the normative orientation of the thesis renders it a problematic framework for understanding practical claims to culture. Because it is designed to meet the objections of exponents of difference blind liberalism, the cultural thesis strongly values cultural continuity and the preservation of group difference, and it emphasizes the role that these goods play in helping individuals to self-define. In reality, though, self-defining individuals must relate to culture in other ways as well: the must be able to challenge or subvert cultural norms and values, or to modify practices to meet the demands of the present. Thus, I argue that
when it comes to the practical problem of accommodating culture claims, the anti-essentialist critiques of the cultural thesis do illuminate the need for a “transformative” approach to culture claims, an approach that does not overvalue cultural continuity and the preservation of group difference.

Do Taylor and Kymlicka support essentialist views of culture?

Both Phillips and Benhabib overlook or mischaracterize important parts of Taylor’s and Kymlicka’s theories in their criticisms of them. Here I will first refute the claim that Taylor and Kymlicka unintentionally support essentialist views of culture by bringing into focus key parts of their theories. Second, I will discuss the way in which the theories of Taylor and Kymlicka, although they do not support essentialism, do place an excessive normative weight on the preservation of group difference and on the continuation of cultural practices and traditions.

To recall, Phillips argues that despite what Taylor and Kymlicka actually think about the importance of culture for all people, their arguments represent culture as something that the individual members of minorities value more than the average member of the majority. By exaggerating the importance that minorities attach to their cultural identities, Taylor and Kymlicka, along with other proponents of the cultural thesis, help to sustain the view that culture can determine the actions of the individual members of minorities.

The central problem with Phillips’ critique is that it overlooks one of the key components of Taylor’s and Kymlicka’s arguments: the way they call into question the
coherence of the idea of state neutrality. Phillips points out that arguments for the cultural thesis invoke the importance that all people attach to their cultural identities, and yet these arguments seem to focus exclusively on the need to preserve minority cultures. However, she fails to discuss the reason why Taylor and Kymlicka advocate the extension of special rights and protections to minority cultures in particular: because majority cultures are already supported by states in a variety of ways, for example, in the designation of official and political boundaries, and even, to some extent, in laws. By overlooking this important context, Phillips creates the impression that there is some ambiguity in their arguments: why say that culture impacts the well-being of all people, but argue that minority cultures in particular must be preserved? But once this argument is placed in the context, it become clear that Taylor and Kymlicka focus on protecting minority cultures not because those cultures are especially important to minority-group individuals, but because those cultures are unfairly disadvantaged when compared to majority cultures that receive state support. Given this, it becomes quite unclear how their arguments exaggerate the importance of culture for minorities.

Phillips's criticism, then, misses its target: Taylor's and Kymlicka's theories do not lend support to the essentialist idea that culture matters more to minorities than to majorities. However, when it comes to the practical matter of accommodating culture claims, she does identify a genuine problem. Recognition and accommodation do sometimes harm individuals when minority cultures are treated as if they determine individual actions. Using the cultural thesis alone as framework for responding to practical claims to culture might sometimes contribute to this problem. The reason is that the cultural thesis is in part a product of debates over the justice of difference-blind

liberalism, and as such it strongly values the importance of group difference for individual identities. Taylor’s work in particular places normative weight on the preservation of group difference as he discusses the suffering that group members experience when members of the majority stand back and allow the distinctive features of their identities to fade. But if the preservation of group difference is the only or predominant consideration when faced with a culture claim, group members will struggle to garner recognition for the ways in which their culture, or their cultural beliefs and values, resemble those of others. Thus, Phillips’s work brings to the fore the need for a practical approach to culture claims that does not overvalue the preservation of group difference.

Benhabib also overlooks or mischaracterizes key parts of the arguments that Taylor and Kymlicka make for cultural recognition and accommodation. For example, she contends that Taylor’s theory “flattens out the contradictions and antagonisms that surround group experience as well as interpretations of culture” because it lacks an ordered set of principles that could be used to adjudicate conflicts between groups and individuals.\(^5\) The key problem with this critique is that it misconstrues one of Taylor’s central political commitments as sign that he supports an under-differentiated concept of culture. That is, the absence in Taylor’s theory of an ordered set of principles to navigate conflicts between collective rights and individual rights has little to do with his view of culture, and instead relates to his commitment to a particular model of democracy—one in which decisions are based on negotiations and discussions, not procedures.

For Taylor, it is in many ways lamentable that modern liberal democracies marked by cultural diversity often treat individual rights and procedures for enforcing

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\(^5\) Benhabib 2002, 65.
those rights as a way to build solidarity across citizen differences. Taylor argues that the procedural liberal approach limits incentives for citizens to learn about one another, or as he puts it, to “bond not in spite of their differences but because of them.”\textsuperscript{58} The reason proceduralism discourages citizens from learning about one another is related in part to efficiency. The less is known about the actual outlooks of individuals and groups, the easier it is to resolve conflicts according to pre-set principles. Taylor’s broader point is that attempting to account for how others understand their own reasons for acting the way they do, a process he has referred to as the development of a “perspicuous” outlook, tends to render set procedures for resolving conflicts somewhat less practical.\textsuperscript{59} When a society has a vested interest in maintaining the authority and efficiency of its procedures, Taylor sees it as being in the interest of that society to learn less about the varying range of standpoints within it.

Hence, the difference between Benhabib and Taylor on this point—that Taylor does not offer the sort of determinate procedure for sorting through rights conflicts that Benhabib thinks is indispensable—is not directly related to their understandings of culture. On the whole, both theorists see a strong need for discourse to help alleviate the tensions created by moral and ethical differences in diverse societies and also to create “a sense of democracy as a cooperative enterprise among citizens.”\textsuperscript{60} Yet, Benhabib and Taylor contrast sharply in their interpretations of how the existence of an authoritative set of principles impacts discourse. Taylor seems to think that its presence stifles discourse,

\textsuperscript{58} Taylor 1998, 153. As mentioned earlier in this paper, another key reason that Taylor opposes procedural approaches to justice is because these are never neutral in his view. Here, however, I will focus on this alternative reason for his scepticism towards proceduralism in diverse societies because it creates an illuminating contrast with Benhabib’s argument.
\textsuperscript{59} Taylor 1985, 125.
\textsuperscript{60} Benhabib 2002, 133.
or limits the extent to which understandings between citizens might be bridged. In contrast, Benhabib does not view the presence of a non-negotiable set of “constitutional essentials” that give priority to individual expressions of identity in cases of conflict as a serious barrier to open discourse.\(^{61}\)

It is now possible to re-evaluate Benhabib’s charge: does Taylor conflate individual claims to authentic self-expression with collective aspirations to cultural recognition? Indeed, Taylor does see a strong connection between individual freedom and the flourishing of the culture one identifies with. As mentioned earlier in this paper, he has been influenced by Herder’s theory that originality is expressed on two levels—by individuals and by groups, as a “culture-bearng people.”\(^{62}\) Following Herder as well as Hegel, Taylor proposes that an individual’s ability to freely express his or her identity is constrained when the wider society reviles, subtly disrespects, or denies the history of the cultural community that he or she identifies with.

While the connection between individual agency and collective self-determination is a central aspect of Taylor’s theory, there is clear evidence that he also recognizes that conflict between individual identity-related claims and collective aspirations is unavoidable. The evidence lies in Taylor’s notion of the dialogical formation of identities and the role that “significant others” play in this process. According to Taylor, a major function of the interactive relationships one has with significant others is to help the individual to develop the moral resources to make independent value-judgments. Individuals thus struggle to define identities against significant others while continuing to

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\(^{61}\) Benhabib 2002, 19. Benhabib establishes three normative conditions that claims must meet in order to be eligible for consideration in her model of “complex cultural dialogue”: egalitarian reciprocity, voluntary self-ascription and freedom of exit and association.

share in the things that derive their meaning through connection to that other.\textsuperscript{63} The result of these relationships, according to Taylor, is that individuals' outlooks on their surrounding contexts are constantly changing; however these changes do not annul the value of the connection that individuals share with their others.\textsuperscript{64} Thus, the notion of the dialogical formation of identities indicates that because individuals desire, or in certain cases, see no genuine option other than to maintain connections with a particular group, criticisms of and challenges to certain collective aims, particularly those that seek to preserve conventions and traditional roles, are destined to arise. Put simply, intragroup conflict is inevitable, according to Taylor's theory, because although individual identities are constantly in flux, rarely can people detach themselves from the cultural context in which they share connections with others. Thus, Benhabib is quite mistaken to suggest that Taylor's theory lends support to the view that cultural groups are not riven by contestation.

I turn now to consider Benhabib's critique of the case that Kymlicka makes for the cultural thesis. To recall the key premise of this critique, the distinction that Kymlicka draws between national minorities and immigrant minorities, and the concept of "societal culture" on which this distinction is based, support the view that cultures remain discrete and fixed over time.

The key question this critiques raises is whether Benhabib criticizes an accurate portrait of Kymlicka's notion of societal culture. To determine if this is the case, one must re-consider the depiction that she offers. Benhabib criticizes Kymlicka's concept on the grounds that "complex human societies, at any point in time, are composed of

\textsuperscript{63} Ibid., 33.
\textsuperscript{64} Ibid., 34.
multiple material and symbolic practices with a history.” She further contends that Kymlicka’s conception of comprehensive societal cultures negates the omnipresence of alternative, competing narratives throughout every culture. Overall, Benhabib’s critique opposes Kymlicka’s notion of societal culture to the idea that cultural groups readily incorporate material from other sources, such that elements originating from other belief systems and economic systems are always circulating and displacing one another. Does this opposition make sense?

I think the answer is “no”; there appear to be some serious problems with Benhabib’s representation of Kymlicka’s notion of societal culture. Further, I suggest that these problems stem from a misunderstanding of how exactly Kymlicka envisions a “single culture” encompassing a society. Judging by the account of culture that Benhabib contrasts with what she takes to be Kymlicka’s, she seems to think that the presence of a “single culture” in a society entails the persistence over time of one set of material and symbolic practices. This, however, is a dubious interpretation of Kymlicka.

A more accurate depiction of Kymlicka’s notion of societal culture would not associate the existence of a single culture with an immutable set of practices or beliefs. Instead, for Kymlicka, what demarcates the existence of a single, or distinct societal culture is that the lives of citizens or members are coordinated around a common set of social institutions. Historical narratives and religion constitute these institutions in certain ways, but it is the common language used in public life that plays an even greater role in sustaining these institutions. At the core of Kymlicka’s notion of societal culture is also a requirement that members are highly motivated, and in some cases have fought for years, to preserve their existence as distinct from other groups, groups which have in many

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65 Benhabib 2002, 60.
cases also struggled to assimilate minorities to their own ways of life. These struggles to maintain distinctness, particularly in the case of indigenous peoples, have not seen societal cultures preserve unmodified ways of life. For many, the dispossession of their lands in combination with assimilative laws have helped to create circumstances in which retaining traditional ways of life is not an option.

Since Kymlicka shifts from thinking of cultures as “fixed over time” to being “distinct” instead, it becomes clear that his notion of societal culture does not stand in opposition to Benhabib’s conception of cultures as highly malleable. For Kymlicka, cultural groups can undergo large-scale change, even near-decimation and still remain distinct. Moreover, Kymlicka regards the flow of cultural materials, practices, and norms as presenting positive opportunities for the members of recipient cultures: “Liberals want a societal culture that is rich and diverse, and much of the richness of culture comes from the way it has appropriated the fruits of other cultures.”

Kymlicka’s distinction between national minorities and immigrant minorities is based on a conception of culture which accounts for the movement of practices and narratives between cultural boundaries over time. However, it seems unlikely that this would satisfy Benhabib’s broader concerns regarding Kymlicka’s allocation of stronger rights to national minorities. In fact, she might respond to my argument with the suggestion that, by demonstrating how Kymlicka recognizes the fluid character of societal cultures, I have perhaps only reinforced her own point—that granting external restrictions to national minorities is a senseless attempt to preserve a form of cultural purity or integrity that cannot be achieved in the modern world.

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66 Kymlicka 1995, 78.
67 Ibid., 102.
An appropriate response to this objection, I think, would start by confirming that both Benhabib and Kymlicka recognize the malleable nature of culture, and moreover that, in many cases, groups benefit from incorporating materials from other cultures. Hence, both authors accept that groups always exert a certain amount of “hybridizing pressure” on one another, and that this is by no means a regrettable phenomenon. The perspectives of Benhabib and Kymlicka diverge, however, with respect to the issue of whether it matters that the flow of cultural materials and hybridizing pressure tends to be unidirectional, from majority or dominant cultures to minorities. As Nikolas Kompridis points out, “hybridization can’t possibly be reciprocal and symmetrical under conditions of political and economic inequality between and among cultures.” For Benhabib, that minorities do not exert a reciprocal amount of hybridizing pressure on majorities is no great cause for concern; as long as the “cultural material” crossing boundaries is compatible with liberalism generally, it simply presents a greater number of opportunities for the recipients, and enhances their freedom of choice.

Kymlicka, on the other hand, regards the asymmetric pressure that majority cultures impose on minorities as a political problem that warrants the allocation of special rights to minorities. As he sees it, new cultural material is not only a source of opportunity for minorities because, when a minority group transfers little of its own collective identity to the wider society, admitting something new can effectively mean losing connection with its own identity. Kymlicka thus contends that minorities’ freedom

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68 Kompridis 2005, 332.
69 Kompridis (2005, 326) writes that Benhabib understands the loss of former attachments and identifications to be “made up by a gain in freedom.”
of choice does not grow in the way that Benhabib and other cosmopolitans anticipate.\textsuperscript{70} Minorities need rights in place to enable them to make decisions about what types of material they wish to incorporate, so that the "members of minority cultures can continue to develop their cultures in the same impure way that the members of majority cultures are able to develop theirs."\textsuperscript{71}

Thus, parts of the arguments that Taylor and Kymlicka make for the recognition and accommodation of minority cultures are either overlooked or mischaracterized in Benhabib's critique. Yet, as with Phillips, her critique does rightly highlight some of the harmful effects that can result from acts of cultural recognition and accommodation. Specifically, Benhabib is concerned about the harm that can be done to individuals when the disputed nature of the significance and meaning of practices is not fully taken into account; that is, when cultures are treated as if they were uncontested wholes. Furthermore, in the face of practical claims to culture, the cultural thesis—if it is applied alone and out of context—may contribute to the problem of cultural holism, because it so strongly values cultural continuity. As I have argued, there are good reasons for Taylor and Kymlicka to place normative weight on the importance of cultural continuity and recognition, especially in the face of power imbalances between majorities and minorities. However, if the cultural thesis were taken as a comprehensive practical approach to culture claims (and it probably should not be), it would overvalue cultural continuity. Though Benhabib's critique of the cultural thesis is misleading in certain

\textsuperscript{70} Kymlicka does not characterize Benhabib's position as cosmopolitan. He does, however, respond to an argument that is similar to the one Benhabib makes—that of Jeremy Waldron—which stems from a cosmopolitan perspective (1995, 102).

\textsuperscript{71} Kymlicka 1995, 105.
respects, it does highlight the need for an approach to practical claims to culture that does not overvalue cultural continuity.

Conclusion

This chapter has raised three sources of doubt about whether the cultural thesis really supports essentialist views of culture. First, Phillips's claim that the cultural thesis exaggerates the importance of culture for minorities becomes implausible when Taylor's and Kymlicka's critical orientation towards the idea of state neutrality is taken into account. Second, contrary to Benhabib's assertion, the absence in Taylor's theory of a procedure for navigating conflicts between collective and individual claims should not be interpreted as a sign that the thesis underestimates the amount of contestation within cultural groups. Third, a more careful reading of Kymlicka's notion of societal culture demonstrates that it does not support a view of cultures as discrete and impervious to change. Hence, there do not appear to be any clear links between the cultural thesis and essentialist views of culture. However, when it comes to the practical matter of recognizing and accommodating the demands of groups, the cultural thesis does not offer obvious ways to avoid problems such as cultural holism and cultural determinism. The thesis alone is not a suitable framework for understanding practical claims to culture because it primarily stresses the benefits that individuals derive from cultural continuity, from continued contact with cultural norms, values and traditions. As well, the cultural thesis emphasizes the importance that maintaining a culturally distinct status holds for minority groups. Yet, group members require more than access to distinctive norms,
beliefs and traditions in order to be self-defining; they also need to be able to subvert their cultures in certain ways, fuse certain elements of their cultures with elements from other cultures and highlight the resemblances between their culture and others. This calls for an approach to culture claims that takes a fuller account of the way in which group members need to transform culture as well as preserve it, in order to be self-defining. In the following chapter I will examine two “transformative” approaches to culture claims, both of which are better suited than the cultural thesis to avoiding the problems of cultural holism and cultural determinism.
Chapter Three: Two Transformative Approaches to Culture Claims

This chapter examines two approaches to claims to culture which, in comparison with the cultural thesis, better account for way in which individuals must be able to transform culture in order to be self-defining. Both approaches accept that minority and indigenous claims to culture warrant serious attention from states as well as earnest efforts to address their causes. As well, both approaches de-emphasize the direct links between individual well-being, cultural continuity and group difference. These transformative approaches ask instead that we consider the impact of the metaphorical boundaries that are set around groups when their cultural attributes are formally recognized and accommodated. Often these boundaries can themselves can have as great an impact on individual well-being, or individual abilities to self-define, as culture itself.

The first approach, which I will call the “unbounded approach,” sees these boundaries in negative terms. While it accepts that culture often plays an important role in shaping individual identities, it also highlights the way in which the boundaries delineated by formal acts of recognition and accommodation can impede individual self-definition. This approach is based in part on the conception of recognition advanced by Nancy Fraser in *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition*. Although Fraser herself deals very little with ethnic or nationalist minority demands, political theorists including Benhabib and Phillips have used her ideas to think through the problems of cultural holism and determinism.72 A key feature of the

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72 Nancy Fraser (1997, 12, 33) suggests that her theory applies mainly to struggles around gender and race but that it may also be useful for addressing struggles around ethnicity and nationality. Benhabib (2002, 68–71) and Phillips (2006, 2) rely on Fraser’s theory in their discussions of cultural holism and determinism.
unbounded approach is that it sheds light on the link between minority culture claims and the social and economic subordination that many of these groups face. The approach also suggests that the destabilization of all boundaries on the social landscape is the best way to address the source of group demands for recognition and accommodation.

An advantage of using the unbounded approach is that it can help to avert the problems of cultural holism and determinism. However, as I elaborate below, the unbounded approach avoids these problems mainly by framing cultural recognition and accommodation as boundary setting acts that serve only to hinder group members from overcoming social and economic subordination. I suggest that this way of framing recognition and accommodation is problematic, especially with respect to the claims forwarded by groups whose members wish to organize their lives together.

I argue that a better transformative approach is the “shifting boundaries approach,” which has been developed in the work of Tim Schouls in relation to debates around indigenous self-government. In contrast to the unbounded approach, the shifting boundaries approach sheds light on why the boundaries set by acts of cultural recognition and accommodation are indispensable for particular communities whose members wish to organize their lives together. The approaches acknowledges that boundaries are important for many communities because they benefit relations between the members. It is relations between the members of a community that the shifting boundaries approach places as a top concern, as these are vital to individual self-definition. Hence, with respect to particular claims to culture, the shifting boundaries approach orients attention towards community integrity, or more specifically, towards the impact that the
boundaries set by recognition and accommodation will have on community integrity, since viable communities make possible ongoing relations between members.

The Unbounded Approach

The unbounded approach asks that we consider minority claims to culture as arising not so much because group members require access to particular cultural elements for their well-being, or for the health of their identities, but because cultural differences often appear to be the cause of minorities’ marginalization and exclusion. The approach asserts that in the absence of asymmetric power relations, cultural differences would not have the same meaning: “group differences do not pre-exist their hierarchical transvaluation, but are constructed contemporaneously with it.”73 The unbounded approach thus conceives of minority claims to cultures as attempts to gain respect for the attributes or differences that prevent group members from fully participating in social life.

A second feature of the unbounded approach is that it seeks to address the social subordination of minorities, which it treats as the general source of culture claims. To address this source, the approach first asks that we reject what Fraser calls “affirmative” responses.74 Generally speaking, such responses affirm the value of specific group attributes or particular cultural practices, customs or traditions, provided that the human rights of group members are not jeopardized. Proponents of the unbounded approach see a number of problems with affirmative responses, but it is the strengthening of boundaries on the social landscape that concerns them most. Affirming a group’s cultural

73 Fraser 2003, 15
74 Fraser 1997, 23.
attributes contributes to the “enhancement of existing group differentiation.” Advocates of the unbounded approach worry about this effect because, as they see it, affirmative responses to minority claims do little to remedy the power imbalances that tend to make particular group attributes prominent in the first place. As long as these power imbalances remain, pronounced boundaries may make groups susceptible to other forms of oppression, even if some of their distinguishing features have been revalued.

Fraser’s work, for instance, suggests that boundaries can work to the disadvantage of “bivalent collectivities,” groups suffering from economic oppression as well as cultural domination. Group differentiations give rise to and sustain unjust economic arrangements, and therefore, dismantling such arrangements requires deconstructing differentiations. Because boundaries function partly to keep group differentiations intact, they also support unjust economic arrangements. In sum, a group’s efforts to gain recognition and accommodation for its particular cultural attributes can at the same time undermine its efforts to free its members from economic oppression.

The notion that affirmative responses render group members more susceptible to forms of oppression is also discussed by Patchen Markell, who argues that the benefits that groups derive from having specific attributes recognized are often offset by their increased vulnerability to “sudden swings in the national mood that can provoke transformations in the organization of social and political privilege.” In other words, a group’s experience of once having had its distinguishing features recognized and

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72 Ibid., 24.
73 As Fraser (1997, 24) writes, affirmative responses tend to leave intact “underlying cultural-valuational structures.”
74 Ibid., 16.
75 Ibid.
76 Ibid.
77 Markell 2003, 173.
revalued may not protect it from angry or suspicious public reactions towards it in the aftermath of certain political events or crises. Yasmeen Abu-Laban makes a similar point in her examination of racial profiling debates in Canada since the September 11th 2001 terrorist attacks. She suggests that the affirmative aspects of Canada’s approach to multiculturalism have worked to entrench ideas about Muslim and Arab difference in the minds of many Canadians. This has in turn contributed to thinking that people of Muslim or Arab decent should be differentially targeted (particularly in airport security checks) for public safety reasons.\textsuperscript{80}

Wary of the effects of affirmative responses, the unbounded approach highlights the benefits of destabilizing or blurring the boundaries that separate groups. The aim of this process is not, as Fraser notes, to “dissolve all differences to single, universal human identity,” but rather to create a “field of multiple, debinarized, fluid, ever-shifting difference.”\textsuperscript{81} For Benhabib, the goal of questioning group differentiations is to illuminate how all cultures are always “polyvocal, multilayered, decentered, and fractured systems of action signification.”\textsuperscript{82} A key effect of such questioning is a reduction of some groups’ power to oppress others, or to profit (in terms of social, political, and economic capital) from their subordination, by bringing the privileged state of their identities into question.

Proponents of the unbounded approach argue that marginalized minorities, cultural and otherwise, stand to gain more in social status, and in their ability to act as full partners in social life, when the social landscape’s boundaries have been blurred. Benhabib argues that there are many risks associated with affirming the content of group

\textsuperscript{80} Abu-Laban 2002.
\textsuperscript{81} Fraser 1997, 24.
identities. In some cases affirmation will do little to change the "social patterns of representation, interpretation and communication" that contribute to the marginalization of minorities, while in other cases, extending official recognition to cultural attributes may give powerful group members a pretext to exclude or limit the rights of other members. In view of these risks, Benhabib contends that a better way to address the source of many claims to culture is to acknowledge "the fluidity of group boundaries." 83

I shift now to the question of why applying the unbounded approach to practical dilemmas of cultural recognition and accommodation can help to avoid cultural holism and cultural determinism. The reason is that the approach orients attention towards how the boundaries set by cultural recognition and accommodation can entrench the subordinate social status of minorities. While culture is important to identities, there are high costs associated with political or legal efforts to set perimeters around it, or recognize particular attributes as the possession one group. Thus, by refusing to recognize these problematic cultural boundaries, the unbounded approach thwarts the efforts of cultural elites to exert greater control over group members by claiming at that a particular practice is "central" to the group's culture. Similarly, the unbounded approach also avoids cultural determinism because it encourages an awareness that recognizing a connection between a particular cultural belief and an action (particularly a violent action) can result in harm for group members. Thus, a key implication of adopting the unbounded approach is that recognition is likely to be withheld from culture claims with the potential to spark problems such as cultural holism and cultural determinism.

However, another implication of adopting the unbounded approach is that most claims seeking cultural recognition and accommodation will fail, not just those advanced

83 Ibid., 70.
by self-interested elites and individuals. This is because the approach assumes that nearly all affirmations of group-based difference will have negative consequences. Even if the accommodation of cultural attributes seems unlikely to result in the curtailment of some members’ rights, accommodation is expected to nonetheless threaten the well-being of group members by impeding efforts towards economic redistribution or by rendering the group vulnerable to other forms of oppression.

Hence, according to the unbounded approach, one is unable to recognize and accommodate groups’ particular cultural attributes without inviting the strengthening of boundaries and endangering the actual well-being of the individual members of groups. For advocates of this approach, it is not problematic that the approach asks us to withhold formal recognition and accommodation for culture, and in turn weaken the boundaries separating groups, because, as they see it, boundaries are markers for oppression foisted on minorities by socially dominant groups and self-interested elites and individuals. Furthermore, proponents of the unbounded approach tend to assume that marginalized minorities would gladly discard the boundaries that separate them from other groups in exchange for inclusion in the wider society’s social and political life, and the resulting gains in control over their own destinies.\textsuperscript{84}

Surely there are many cases where proponents of the unbounded approach are right that the members of socially marginalized minorities would welcome a complete “reconstitution of the boundaries of the polity” in exchange for inclusion as citizens and

\textsuperscript{84} Here I do not mean to suggest that proponents of the unbounded approach call for a return to what Taylor refers to as “the politics of equal dignity” or a politics that avoids recognizing difference at any level (group or individual) for fear of discriminating. Rather, the approach’s supporters tend to assume that group membership generally offers individuals few benefits outside of solidarity in struggles against injustice. This is most apparent in Fraser (1997) where she frames the destabilization of collective identities as a process that results in few, if no real costs for group members. Similarly, in discussing the “reflexive reconstitution of collective identities,” Benhabib portrays the dissolution of group identities as costless for members (2002, 70).
the opportunities made available to them via that inclusion. The individuals affiliated with some collective identities would no doubt be glad see these “put out of business.” However, in other cases, efforts to reconstitute collective identities or blur boundaries may limit individual group members’ abilities to self-define by deteriorating the conditions that enable them to do so.

The aversion to cultural recognition and accommodation that the unbounded approach promotes is problematic, however, because some boundaries are considered vital by their members, quite apart from their treatment by the wider society. Membership in such groups—organized around elements of common culture, religion and language—is valued because it offers interactive relations that greatly enhance individuals’ self-understandings in ways that allow them to determine the courses of their own lives. As Iris Young puts it, individuals come to realize their own goals and interests through group-based experiences, and thus groups impart elements of concreteness to individual lives. (Although the term “community” may be more appropriate than “group” since it evokes the way members’ lives are organized to maintain ongoing relations.)

Crucially, one thing that recognition and accommodation can do is stake out boundaries that help to sustain these relations by separating communities and surrounding polities without disconnecting them altogether. By limiting outside pressures, boundaries can offer community members “protected spheres in which to build lives that correspond to their own priorities.” Proponents of the unbounded approach often recognize the relational nature of identity-formation, but neglect the way in which accommodation

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85 Benhabib 2002, 70.
86 Young 1989, 263.
87 Schouls 2003, 131.
helps to sustain relations that foster individual self-definition by strengthening boundaries.88

In sum, adopting the unbounded approach entails three important consequences. First, the problems of cultural holism and cultural determinism are avoided. Second, and less desirably, most claims to culture are met with a strong reluctance to accord recognition and accommodation. The third consequence of using this approach is that the quality of community relations, and consequently the well-being of individual identities, comes under threat. This threat does not arise because the unbounded approach assails communal relations directly, or refutes the importance of such relations to identity-formation. Rather, it poses this threat by disregarding the role that boundaries play in sustaining group members’ relations with one another.

The Shifting Boundaries Approach

Although the unbounded approach avoids the problems of cultural holism and cultural determinism, it is at a disadvantage when it comes to claims to culture from groups that have an interest in maintaining connections over time, or, in other words, from communities. This creates the need for an alternative transformative approach to culture claims, one that accounts for the positive functions that boundaries serve. The “shifting boundaries” approach resembles the unbounded approach in some respects; most

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88 Benhabib (2002, 15) refers to the relational or dialogical formation of identities: “To be and to become a self is to insert oneself into webs of interlocution.” As Kompridis (2005, 326) notes, this valid understanding of identity-formation does not help Benhabib to appreciate the range of purposes that boundaries serve. Kompridis argues that in treating boundaries as “inherently exclusionary and repressive,” Benhabib and other proponents of the unbounded approach demonstrate a “one-sided view” of the work that they do.
importantly, it is not restricted to interpreting culture claims only in terms of individual need for cultural continuity and group distinction. But whereas the unbounded approach sees culture claims as arising in response to socio-economic subordination, the shifting boundaries approach points in a different direction. It emphasizes that culture claims also relate to communities' needs to secure stable, healthy relations in order for individuals to freely define themselves.

The first key feature of the shifting boundaries approach is the distinction it draws between culture and community. Communities are comprised of members with diverse life experiences, whose outlooks have been shaped by their relations with one another, through their differing subject-positions, and also through the commitments they hold outside of the community. In view of this diversity, communal bonds are formed by members' "sense of relatedness," the "shared and ongoing sense of belonging to one another over time."\textsuperscript{89} This sense often stems from several sources including myths of common ancestry, shared historical memories, an association with a homeland or territories, and elements of common culture.\textsuperscript{90} Shared memories of colonial domination, and experiences of state assimilation efforts are also factors leading individuals, and especially indigenous peoples, to identify with communities. Overall, communities hold together because members sense that maintaining relations with one another will allow them to express and define themselves more freely than if they were simply dispersed within the majority population.

Importantly, the shifting boundaries approach recognizes that individuals do not benefit from community membership only because they possess the same cultural

\textsuperscript{89} Schoo1s 2003, 9.
\textsuperscript{90} Ibid.
attributes as other members. Common culture plays a part in holding communities together, but other factors are more significant. This is evinced in a couple of ways. First, the members of a community are sometimes barred from engaging in particular cultural practices. It may be that a necessary natural resource has been depleted, or ancestral territories have been destroyed. In such cases, losing access to cultural practices rarely leads community members to stop identifying with one another. Second, the members of a community often disagree about whether or not particular practices or traditions are actually a part of their culture. These disagreements do not cause communities to disintegrate. Moreover, in some conflicts, for example, where discriminatory membership codes are claimed by some to be based on cultural traditions, individuals struggle against culture to regain or preserve their connections to a community. Thus, the shifting boundaries approach orients attention away from the idea that communities exist primarily because members share and reproduce the same cultural attributes. Instead, the approach highlights the sense in which communities are held together namely by members’ sense of belonging (which is partly enhanced by common culture), and a sense that through membership, their lives will take shape the way they want them to.

Although the shifting boundaries approach acknowledges that culture is not the sole source of a community identity, or the key factor uniting its members today, the approach nevertheless indicates that recognition and accommodation should be accorded to certain culture claims.91 The boundaries staked out by certain acts of cultural recognition and accommodation make communities more viable, and thus in turn help to strength the relations between members. When do boundaries accomplish this aim?

Boundaries have the potential to augment community viability by helping members to

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91 Schouls 2003, 15.
secure the resources they need to continue enjoying and forging the relationships that matter to them. That is, when claims focus on the role that particular resources play in a group’s way of life, the boundary created by accommodation can make life in the community an option for some who might otherwise have had to seek economic opportunities elsewhere. In other cases, when claims focus on traditional cultural, legal and political institutions, boundaries can enhance community viability by protecting group members from pressure to adopt the dominant culture’s ways of life.

There are three important implications that follow from focusing on community viability when considering particular claims to culture. First, culture claims that will fortify boundaries between a community and the wider society can be considered candidates for recognition and accommodation even though they may enhance group differentiation. Here of course the proponents of the unbounded approach would object by arguing that groups are made more susceptible to economic and political injustices when their differences are recognized. These objections are met with two responses. First, concerns that boundaries will negatively impact groups suffering from economic injustices as well as cultural domination may be misplaced because, as James Tully suggests, respect for the boundaries of indigenous and minorities communities can also have positive economic effects. When community members are free to self-define in accordance with their own priorities they recover the self-respect and self-esteem needed to gain economic and political power. Second, the charge that boundaries increase group members’ vulnerability to discrimination in the wake of political events and crisis

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92 Ibid., 55.
93 Tully 2000c, 470.
is met by the argument that strong democracies are a bulwark against such forms of oppression.

A second implication of the shifting boundaries approach demonstrates its transformative character: cultural practices that break from tradition can be candidates for recognition and accommodation. Modified or adopted practices often contribute to community integrity in ways that traditional practices cannot. The cultural practices or activities that extend furthest back in a community’s shared historical memory may not, when recognized in the present, create the kinds of boundaries that are required to meet modern pressures. For this reason, the shifting boundaries approach is able to recognize culture claims that occupy a place the community’s shared historical memory, as well as claims that represent breaks with tradition, or the incorporation of new cultural materials.

A third implication of using the shifting boundaries approach is that the problems of cultural holism and cultural determinism at held at bay. This approach avoids these problems because accounts of the historicity or centrality of cultural practices, norms and values are not taken as sufficient reasons (in and of themselves) to extend differentiated rights; rather, adjudicators are obliged to consider how the boundaries established by cultural recognition and accommodation will impact relations within communities. That said, many legitimate culture claims—i.e. ones that protect important community relations—often do emphasize the historicity and centrality of practices. Not all claims to cultural authenticity are a guise for self-interested elite or individual ambitions. The shifting boundaries approach recognizes that there are often incentives for communities to frame demands in terms of cultural historicity because, generally speaking, only those
types of culture claims have been accommodated by Canadian courts. The importance of cultural continuity to individual identities has been emphasized both by proponents of the cultural thesis as well as those involved in the adjudication process. But because identities are more dynamic than it has often been assumed, and therefore more dependent on relations than on culture itself, the shifting boundaries approach accepts that there is often a strategic element to claims oriented towards cultural authenticity. Hence, in an effort to benefit community members’ dynamic, relational identities, the approach does not dismiss claims to central or historic cultural attributes, but asks about the impact they might have on community.

Here an important objection might be made against using community viability to adjudicate claims. It might be argued that elites will simply adapt their claims and, rather than demanding rights to “core” or “central” practices, they will use the language of community viability to garner rights to practices that may be used to control other group members. For example, rather than arguing that the practice of excluding out-marrying female members is an authentic custom, some indigenous leaders might argue that it preserves community viability despite its non-traditional status (in Canada sections 12(1)(b) and 14 of the Indian Act imposed this practice on indigenous Bands). In fact, as Caroline Dick points out, this very move has been made by some leaders in disputes involving federal legislation that repeals Indian Act sections 12(1)(b) and 14, and reinstates women previously stripped of their Indian status and Band membership. Dick notes that after leaders unsuccessfully argued against the change on the grounds that out-marrying women historically “followed” their husbands and severed attachments with

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94 The following chapter will spell this point out in greater detail.
95 Bill C-31 An Act to Amend the Indian Act was enacted in 1985. Since that time, indigenous Bands including the Sàiwàidí have fought against restoring status to previously excluded female members.
their natal communities, they have since changed their arguments to focus more on community integrity. One such argument holds that re-admitting previously excluded women will undermine community health, well-being and stability because they have become culturally affiliated with the dominant society.  

However, if properly understood, the shifting boundaries approach cannot be easily made to sanction discriminatory practices. First it should be made clear how the shifting boundaries approach understands “community integrity.” Integrity is about the quality of relations in communities, and not about maintaining the ‘purity’ of communal identity or consistency among members’ ideas, experiences and knowledge. Practices that cause some members to see themselves in unequal relations with other members are detrimental to community integrity. According to Schouls, discriminatory practices threaten community integrity by perpetuating power disparities which can prompt excluded members to identify less with the community, and in some cases, to leave.  

When communities sanction discriminatory practices and seek accommodation for them they risk driving away members who find it hard to self-define.

There is one more potential criticism of the shifting boundaries approach that I would like to address before bringing this chapter to a close. Using the same approach to address both indigenous claims and the claims of other ethnic, cultural or religious communities might be highly problematic given that indigenous rights claims are of a fundamentally different nature. This is an important point: there are special considerations to keep in mind when dealing with indigenous claims. First, indigenous

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97 Schouls (2003, 110) points out today’s integrated global environment offers many indigenous peoples choices about how to express their identities. Further, he notes that when indigenous communities pursue traditional cultural integrity in ways that individuals feel to be repressive, they risk alienating members.
claims differ from those advanced by other ethnic, religious and cultural communities in that they arise from particular historical contexts marked by colonial oppression and domination. 98 James Tully argues that in the present day, states such as Canada, the US, New Zealand and Australia still govern indigenous peoples and their territories using “structures of domination,” including law. 99 The colonial nature of past and present relations between states and indigenous peoples means that indigenous claims are pursuing freedom or self-determination in ways that others are not. Second, there are legal factors that set indigenous claims apart from those advanced by other types of communities. As David Schneiderman points out, indigenous claims are often based on solemn agreements between nations, and are founded in the legal texts of treaties and oral understandings. 100

In presenting the shifting boundaries approach as one that might be applied to both indigenous claims and claims forwarded other types of communities, I do not mean to suggest that there are not unique considerations that should enter into decisions involving the former. But as the case study that I focus on in the following chapter shows, decisions involving indigenous claims are likely to be affected by some of the same problems that affects other groups: misunderstandings about the relationship between culture and identity, and the overvaluing of cultural continuity and distinctiveness.

In sum, the shifting boundaries approach is ‘transformative’ because it recognizes that culture does not help individuals to be self-defining solely by connecting them with the past and distinguishing them from others. In this respect, the shifting boundaries approach resembles the unbounded approach. The two approaches diverge, however,

98 Green 2000, 137–8.
99 Tully 2000a, 37.
100 Schneiderman 1996.
with respect to the impact of boundaries on individuals. The unbounded approach stresses
the potential for boundaries to distance minorities from social and political equality. The
shifting boundaries approach, on the other hand, recognizes that boundaries often
perform a useful function for many of the minorities who organize their lives in
communities. Boundaries serve minority and indigenous communities by helping
members to maintain ongoing relations with each other. Given this orientation, the
shifting boundaries promotes a less cautious view towards claims seeking
accommodation for particular cultural attributes, and asks that these claims be assessed
on the basis of what impact the boundaries staked out by recognition and accommodation
will have on communities.

Conclusion

Up this point I have outlined the important features of two transformative approaches to
culture claims. Further, I have argued that the shifting boundaries approach, as opposed
to the unbounded approach, is a better supplement to the cultural thesis, because it
accounts for a wider range of the purposes that cultural boundaries serve. However, the
advantages of the shifting boundaries approach are still to be demonstrated. In the
following chapter I will examine a legal case, R. v. Van der Peet, which many scholars
argue has undervalued cultural transformation, and, in turn, negatively impacted the lives
of group members. I will consider how applying each of the two approaches described
above might altered the outcome of this case.
Chapter Four: Case Study: R v. Van der Peet

The case of R. v. Van der Peet provides a good illustration of how cultural continuity and difference can be privileged in the adjudication of claims. The case involves a member of the Sto:lo First Nation, Dorothy Van der Peet, who was prosecuted for selling ten salmon without a commercial fishing license. Van der Peet challenged that an Aboriginal right entitled her to sell the fish; however, the Canadian Supreme Court rejected her claim on the grounds that trading in salmon was not an integral part of the Sto:lo’s ancestors’ pre-colonial way of life. Below, I explain how Van der Peet exemplifies the current need for a transformative approach to culture claims, drawing from a few scholars’ critical responses to the case. I then consider how the case might have been decided differently, had each of the two transformative approaches outlined in the previous chapter been employed.

As I consider how applying the unbounded approach and the shifting boundaries approach to Van der Peet might have altered the decision-making process and the conclusion that was reached, I highlight a few similarities. One important similarity is the way in which both approaches highlight the problems associated with criteria the Court used to make its actual decision. However, there are some significant differences. Whereas the unbounded approach acknowledges selling salmon as part of the Sto:lo’s culture, it discourages the formal recognition of the practice. In contrast, the shifting boundaries approach sheds light on the potential for recognition to contribute to community viability.

Culture, Aboriginal rights and Van der Peet

The cultural differences expressed by indigenous peoples have been greatly devalued throughout Canadian history, and have served in part to justify a range of injustices, including dispossessing peoples of their sovereignty and ancestral territories, enacting laws to prevent them from engaging in cultural practices, and denying communities the right to educate their children in traditional ways using traditional language. James Tully discusses these efforts to eradicate or silence indigenous cultural differences as manifestations of a modern drive, fuelled in part by the writings of some liberal political thinkers, towards a uniform constitution.102

Since the enactment of the Constitution Act, 1982, however, Aboriginal cultural differences have garnered more respect as section 35(1) constitutionally “recognizes and affirms” existing Aboriginal rights.103 Patrick Macklem explains how, starting with R. v. Sparrow (1990), the Supreme Court of Canada has indicated that Aboriginal rights are designed to protect integral aspects of Aboriginal cultures. The Supreme Court of Canada’s response to R. v. Van der Peet is regarded by Macklem and other commentators as clearer sign yet that Aboriginal rights and culture are firmly connected in the Court’s perspective.104

In Van der Peet the Supreme Court looked for an Aboriginal right in the context of criminal charges brought against Dorothy Van der Peet under sections of the Fisheries Act. Previously, under the precedent set by R. v. Sparrow, the claimant of an Aboriginal

102 Tully 1995.
103 Section 35 (1) of the Constitution Act, 1982 states: “The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed.”
104 Macklem 2001, 58.
right was obliged to show that the activity she or he was seeking protection for had been practiced Aboriginally, and was never fully extinguished. If these criteria were met, the claimed activity stood a chance of being recognized as an Aboriginal right.\textsuperscript{105} However, in \textit{Van der Peet} the Supreme Court altered the criteria a claim must meet in order to be considered for Aboriginal rights protection.\textsuperscript{106} In addition to those requirements mentioned above, it was determined that the proponent of an Aboriginal right also had to prove the \textit{centrality} of the claimed practice to their \textit{pre-colonial} culture. According to Chief Justice Lamer, who spoke on behalf of the majority in \textit{Van der Peet}, Aboriginal rights are intended to protect practices or activities “integral to the distinctive culture of the Aboriginal group claiming the right.”\textsuperscript{107} Therefore, also according to Lamer, a practice, tradition or custom cannot be considered an Aboriginal right if the group’s pre-colonial way of life would not have been dramatically different had it not been in place.\textsuperscript{108}

The Supreme Court of Canada found against \textit{Van der Peet} because the practice of selling salmon did not satisfy the new criteria. There was insufficient evidence to support the conclusion that the Sto:lo were engaged in commercial fishing at the time when their ancestors first came into contact with Europeans. Other Aboriginal peoples pursuing the rights to sell and barter fish have been successful, however. In \textit{R. v. Gladstone}, for example, the Supreme Court (\textit{per} Lamer C.J.) concluded that such activities were “central and defining features” of the Heiltsuk’s pre-colonial culture, and therefore the

\textsuperscript{105} The practice must also have been deemed compatible with Canadian law.
\textsuperscript{106} Barsh and Henderson 1997, 993.
\textsuperscript{107} \textit{Van der Peet} 1996, para. 46.
\textsuperscript{108} Ibid., para. 59.
group was entitled to continue with them in the present. Yet, despite evidence of a willingness on the Court’s part to recognize Aboriginal rights to the commercial exploitation of fish, the Van der Peet decision has attracted a great deal of criticism, much of it centering on the essentialist view of Aboriginal cultures said to have been revealed by the criteria or test the Court used to make its decision.

Criticisms of Van der Peet

Many scholarly assessments of Van der Peet exhibit two types of criticism related to the legitimacy of the Court’s decision to use culture to determine Aboriginal rights. First, the Court’s linkage of Aboriginal rights and culture is assailed on the grounds that focusing on culture diverts attention away from questions related to indigenous political sovereignty. Michael Asch writes,

[T]he Court has moved to rely on culture to determine the content of Aboriginal rights in order to avoid exploration in another area: political relations. The Court is determined not to confront the issue of how legitimate sovereignty was acquired by the Crown.106

Similarly, Macklem argues that an inquiry into the constitutional status of indigenous peoples in Canada must go beyond questioning which cultural differences the state ought to respect, and instead consider whether and to what extent the state is entitled to treat indigenous people as subject to Canadian sovereign authority.111

110 Asch 2000, 133.
Assessments of Van der Peet also exhibit a second type of criticism. In short, the test the Court used to make its decision is said to evince a fundamentally flawed view of indigenous culture. Critics point to the Van der Peet test’s pre-contact requirement as one indication of this mistaken conception. The requirement is perceived this way because it denies rights protection to indigenous practices that developed after the arrival of Europeans, or solely as a result of European influence.\textsuperscript{112} Many practices that indigenous communities depend on today are thus rendered ineligible for protection by the requirement. Critics complain that the Court overlooks the adaptability of Aboriginal culture. John Borrows writes, “Canadian courts have not yet come to terms with the fact that, like others, Aboriginal people are traditional, modern and post-modern.”\textsuperscript{113} For others, the pre-contact requirement reflects the idea that indigenous culture cannot adopt new elements and still be considered “Aboriginal.”\textsuperscript{114} This is problematic because cultures must frequently adopt new elements in order to survive.

There is also a second component of the Van der Peet test that critics treat as a sign of its incomprehension of indigenous culture: the requirement that a claimed practice must have once formed a central part of a group’s way of life. This requirement is criticized for incorrectly presuming that the elements of a culture can be divided up into categories labeled “core” and “periphery,” or “central” and “incidental” when in reality this is far from possible, even for experts. Such distinctions are extremely difficult to make because “culture is a system and process rather than merely item arrangements.”\textsuperscript{115} In other words, cultural elements do not exist independently of one another “so that the

\textsuperscript{112} Borrows 1998, 63.
\textsuperscript{113} Ibid.
\textsuperscript{114} Barsh and Henderson 1997, 1002.
\textsuperscript{115} Asch 2000, 129.
loss of one element does not compromise the perpetuation and enjoyment of others.\textsuperscript{116} Further, criticisms of Van der Peet’s pre-contact requirement are repeated in relation to the test’s centrality requirement. As critics note, even if it is granted that certain practices do play a more important role in a community’s life of way of life at a given time, by no means will the practices considered “central” hundreds of years ago necessarily have much relevance for members today.

Critics thus draw attention to a few indications that the Van der Peet test is underpinned by problematic assumptions about indigenous cultures. These concerns are raised because the test is used to define Aboriginal rights, and critics, along with indigenous peoples themselves, do not want to see these rights limited by outsiders’ flawed views of their cultures. The problem that is foreseen to result from the test is a “freezing” of rights.\textsuperscript{117} While it is not altogether clear, the concept of frozen rights suggests that, in basing a community’s contemporary rights almost exclusively on their ancestors’ ways of life, the Court is not recognizing rights that will be helpful for coping with the demands and pressures facing them today. Concerned about the implications of frozen or irrelevant rights on indigenous communities’ abilities to sustain themselves, critics deliberate the question of how the Court’s way of sorting through Aboriginal rights claims might be remedied. It is towards this question that I now turn.

Some scholars recommend dispensing with any association between Aboriginal rights and culture.\textsuperscript{118} The problem might be not that the Court has misconceived Aboriginal cultures, but that in making culture (however conceived) determine

\textsuperscript{116} Barash and Henderson 1997, 1000.
\textsuperscript{117} The problem of ‘frozen rights’ was raised by Justice McLachlin and Justice L’Heureux in their dissenting comments. See Van der Peet 1996, para. 167 and 240.
\textsuperscript{118} Barash and Henderson 1997; Borrows 1998; Asch 2000; Macklem 2001.
Aboriginal rights, the Court is eschewing questions related to Aboriginal political sovereignty. For this reason, many authors support an alternative method to determine the content of rights. For some, the best alternative would be for the common law to recognize groups' own ancestral laws and systems, or to follow the "doctrine of continuity."\textsuperscript{119} As Borrows explains, "Under this new methodology, the Court would evaluate new situations by reference to what the law recognized in the past."\textsuperscript{120}

Were courts to recognize indigenous peoples' laws as opposed to the traditions and practices followed by their ancestors at certain times, it may be possible to forestall many of the frozen rights problems discussed above. This is because, with deference to indigenous laws, the Court's own assumptions about what is or is not an authentic aspect of a community's culture would not factor into the determination of its rights. However, as Asch notes, accepting that Aboriginal rights derive from communities' own ancestral laws and customs would require a political will on the part of Canadian government that does not appear readily available today. He writes, "[T]he courts will probably continue to frame Aboriginal rights as cultural rather than political rights until governments agree to fundamental changes in view."\textsuperscript{121}

As Asch's comments indicate, at present it may not be feasible for the Court to stop using culture to define Aboriginal rights. However, there are other promising options available for remedying the problem of defining Aboriginal rights on the basis of problematic conceptions of culture. For instance, the Court could adopt a more transformative approach to culture. Below I consider how each of the two approaches

\textsuperscript{119} Justice McLachlin (\textit{Van der Peet} 1996, para. 247) argues that the sources of Aboriginal rights are peoples' traditional laws and customs. Barsh and Henderson (1997) and Borrows (1998) also contend that Aboriginal rights ought to be based on indigenous law rather than culture.

\textsuperscript{120} Borrows 1998, 56.
\textsuperscript{121} Asch 2000, 136.
outlined in the previous chapter might have altered the Court’s perspective on the Aboriginal rights claim forwarded in *Van der Peet*. My purpose is to identify which approach is best suited to address the concerns touched on above.

**Choosing Between Transformative Approaches to Culture**

*The unbounded approach*

Had the unbounded approach been applied to the *Van der Peet* case, the test used by the Court to make its decision, namely the pre-contact and centrality requirements, would not have been employed. One reason is that the unbounded approach sees culture in a constant state of flux, and therefore rejects the idea that there are historical moments in which cultures assume authentic, definitive forms—or forms that could define future rights.

The unbounded approach highlights a second problem with the *Van der Peet* test as well. The test grants legal recognition primarily to group differences, to the attributes that are thought to have set one group’s ancestral way of life apart from others, including the colonizer’s. To recall part of my earlier discussion of the unbounded approach, it does not treat group differences as objective givens, and holds instead that differences acquire meaning in the presence of asymmetric power relations. With relation to the *Van der Peet* test, proponents of the unbounded approach (along with other critics) object to the way these criteria appear biased in favour of groups whose cultures differ most dramatically from European cultures. Advocates of the unbounded approach further point out that by emphasizing distinctiveness, the criteria disadvantage groups that have adapted their
cultural ways as well as groups whose ancestors may have bore resemblances to Europeans cultures at the time of contact.\textsuperscript{122}

In addition to highlighting problems with the Van der Peet test’s pre-contact and centrality requirement, the unbounded approach also impels one to reinterpret the impetus behind the claim that was advanced in \textit{Van der Peet}. Following this approach, in advancing their claim, the Sto:lo were not simply seeking recognition and accommodation for an aspect of their collective cultural identity. Rather, the group’s actions were related to the impoverished status of many Aboriginal communities in Canada, since they were pursuing recognition for a practice with the potential to provide some group members with financial gains. The unbounded approach thus interprets the claim forwarded in \textit{Van der Peet} as an effort to raise the group members’ economic status, rather than an effort to gain access to a practice that defines the group’s indigenous identity.

Having reinterpreted the impulse behind the claim put forth in \textit{Van der Peet}, the unbounded approach also offers an alternative perspective on why formal recognition should have been withheld. To be clear, the unbounded approach would not deny that exchanging fish for other goods or money is part of Sto:lo culture. It holds that if group members subjectively understand their culture that way, surely no one has the right to try to convince them otherwise, least of all a Court and judiciary whose authority to make such a decision should also be drawn into question.\textsuperscript{123} The unbounded approach would, however, shed a critical light on formal recognition for the practice, but not for reasons at

\textsuperscript{122} Asch (2000) makes this point in his critique of the \textit{Van der Peet} decision.

\textsuperscript{123} David Schneiderman (1996, 36–41) criticizes assumptions that the “Courts of the colonizer” can secure justice for indigenous peoples by arguing that recent decisions involving indigenous claims show clear signs of the legal understandings that first justified the basis for colonial sovereignty.
all related to the practice’s authenticity. Instead, supporters of the approach would draw attention to what they consider to be the source of the claim, the economic marginalization of the group, and argue that recognition may in fact worsen this situation. Generally speaking, group differentiation works to sustain unjust economic arrangements. In the case of the Sto:lo, proponents of the unbounded approach might suggest that although the boundaries staked out by a differentiated right to sell fish (i.e. without first obtaining a commercial license) may provide members with limited economic gains, they will also further entrench the social boundaries that underpin the community’s inequitable levels of services and opportunities. In other words, the temporary gains from recognition of a fishing right will be offset by the further isolation of impoverished indigenous communities from the wider Canadian society.

Thus, had the unbounded approach been applied to Van der Peet, the Sto:lo’s claim would have received a different interpretation. But practically speaking, the end result would most likely have remained the same since the approach emphasizes how the boundaries established by a group-differentiated fishing right have potential to entrench a group’s subordinate economic status.

*The shifting boundaries approach*

Applying the shifting boundaries approach to the Van der Peet case would also have rendered the Court’s pre-contact and centrality requirements untenable. Much like the unbounded approach, the shifting boundaries approach draws into question the idea that cultures assume authentic forms at certain points in time. Instead, the shifting boundaries
approach highlights the sense in which communities' cultural expressions continually "emerge, recede, and reconfigure themselves in response to external pressures and opportunities."\textsuperscript{124}

The shifting boundaries approach also illuminates another problem with the \textit{Van der Peet} test: it valorizes pre-contact Aboriginal cultures, and overestimates their importance for modern peoples and communities. Without denying that ancestral ways do contribute to the well-being of modern communities, the shifting boundaries approach stresses that really, it is group members' relations with one another that matter most for indigenous communities today. The \textit{Van der Peet} test effectively disregards this reality by focusing exclusively on the central elements of pre-contact cultures. Further, and here again echoing in part a point raised by advocates of the unbounded approach, focusing on cultural authenticity conceals the full range of reasons motivating culture claims. In particular, the shifting boundaries approach points to the viability of the community as a key motivation.

Setting aside the criteria that the Court used to decide in \textit{Van der Peet}, the shifting boundaries approach asks instead that the claim be assessed in terms of whether it would have contributed to community integrity. To determine if this is the case, the approach first looks in the same direction as unbounded approach: that is, away from questions pertaining to practice's "authenticity" and towards the strategic incentive it may have held for the claimants. Further, the approach recognizes that in this case the claimed practices had the potential to relieve some of the economic burdens felt by group members. (That is, selling salmon would could generate some income for group members.) Unlike the unbounded approach, however, which assumes that socioeconomic

\textsuperscript{124} Schouls 2003, 50.
subordination is remedied most effectively when all boundaries on the social landscape are blurred, the shifting boundaries approach recognizes that many communities require more than economic security to be self-defining; they also need stable relations with others who share similar priorities. The shifting boundaries approach thus asks that the Sto:lo’s claim be considered with respect to both factors: people’s need for economic security and for an ongoing connection with a community.

Assessing Van der Peet with the shifting boundaries approach allows one to see why the Court erred in refusing to recognize the Sto:lo’s claim. It is not that exchanging fish for goods and money truly is a defining part of the Sto:lo’s identity. Rather, it is that in rejecting the claim, the Court barred members from engaging in an economic activity within the community, an activity that may have only produced limited financial gains for some, but one that would have nevertheless contributed to viability and sustainability of the community by giving people a way of making a living locally. The Court’s decision was marred not only by a misunderstanding of culture, but also by a disregard for the importance of viable indigenous communities for the health and autonomy of indigenous people.

There are two issues that I would like to address before bringing this section to a close. First, in weighting the impact that recognition would have on Sto:lo’s socioeconomic status more heavily than the practice’s cultural authenticity, does the shifting boundaries approach not imply that economically-imperiled non-indigenous communities can make similar claims? The answer is no, not every community can make similar claims—even those whose members share historical memories of engaging in a specific form of economic activity such as fishing or forestry. Setting aside the unique
constitutional status of indigenous peoples in Canada, the shifting boundaries approach offers the following reason. Although the members of closely-knit, single-industry communities are adversely affected by the collapse of that industry and, subsequently, by having to leave the community, most will, with time, integrate into new communities. Indeed, the same could be said of some members of indigenous and other ethnic, religious or linguistic communities—they could successfully integrate into the mainstream society. However, the shifting boundaries expects that in most cases, the members of indigenous and minority communities will suffer more from the disintegration of community life than those who already identify with the mainstream society. The reason is that the character of the relations members experience outside of communities would be distinctly different from those they experience within. This difference in relations would make it more difficult for them to shape their lives in the ways they would like to. Hence, the differentiated right of indigenous peoples to advance culture claims based on socioeconomic need derives in part from the way that indigenous identities would be especially harmed by disintegrated community relations.

The second issue I wish to address is the concern raised by proponents of the unbounded approach that fortifying the boundaries around indigenous communities would result in a greater economic threat to members’ well-being than does withholding rights to trade and sell fish. I see two ways of responding to this challenge, which is essentially concerned that recognition will interfere with redistribution. I think the second possible response better meets this challenge, but here I will mention both. The first

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125 This point is similar to one that Kymlicka (1995, 85–86) makes about the difficulties that minorities experience in existing societal cultures. He writes: "But even where successful integration is possible, it is rarely easily. It is a costly process, and there is a legitimate question whether people should be required to pay those costs unless they voluntarily choose to do so."

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response is associated with the work of scholars such as Taiaiake Alfred who are in favour of establishing rigid, national boundaries around indigenous peoples. This response holds that indigenous communities need not worry about boundaries impeding redistribution because the Canadian state’s transfer of funds to indigenous communities is a danger in itself, in that it works to generate relations of dependence between communities and the state. As Alfred writes, dependence on state funds renders indigenous peoples “subject to perpetual coercion” and able to “challenge state power only at the risk of extreme economic and social deprivation.”

Alfred’s comments raise a very important point about the form of Canada’s economic support for indigenous communities and how it does not contribute to the growth of sustainable, local economies. However, given that many indigenous communities now consist of fewer than one thousand members, it may be unfeasible for them to live without some form of economic exchange with Canadian communities. Isolation would likely jeopardize the well-being of the members of many indigenous communities. Thus, although Alfred and others are right to criticize redistributive arrangements that will only worsen the dependence of indigenous communities, neither is it clear that the fortifying of boundaries is the best solution.

So the unbounded approach is right to raise concerns that boundaries can harm minority groups when they result in isolation or neglect. Clearly, some sort of openness, exchange, or permeability is important for the economic flourishing of indigenous communities. However, the unbounded approach is wrong to assume that boundaries can only hinder, and not help, these beneficial relations between indigenous communities and

126 Alfred 1999, 75.
127 Schouls 2003, 83.
the wider society. In fact, mutually recognized boundaries can actually connect indigenous peoples (and other cultural, ethnic and religious communities) with their neighboring societies and strengthen these relations. This may seem a contradictory idea, since boundaries also separate these communities in certain ways, but an analogy to international relations might help to make this point more clear. States that recognize each others’ sovereignty, in other words, that recognize their boundaries, are able to then create extensive codes of conduct between themselves (pertaining to trade, immigration, diplomacy, etc.). In forging these connections, through negotiation and discussion, states gain a better understanding of one another. Of course, the relations between indigenous peoples and the states encompassing them are quite different than those between states—in particular, the power discrepancies between most states are far less—but the analogy is useful nonetheless. Boundaries, and struggles over how and on what terms they will be set, foster greater understanding between communities and their neighboring societies.¹²⁸ Without these struggles, negotiations and discussions, the level of mutual understanding would be less. This is to say, polities would be less familiar with the issues facing community members. Hence, advocates of the unbounded approach wrongly assume that boundaries contribute to the economic deprivation of communities by disconnecting them from majority and concealing their deprived status. This is not the case; provided they are negotiated in fair terms with open discussions and negotiations, boundaries generate mutual understanding and connections rather than isolation.

Conclusion

This chapter has focused on a case in which the well-being of an indigenous community was threatened by a Court’s skewed perspective on indigenous culture and on the relationship between culture and identity. In *R. v. Van der Peet* the Supreme Court of Canada ruled that the Sto:lo First Nation holds no Aboriginal right to sell and exchange fish. Here I have compared how two different approaches to claims centered on culture might have altered the Court’s decision.

One of the key advantages of adopting the unbounded approach is that the Sto:lo would not have been placed in a situation in which an outside institution claims to know their culture better than they do. The approach accepts that if members understand a particular practice or activity to be an aspect of their culture, it is. However, applying the unbounded approach to *Van der Peet* would likely have meant that formal recognition for the practice would still have been withheld, as the approach assumes that the boundaries staked out by formal recognition would threaten individual group members by further distancing them from needed economic resources.

The shifting boundaries approach would allow for a better perspective on the claim put forward in *Van der Peet*. As with the unbounded approach, exchanging fish for other goods or money is taken to be part of the Sto:lo’s culture; however, the cultural authenticity of the practice is not the main reason why the shifting boundaries approach would lend formal recognition to it. The shifting boundaries highlights a different reason for extending formal recognition: because of the practice’s strong potential to increase the community’s viability by providing members with an immediate, local source of income.
This, in turn, would allow Sto:lo individuals the opportunity to be self-defining, drawing upon meaningful relationships with others in the community. Contrary to the assumptions underpinning the unbounded approach, not all boundaries threaten economically imperiled groups. Boundaries can also connect indigenous communities (as well as other cultural, ethnic and religious communities) with their surrounding polities in ways that engender mutual awareness and concern.
Final Conclusion

Liberal political theorists such as Charles Taylor and Will Kymlicka offer important reasons as to why liberal democracies such as Canada must remain open to actively recognizing and accommodating minority and indigenous cultural differences. One of the central reasons these thinkers put forward for accommodating cultural diversity with differentiated rights and exemptions from common rules is itself a challenge to liberalism. That is, liberal values and institutions cannot be culturally neutral, and mistaken views that they are or even can be neutral disadvantage peoples whose ways of life have not been shaped by liberal norms and ideals.

The cultural thesis, which has been developed by liberal thinkers such as Taylor and Kymlicka, will remain relevant to debates around accommodating cultural diversity for some time to come. However, when it comes to practical dilemmas of cultural recognition and accommodation, relying on the cultural thesis alone as a framework for understanding the issues at stake can result in confusion. This is because the thesis has been formulated largely in opposition to forms of difference-blind liberalism, which deny that any sort of group-differentiated rights are permissible. As a product of debates over liberalism’s capacity to respect cultural diversity, the cultural thesis strongly emphasizes the importance of cultural continuity and group difference for the individual. This is not the same as saying that the thesis supports essentialist views of culture: view of cultures as discrete and static, or of cultural traditions and beliefs determining the actions of individual group members. Yet the way in which the cultural thesis places normative weight on cultural continuity and group difference can distort the issues at stake in
practical claims to culture, for, as the Van der Peet case clearly shows, communities often need to transform culture and, for the sake of members’ well-being, garner recognition for those transformations.

This paper has presented two general approaches to claims to culture. Both approaches compensate for the cultural thesis’ strong value on cultural continuity and group difference, and thus in turn help to avoid the problems of cultural holism and cultural determinism. These approaches orient some attention away from the direct links between culture and individual well-being, and direct attention towards the way in which acts of cultural recognition and accommodation establish metaphorical boundaries around groups or communities. Whereas the unbounded approach asks us to be wary of the effects that these boundaries have on groups, the shifting boundaries approach asks that we consider how, in certain cases, boundaries better enable individuals to self-define by strengthening relations within communities. I have argued that the shifting boundaries approach, which acknowledges the potential for boundaries to contribute to community integrity, is a more appropriate framework for understanding the claims to culture arising from communities.

I will leave off with a few final remarks about my argument. In sum, I have argued that because communal relations contribute immensely to individual abilities to self-define, community integrity should enter in as a central consideration when claims to culture arise. My intention here has not been to suggest that community integrity can or should be the primary consideration in every instance when cultural difference is at issue, or that the shifting boundaries approach ought be applied in every such case. Claims to culture arise in a variety of contexts, and different considerations will come into play in
these contexts. Nevertheless, I think that the shifting boundaries approach, which highlights the sense in which boundaries and community integrity are of central issue to many disputes over cultural difference, offers a more useful framework for interpreting claims advanced by groups who want to maintain some distance from mainstream society than does the unbounded approach, which is put forward by other respondents to Taylor, Kymlicka and the cultural thesis in general.

I wish to address one final issue before bringing this paper to a close. Some might question my support for using community integrity to adjudicate of claims to culture because it seems to suggest that minority and indigenous claimants’ own understandings of the meaning and significance of cultural practices can be pushed aside to give priority to this new standard. To clarify, when claims to culture arise, close attention should be paid to the claimants’ own understandings of the meaning and significance of practices. Yet to reiterate a point that has been raised a number of times in this paper, often it will be the case that not one but many understandings emerge when the voices of different group members are listened to. Here, my primary purpose has been to argue that in cases where there is wide disagreement about the meaning of practice, attempts to render some kind of truth by digging deeper into the practice’s history go in the wrong direction. I have recommended instead that the present day circumstances of communities be taken into account to help resolve practical dilemmas of cultural recognition and accommodation.
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