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*Volume 50, Issue 3 (Spring 2013)*  
*Rights Constitutionalism and the Canadian*  
*Charter of Rights and Freedoms*  
*Guest Editors: Benjamin L. Berger & Jamie*  
*Cameron*

Article 6

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1-1-2013

## Rights in the Age of Identity Politics

Avigail Eisenberg

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### Citation Information

Eisenberg, Avigail. "Rights in the Age of Identity Politics." *Osgoode Hall Law Journal* 50.3 (2013) : 609-636.  
DOI: <https://doi.org/10.60082/2817-5069.1018>  
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## Rights in the Age of Identity Politics

### Abstract

In 1982, the Charter of Rights and Freedoms was entrenched in the Constitution at the height of what has come to be known as an era of identity politics. The influence of identity politics on Canadian jurisprudence is evident both in some of the specific rights entrenched in the Charter and in the manner these rights have been interpreted. This paper examines two approaches to Charter interpretation that use the resources of identity politics. On the identity approach, claims individuals and groups make about their identities in the course of advancing rights claims are treated as immutable, non-negotiable facts, rather than as contingent attributes grounded in their choices. The identity approach has been fruitfully used to trace discrimination and historical injustice against groups. On the reasonable accommodation approach, courts determine whether specific practices of ethnic and cultural minorities can be accommodated in particular contexts, such as schools or the workplace, without imposing undue hardship on the providers of education or employment. Reasonable accommodation can effectively call into question seemingly neutral rules and standards and expose their biases against minority groups. Although both of these approaches have merits, they also carry risks for minorities. To address these risks, institutions should adopt policies that both encourage “institutional humility” and create viable democratic spaces for minorities to participate in the processes in which the representation and assessment of their identities are at issue.

### Keywords

Canada. Canadian Charter of Rights and Freedoms; Identity politics; Canada

## Rights in the Age of Identity Politics

AVIGAIL EISENBERG \*

In 1982, the *Charter of Rights and Freedoms* was entrenched in the *Constitution* at the height of what has come to be known as an era of identity politics. The influence of identity politics on Canadian jurisprudence is evident both in some of the specific rights entrenched in the *Charter* and in the manner these rights have been interpreted. This paper examines two approaches to *Charter* interpretation that use the resources of identity politics. On the identity approach, claims individuals and groups make about their identities in the course of advancing rights claims are treated as immutable, non-negotiable facts, rather than as contingent attributes grounded in their choices. The identity approach has been fruitfully used to trace discrimination and historical injustice against groups. On the reasonable accommodation approach, courts determine whether specific practices of ethnic and cultural minorities can be accommodated in particular contexts, such as schools or the workplace, without imposing undue hardship on the providers of education or employment. Reasonable accommodation can effectively call into question seemingly neutral rules and standards and expose their biases against minority groups. Although both of these approaches have merits, they also carry risks for minorities. To address these risks, institutions should adopt policies that both encourage “institutional humility” and create viable democratic spaces for minorities to participate in the processes in which the representation and assessment of their identities are at issue.

En 1982, la *Charte des droits et libertés* a été enchâssée dans la *Constitution* à l’apogée de ce que l’on pourrait appeler l’ère revendicatrice des groupes marginaux. L’influence de ces revendications sur la jurisprudence canadienne apparaît tant dans certains droits particuliers qui ont été enchâssés dans la *Charte* que dans la manière dont on a interprété ces droits. Cet article examine deux approches permettant d’interpréter les droits de la *Charte* qui procèdent des revendications des groupes marginaux. Selon l’approche identitaire, les revendications des particuliers et des groupes fondées sur leur identité dans le but de faire valoir leurs droits sont traitées comme des faits immuables et non négociables, plutôt que comme attributs découlant de leurs choix. L’approche identitaire a été utilisée avec succès

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\* Professor, Department of Political Science, University of Victoria. An earlier version of this article was presented at the inaugural Osgoode Hall Law Journal Symposium, “Canada’s Rights Revolution: A Critical and Comparative Symposium on the Canadian *Charter*,” Osgoode Hall Law School, York University, Toronto (14 September 2012). My thanks to Benjamin Berger, Jamie Cameron, Bruce Ryder, symposium participants, and the anonymous referees for their insightful and helpful comments

pour retracer la discrimination et l'injustice historique à l'encontre de certains groupes. Selon l'approche des accommodements raisonnables, les tribunaux déterminent s'il est possible d'accommoder certaines pratiques des minorités ethniques et culturelles dans des contextes particuliers, notamment ceux de l'école ou du lieu de travail, sans imposer de préjudice injustifié aux établissements scolaires ou aux employeurs. Les accommodements raisonnables peuvent en effet remettre en question des règles et des normes apparemment neutres et exposer les préjugés qu'elles véhiculent à l'encontre de groupes minoritaires. Bien que ces approches aient chacune ses mérites, elles comportent également certains risques pour les minorités et il est essentiel que les institutions apprennent à mieux aborder ces risques. Aborder ces risques signifie adopter des politiques qui à la fois favorisent l'« humilité institutionnelle » et créent un espace démocratique viable pour permettre aux minorités de participer aux processus dans lesquels la représentation et l'évaluation de leur identité est en cause.

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I.	TWO IDENTITY APPROACHES TO <i>CHARTER</i> RIGHTS.....	613
	A. The Identity Approach.....	613
	B. The Reasonable Accommodation of Identity.....	621
II.	TWO WAYS FORWARD: INSTITUTIONAL HUMILITY AND DEMOCRATIC SPACE.....	630
	A. Institutional Humility.....	632
	B. Democratic Space.....	634
III.	CONCLUSION.....	636

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**WHILE RELIGIOUS CONFLICT** is not new to democracies in the West, the last three decades have witnessed an increase in such conflicts and an intensification of struggles between minority groups and the state. During this time a diverse array of groups has become mobilized and politicized on the basis of features of identity such as gender, race, language, ethnicity, indigeneity, religion, disability, and sexuality, and they have made claims for protection or accommodation of their identity before national and international courts. Although there is nothing new about political struggles in which groups contest their status or demand that the state recognize some aspect of their identity, the last three decades have witnessed an increase in such conflicts in the West and an intensification of struggles between minority groups and the state. Indigenous peoples have mobilized increasingly on the basis of Indigenous identity and have advanced claims at the international and domestic levels to seek recognition of their distinctive cultures and to secure land and other resources needed to protect their ways of life.<sup>1</sup> Religious minorities have mobilized to contest the terms of their access to

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1. Studies that explore identity politics in the context of Indigenous struggles include: Courtney Jung, *The Moral Force of Indigenous Politics: Critical Liberalism and the Zapatistas* (Cambridge, UK: Cambridge University Press, 2008); Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (New York: Oxford University Press, 2007); Tim Schouls, *Shifting Boundaries: Aboriginal Identity, Pluralist Theory, and the Politics of Self-*

the benefits of citizenship by engaging in debates about the legal recognition of religious arbitration, prohibitions on wearing headscarves and *kirpans* (Sikh ceremonial knives), the censorship of blasphemous cartoons, and the criminalization of polygamy, to name just a few examples.<sup>2</sup> In the context of some of these struggles, minorities have argued that the protection and accommodation

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- Government* (Vancouver: UBC Press, 2004); Donna Lee Van Cott, *The Friendly Liquidation of the Past: The Politics of Diversity in Latin America* (Pittsburgh: University of Pittsburgh Press, 2000). See also Avigail Eisenberg, "Domestic and International Norms for Assessing Indigenous Identity" in Avigail Eisenberg & Will Kymlicka, eds, *Identity Politics in the Public Realm: Bringing Institutions Back In* (Vancouver: UBC Press, 2011), ch 6 at 137; Juliet Hooker, "Indigenous Rights in Latin America: How to Classify Afro-Descendants?" in *ibid*, ch 5 at 104; and Villia Jefremovas & Padmapani L Perez, "Defining Indigeneity: Representation and the Indigenous Peoples' Rights Act of 1997 in the Philippines" in *ibid*, ch 4 at 79.
2. On religious arbitration in Canada, see Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* (Toronto: Ministry of the Attorney General of Ontario, 2004), online: <[www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd)>; Anna C Korteweg & Jennifer A Selby, eds, *Debating Sharia: Islam, Gender Politics, and Family Law Arbitration* (Toronto: University of Toronto Press, 2012). Debates about prohibitions on wearing headscarves are explored by Natasha Bakht, "Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms" in Ralph Grillo et al, eds, *Legal Practice and Cultural Diversity* (London, UK: Ashgate, 2009) at 115; John R Bowen, *Why the French Don't Like Headscarves: Islam, the State, and Public Space* (Princeton: Princeton University Press, 2007); Joan Wallach Scott, *The Politics of the Veil* (Princeton: Princeton University Press, 2007). See also *R v NS*, 2012 SCC 72, 290 CCC (3d) 404. This case dealt with accommodation of veiling in the context of criminal trials. The *kirpan* controversy in Quebec schools was central to the Report of the Bouchard-Taylor commission. See Quebec, Commission de Consultation sur les Pratiques d'Accommodement Reliées aux Différences Culturelles, *Building the Future: A Time for Reconciliation* (Quebec City: Consultation Commission on Accommodation Practices Related to Cultural Differences, 2008) (Gérard Bouchard & Charles Taylor) at 33 [*Building the Future*], online: <<http://www.accommodements.qc.ca/documentation/rapports/rapport-final-integral-en.pdf>>. See also *Multani v Marguerite-Bourgeoys (Commission scolaire)*, 2006 SCC 6, 1 SCR 256 [*Multani*]. For discussions of the Report and the Supreme Court decision see Jean-Francois Gaudreault-DesBiens, "Religious Challenges to the Secularized Identity of an Insecure Polity: A Tentative Sociology of Québec's 'Reasonable Accommodation' Debate" in Ralph Grillo et al, (*ibid*) at 151. The Danish Cartoon Affair is examined in Jytte Klausen, *The Cartoons that Shook the World* (New Haven: Yale University Press, 2009). See also Cécile Laborde et al, "Review Symposium: The Danish Cartoon Controversy – The Danish Cartoon Controversy and the Challenges of Multicultural Politics" (2011) 9:3 Perspectives on Politics 603. Debates about the criminalization of polygamy are explored by Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915* (Edmonton: University of Alberta Press, 2008) and, in a more contemporary context, in Lori Beaman & Gillian Calder, eds, *Polygamy's Rights and Wrongs* (Vancouver: UBC Press [forthcoming in 2013]).

of some aspect of their distinctive identity is a requirement of justice and a means of realizing the democratic values of contemporary nation-states.

In Canada, the era of identity politics coincides with the entrenchment of the *Charter of Rights and Freedoms*<sup>3</sup> (*Charter*). Since 1982, the *Charter* has extended constitutional protection to legal and political rights, many of which relate to features of individual and group identity. For instance, section 15 of the *Charter* guarantees equality on the basis of several identity categories including sex, race, ethnicity, religion, sexual orientation, and disability; sections 16–22 recognize the linguistic rights of French and English minorities; and section 27 requires rights to be interpreted in a manner consistent with the multicultural nature of Canadian society. Many *Charter* scholars were initially hopeful that a constitution sensitive to these kinds of identity and group differences would promote an expansive set of rights for vulnerable groups and would have a democratizing effect on constitutionalism in Canada.<sup>4</sup> Yet for judges and legislators, who must respond to identity claims in the public sphere, the challenge has been to translate the abstract values of multiculturalism and identity-based rights into practical and applicable terms. The challenges of translating the *Charter's* principles into practice have proven especially difficult in cases that invoke identity-based claims. A growing number of legal and political scholars see identity politics as generating group-based claims to non-rational, non-negotiable attachments that can distort the protection of rights and freedoms and worsen the position of minorities whom these claims are meant to help.<sup>5</sup> Whereas some scholars remain

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3. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
  4. The *Charter* initially generated several critical assessments as well, beginning with Keith Banting & Richard Simeon, eds, *And No One Cheered* (Agincourt, Ont: Methuen, 1983); Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997). These works all quickly became basic reading for scholars interested in *Charter* politics. More optimistic accounts of the *Charter's* impact on minority rights can be found in Alan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill–Queen's University Press, 1992); and Gregory Hein, "Interest Group Litigation and Canadian Democracy" (2000) 6:2 *Choices* 3.
  5. On the non-negotiable and essentializing nature of identity claims in the context of legal and political decision making, see Anne Phillips, *Multiculturalism without Culture*, (Princeton: Princeton University Press, 2007) at 48-53 [Phillips, *Multiculturalism without Culture*]. On the non-rational nature of identity claims and the risk that identity claims can undermine democratic values, see Daniel Weinstock, "Is Identity a Danger to Democracy?" in Igor Primoratz & Aleksandar Pavković, eds, *Identity, Self-determination and Secession* (Burlington, VT: Ashgate, 2006) 15. For more on the risk that identity claims can undermine democratic values, see Monique Deveaux, *Gender and Justice in Multicultural Liberal States* (Oxford:

optimistic about the role that identity claims can play in challenging the sometimes narrow, legalistic interpretations of *Charter* rights, the view of identity that is generally reflected in the practice of law and in politics has provided political and legal actors with reasons to hesitate before venturing down the path of identity politics in advancing claims under the *Charter*.

In this article, I assess the risks and benefits of approaches to *Charter* rights that employ the resources of identity politics. Two such approaches have been defended as helpful and revealing ways of understanding and advancing the fair treatment of minorities: 1) the “identity approach” and 2) “reasonable accommodation.” The first section explains these approaches and shows that, while they provide effective means to address legitimate claims to injustice, they may also lead to serious risks for minority groups. The second section examines whether these risks are surmountable, and the third section explores two policy frameworks, which I label “institutional humility” and “democratic space,” that can help minimize these risks. These two frameworks aim to increase the capacities of public institutions to respond to the risks of identity politics by enhancing the transparency and accountability of decision-making processes and by providing opportunities for minorities to challenge hegemonic presumptions about appropriate responses to their identity claims.

## I. TWO IDENTITY APPROACHES TO *CHARTER* RIGHTS

### A. THE IDENTITY APPROACH

One benefit associated with identity politics is that the attachments people have to ethnicity, religion, language, and so forth can track social exclusion and institutional bias and thereby provide a way of exposing the injustices suffered by particular groups to the scrutiny of judges and other agents of public institutions. Identity-based attachments can point to rules and processes that are represented as neutral but that have the effect of disadvantaging and marginalizing particular minorities.<sup>6</sup> The failure of states to recognize identity-based attachments can

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Oxford University Press, 2006) and Jeremy Waldron “Cultural Identity and Civic Responsibility” in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 155.

6. On the false neutrality of some legal and political norms for cultural minorities, see Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005) at 88-99; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 108-15 [Kymlicka, *Multicultural Citizenship*]; David Miller, “Liberalism, Equal Opportunities and Cultural Commitments” in Paul Kelly, ed, *Multiculturalism Reconsidered: ‘Culture and Equality’ and its Critics* (Cambridge, UK: Polity

entrench group disadvantage and is sometimes experienced as a form of disrespect by group members.<sup>7</sup> For these reasons, several political philosophers have been sympathetic to at least some manifestations of identity politics and have argued for approaches to legal and political decision making that enhance the just and fair treatment of minorities through a sensitivity to identity claims.<sup>8</sup>

But several studies have also shown that, in real-world settings, identity claims fall short of their emancipatory promise. For instance, legal scholarship shows that courts have failed to assess identity claims fairly or in ways that are helpful in revealing valid concerns about discrimination and disadvantage towards particular groups.<sup>9</sup> Sometimes this failure results from judges relying too heavily on conservative notions about group identities that are already entrenched in law and politics. Furthermore, legal processes rely too heavily on the discretion of judges who are overwhelmingly members of the majority elite and whose perspectives may reflect broader public stereotypes and misinformation about minorities. Where these conservative attitudes are uncontested, the risk is that legal reasoning that is sensitive to identity claims may be less sensitive to the interests of dissenting and marginalized members of minority groups. The aim of identity-based claims is to broaden the kind of arguments that can be advanced by minorities and to require that public decision makers become more sensitive to legitimate cultural and religious differences; however, the actual result may be

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Press, 2002) 45. More generally, see James Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge, UK: Cambridge University Press, 1995); and Charles Taylor, "The Politics of Recognition" in Charles Taylor et al, *Multiculturalism: Examining the Politics of Recognition*, expanded ed by Amy Gutmann (Princeton: Princeton University Press, 1994) (providing arguments critical of liberal and procedural neutrality).

7. On the relation between respect and identity politics, see David Copp "Social Unity and the Identity of Persons" (2002) 10:4 J of Political Phil 365; Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford, UK: Oxford University Press, 2009) 28-32 [Eisenberg, *Reasons of Identity*]; and Margaret Moore, "Identity Claims and Identity Politics: A Limited Defence" in Primoratz & Pavković, *supra* note 5, 27. See also Taylor, *ibid* at 41-43.
8. See e.g. Appiah, *supra* note 6; Eisenberg, *Reasons of Identity*, *ibid*; Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003); Kymlicka, *Multicultural Citizenship*, *supra* note 6; Taylor, *supra* note 6; Tully, *supra* note 6.
9. Studies focused on the shortcomings of courts in assessing identity claims include Richard T Ford, *Racial Culture: A Critique* (Princeton: Princeton University Press, 2005); Pascale Fournier, "The Ghettoisation of Difference in Canada: 'Rape by Culture' and the Danger of a 'Culture Defence' in Criminal Law Trials" (2002) 29:1 Man LJ 81; Anne Phillips, "When Culture Means Gender: Issues of Cultural Defense in the English Courts" (2003) 66 Mod L Rev 510; Alison Dundes Renteln, *The Cultural Defense* (New York: Oxford University Press, 2004); Leti Volpp, "Blaming Culture for Bad Behaviour" (2000) 12:1 Yale JL & Human 89.



to deepen stereotypes about group identities and entrench hierarchies, such as patriarchy, within groups that make such claims.<sup>10</sup>

The risk that judges or legislators will accept identity claims that distort a group's identity<sup>11</sup> or define that identity in a manner that discriminates against a subset of group members can be especially great when identity claims are accepted by courts to be immutable, static, and non-negotiable facts about a group and when these claims cannot be subject to appropriate critical assessment. This is the risk of what has recently been called an "identity approach" to religious freedom in Canada. As Richard Moon describes,<sup>12</sup> under the identity approach to *Charter* rights developed by the Supreme Court of Canada (SCC), judges accept individual attachments to religious beliefs and practices as immutable; religious beliefs and attachments thereby become a basis upon which the law may not discriminate. On Moon's account, since the entrenchment of the *Charter*, courts have changed their approach to religious freedom from one that is sensitive to protecting individual choice to one that accepts religion as an established fact about the individual and prohibits discrimination on this basis. When religious commitments are understood to be personal choices, the law's

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10. The entrenchment of elite hierarchies, including patriarchy, in the context of identity politics is discussed by Deveaux, *supra* note 5; Phillips, *Multiculturalism without Culture*, *supra* note 5; Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge, UK: Cambridge University Press, 2001); Sarah Song, *Justice, Gender, and the Politics of Multiculturalism* (Cambridge, UK: Cambridge University Press, 2007); Jeff Spinner-Halev, "Feminism, Multiculturalism, Oppression and the State" (2001) 112:1 *Ethics* 84. For a discussion of the interplay between the ideals and real-world manifestations of identity politics, see Avigail Eisenberg & Will Kymlicka, "Bringing Institutions Back In: How Public Institutions Assess Identity" in Avigail Eisenberg & Will Kymlicka, *supra* note 1, ch 1 at 1.
  11. Several scholars of Aboriginal rights in Canada worry that, beginning with *R v Van der Peet*, the Court has reduced Aboriginal rights to claims for the protection of distinctive cultural practices (such as fishing for salmon, harvesting trees to make furniture, hunting moose) rather than broader claims for jurisdictional authority or self-determination: *R v Van der Peet*, [1996] 2 SCR 507, 9 WWR 1. The "distinctive culture test" adopted by the Court in *Van der Peet* has been criticized for imposing narrow and static understandings of Indigenous culture that link the constitutional recognition of Aboriginal rights to the continued adherence of communities to these distinctive practices. See Gordon Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36:3 *Osgoode Hall LJ* 447; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997-98) 22 *Am Indian L Rev* 37.
  12. See "Religious Commitment and Identity: *Syndicat Northcrest v Amselem*" (2005) 29 *Sup Ct L Rev* (2d) 201; "Government Support for Religious Practice" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 217 [Moon, "Government Support"].

aim is to protect individuals in choosing to follow their religious beliefs even if, sometimes, individuals must absorb the costs of their choices. To use Moon's example, according to the choice approach, the *Lord's Day Act*, which required all businesses to close on Sunday until it was struck down in 1985,<sup>13</sup> did not violate religious freedom because it did not prohibit those who believe Saturday or Friday to be the Sabbath from closing their businesses on these other days as well, even though the choice to follow their religious commitments imposed additional costs on them.<sup>14</sup>

In contrast to the choice approach, when religious commitments are treated as matters of identity—that is, as immutable, static, involuntary, and non-negotiable—they become features of a person that the law must respect in order to treat people as equals.<sup>15</sup> When religious commitments are viewed as expressions of one's identity, a law that privileges the practices of one religious group over others (such as a law that requires businesses to close on Sundays) may violate religious freedom if it exposes individuals to disrespect or disadvantage, or if it denies them dignity as members of a particular group.<sup>16</sup> As Moon puts it, if religious belief is part of the individual's identity, "then its unequal treatment may be experienced by the individual as an interference with his dignity and as a failure to treat him and his identity group with equal respect."<sup>17</sup>

The benefit of what Moon calls an identity approach is that it can track social exclusion and historical injustice towards minority groups<sup>18</sup> in a way that an approach focused on protecting individual choice cannot. In part, this is because an identity approach treats identity as somewhat static and immutable and thereby accepts as emblematic of identity a particular group practice, belief, or commitment. The approach then uses that practice, belief, or commitment to trace discrimination against the group to which the individual belongs. We can see this connection being drawn between the restriction of a group practice

13. The *Lord's Day Act* was struck down in *R v Big M Drug Mart*. See *Lord's Day Act*, RSC 1970, c L13; and *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M Drug Mart* cited to SCR].

14. Moon, "Government Support," *supra* note 12 at 222-27. For a philosophical defense of a choice-centred approach to cultural and religious diversity, see Brian Barry, *Culture and Equality* (Cambridge: Harvard University Press, 2001).

15. See also Waldron, *supra* note 5 and Weinstock, *supra* note 5.

16. Moon, "Government Support," *supra* note 12 at 232.

17. *Ibid.*

18. Whereas Moon focuses on the claims of religious minorities, a shift to an identity approach in legal and political advocacy by people with disabilities on the subject of *Charter* rights has also been documented. See Lisa Vanhala, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (New York: Cambridge University Press, 2011) ch 2 at 57.

and damage to a group's identity in numerous cases in which groups contest legal restrictions on the grounds of religious freedom. For example, in a recent reference case about the criminal prohibition of polygamy,<sup>19</sup> the Fundamentalist Latter Day Saints (FLDS) in Bountiful, British Columbia presented evidence to show that the criminal prohibition of polygamy has been used historically as a tool by the state to expose members of their community to disrespect and discrimination. The FLDS community submitted historical, political, and sociological evidence to show that the criminal law prohibiting polygamy was initially designed to dissuade the break-off Mormon sect from immigrating to Canada, and was then used to stigmatize, marginalize, and exclude the group from the benefits of citizenship in Canada and the United States. Women in the community stated in interviews that, even if they choose not to enter a polygamous marriage, they feel stigmatized by the law—as do all the other members of their community. On their view, the criminal prohibition exposes all members of the community to disrespect by prohibiting a practice that is emblematic of the group's identity.<sup>20</sup> Whereas the criminal prohibition impedes individuals in the community from choosing to follow one of their religious commitments, the injustice the community claims to experience is not simply a matter of having the choices of their members restricted. The prohibition of polygamy today fits into a group-based history of social exclusion and a narrative of persecution that is far more profound to the group's sense of dignity than what a snapshot assessment of individual choice reveals.

So, whereas social exclusion and discrimination are considered unjust only because they are experienced by individuals, an identity approach connects individuals to groups through collective practices and, through these group practices, to a history from which structural injustices embedded in histories of exclusion can be exposed where they would otherwise be obscured by focusing on individuals here and now. On this view, consider the argument made by some Muslims that the publication of cartoon depictions of Muhammed by *Jyllands Posten* in 2005 was unjust because it violated the religious sensibilities of Muslim individuals that prohibit reproducing images of the prophet (let alone profane ones).<sup>21</sup> This rationale provides what several commentators considered to

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19. *Reference Re Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, 28 BCLR (5th) 96.

20. Angela Campbell, "Bountiful Voices" (2009) 47:2 Osgoode Hall LJ 183 at 221. Campbell was one of the witnesses called during the reference case.

21. The cartoons were published by *Jyllands Posten* on 30 September 2005 and then reproduced in dozens of newspapers, magazines, and websites worldwide. For scholarship that considers Muslim perspectives on the cartoon affair, see Tariq Modood, "The Liberal Dilemma:

be a weak case for the legal censorship of the cartoons because, after all, many publications offend individual religious sensibilities, and those who are truly offended can choose to avoid reading or seeing the offensive material.<sup>22</sup> And yet, a stronger case against publishing the cartoons might have been made on the basis of group identity, claiming that publishing the cartoons is disrespectful to Muslims and that free speech ought not to be exercised in ways that ignore (if not ridicule) distinctively Muslim sensitivities.<sup>23</sup> While the identity-based argument in this case may not provide a rationale for legally prohibiting publication, it helps to reveal a compelling moral reason, based on group identity, why the cartoons ought not to be published. This moral reason clarifies that part of what is at stake in this case is a collective experience; this collective element illuminates why the publisher's refusal to reflect on these factors marginalized some Muslims and was experienced, collectively, as a form of disrespect.<sup>24</sup> Even though injustice in this case is said to exist only because of how individuals are affected by the publication of the cartoons, the argument that an injustice has occurred rests in part on evidence that shows a history of discrimination and disrespect in the West against Muslims as a group.

These examples illustrate that, in many contexts, a policy or rule can be considered unjust not only because it impairs an individual's freedom to follow a religious practice or value that is meaningful to her, but also because the

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Integration or Vilification?" (2006) 44:5 Int'l Migration 4. Saba Mahmood also presents an account of what is at stake morally and emotionally for a large number of Muslims in the Danish cartoon controversy. See "Religious Reason and Secular Affect: An Incommensurable Divide?" (2009) 35:4 Critical Inquiry 836.

22. For different perspectives on the case, see the special issue of the International Migration journal: Tariq Modood et al, "The Danish Cartoon Affair: Free Speech, Racism, Islamism and Integration" (2006) 44:5 Int'l Migration 3.
23. Modood, *supra* note 21 at 4-7; Joseph H Carens, "Free Speech and Democratic Norms in the Danish Cartoons Controversy" in Modood et al, *ibid* at 33-42.
24. The protection of free speech may, nevertheless, be justified even where such group-based considerations are taken seriously. The point here is that, if a convincing case can be made for restricting the cartoons on the basis of religious freedom, such a case requires an assessment that goes beyond individual sensitivities and considers the significance and importance of the religious beliefs and practices of Muslims that are subject to disrespect and discrimination because of the cartoons. For two arguments that consider such a view, see Modood et al, *supra* note 22; Mahmood, *supra* note 21. See also Geoffrey Brahm Levey & Tariq Modood "Liberal Democracy, Multicultural Citizenship and the Danish Cartoon Affair" in Geoffrey Brahm Levey & Tariq Modood, eds, *Secularism, Religion and Multicultural Citizenship* (Cambridge, UK: Cambridge University Press, 2009) 216 (arguing, correctly in my view, that the cartoon affair is a dispute about how to interpret liberal values rather than only a struggle between liberal and Muslim values).

restriction targets a religious group and marginalizes its members by exposing them to discrimination, disadvantage, and disrespect. Evidence about the meaning and importance of the practice to the group helps to illuminate this collective dimension, which can easily be overlooked by assessments that narrowly focus on whether an individual believer was free to choose.

Yet at the same time as such an approach can illuminate group-based injustices, it also carries various risks. One risk is that if an identity approach treats a group's identity as immutable, static, and non-negotiable, it can constrain individuals and groups by tying them to static understandings of their identities and, in some cases, by entrenching stereotypes about their identities or by deepening internal hierarchies that are associated with defining a group's identity in particular ways. This can occur because of the conservatism or misinformation of those outside the group, such as judges or legislators, or because of the manner in which groups themselves present their claims. Because groups have a stake in how they are defined by outsiders, they can exacerbate this risk by exaggerating the importance of their practices or the unqualified unity and uniformity of the group in the hopes that doing so will enhance their chances of winning legal recognition and protection for some aspect of their identity.<sup>25</sup> Either way, an identity approach to rights carries the risk of one kind of essentialism, which is that the state or group actors will reinforce stereotypes about a group or static boundaries about who counts as a member (or a member in good standing) of the group in the course of legally validating particular collective practices or commitments as core and immutable features of a group's identity.<sup>26</sup>

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25. Some advocates of religious arbitration in Ontario stated that "Muslims place their spiritual and social lives in dire peril because they are thus made to submit to that which is other than what Allah has ordained." Syed Mumtaz Ali, "The Review of the Ontario Civil Justice System: The Reconstruction of the Canadian Constitution and The Case for Muslim Personal/Family Law" (Toronto: Canadian Society of Muslims, 1994) at 1, online: <<http://muslimcanada.org/submission.pdf>> (Submission to the Ontario Civil Justice Review Task Force). Others viewed such statements as attempts to consolidate the Muslim community by inflating the importance of particular practices and thereby marginalizing Muslims who did not adhere to those practices. For scholarship that considers this dynamic, see Anver M Emon, "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence and Multicultural Accommodation" in Korteweg & Selby, eds, *supra* note 2 at 192. For an anthropological account of the problem of performativity or "self-essentialism" in the case of Indigenous claims, see Elizabeth A Povinelli, "The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship" (1998) 24:2 *Critical Inquiry* 575.

26. For an elaboration of the risks of essentialism, see Eisenberg, *Reasons of Identity*, *supra* note 7 at 61-62 and ch 6.

In addition to the risks of essentialism, identity-based claims can entrench the power of particular elites or elite hierarchies within groups. Again, sometimes this risk starts within groups—especially within vulnerable groups that are struggling against assimilation and fragmentation. Sometimes, group elites will define a group's identity and resist attempts by some members to develop more fluid or hybrid notions of membership, which may more accurately reflect the nature of people's social attachments, in order to shield the group from assimilative pressure. Feminist scholarship on cultural rights points to numerous cases in which conservative group elites successfully use legal norms to protect sexist practices and patriarchal hierarchies—for instance, where elites seek legal recognition for religious rules of membership because, they claim, these rules are central to the religious identity of the group even though they disadvantage women.<sup>27</sup> Religious practices that control women can seem especially important to keeping the community stable and preventing group fragmentation, which are important to protecting group identity.<sup>28</sup> So group leaders may present particular religious commitments as central and integral to the group's identity in order to define the group and unite it in particular ways, thereby protecting a favoured understanding of the group's identity while also protecting the leadership positions of a group of elites.

In many of these cases, the risk of essentializing identity or entrenching hierarchies that increase the vulnerable status of women or other members of a group only arises if the group's identity is defined in immutable and static ways. Where a group's identity is publicly recognized to be pluralistic, fluid, and hybrid it is much more difficult for judges and other public decision makers outside the group to endorse conservative, essentialized, or stereotypical understandings about that identity; likewise, it is more difficult for elites within the group to present the group's identity as uniform and uncontested.<sup>29</sup> Yet, sometimes, without these more static understandings of who counts as a member of the group or what

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27. Examples of practices that have been presented to courts as central to the cultural or religious identity of a group, but which are also patriarchal, include dowry practices in South Africa, the marrying out rule in Canada, polygamy, the *get* in Judaism, and *shari'a* law concerning divorce in Islam. For discussion of these and other examples, see Deveaux, *supra* note 5; Phillips, *Multiculturalism without Culture*, *supra* note 5; Shachar, *supra* note 10; Song, *supra* note 10; Volpp, *supra* note 9. See also Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights, and Diversity* (New York: Cambridge University Press, 2005).

28. Shachar, *ibid.*

29. The Ontario debates about religious arbitration provide an illustration of the impact that publicity can have on the ability of religious elites to define religious identity statically for large groups. For an assessment of the identity politics in these debates, see Eisenberg, *Reasons of Identity*, *supra* note 7 at 45-51.

practices are central and integral to the group's identity, courts are unable to track the ways in which the group has been exposed to social exclusion or even to identify stable conceptions of the group itself. In short, the identity approach presents a dilemma insofar as it may have the effect both of providing public decision makers with the means to trace social exclusion and unjust treatment, and of essentializing groups and entrenching hierarchies, identities, and stereotypes.

#### B. THE REASONABLE ACCOMMODATION OF IDENTITY

Another criticism commonly leveled against identity politics is that it encourages groups to advance claims in terms that, at best, promise minor adjustments of accommodation in the public sphere and fail to address deeper social problems such as racism, poverty, and dispossession. Identity politics is therefore sometimes viewed as a way of co-opting minorities rather than of addressing serious forms of injustice. States have been known to encourage groups to repackage their claims as cultural claims in order to make them easier and "safer" to address; but when groups respond to these incentives, they divert their resources from political struggles more directly relevant to their interests in order to enjoy at least some modicum of security and protection for their cultural or religious identity. Minorities are sometimes offered symbolic recognition, or their leaders are given token positions of power and prestige, while ongoing social processes of discrimination and oppression continue unaddressed.<sup>30</sup> In relation to Canadian multiculturalism, several critics have similarly argued that, in practice, multiculturalism is a form of window dressing that allows liberal states to present themselves as tolerant and welcoming of minorities while doing little to address the racism, unemployment, and poverty that adversely affect the lives of visible minorities today.<sup>31</sup>

The problem associated with reasonable accommodation is that minorities will be co-opted by legal processes that encourage them to advance identity claims as a means to mount their struggles for justice. The requirement of reasonable accommodation entered Canadian law in the mid-1980s through human

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30. For further discussion of this "risk of co-optation," see Eisenberg & Kymlicka, *supra* note 10 at 5.

31. See e.g. Yasmeen Abu-Laban & Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity, and Globalization* (Peterborough, Ont: Broadview Press, 2002); Hamani Bannerji, *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Gender* (Toronto: Canadian Scholars' Press, 2000); Gerald Kernerman, *Multicultural Nationalism: Civilizing Difference, Constituting Community* (Vancouver: UBC Press, 2005); Sherene H Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (Toronto: University of Toronto Press, 2008).

rights cases about religious discrimination in the workplace.<sup>32</sup> As a result of these cases, employers are required to adapt workplace rules and practices so as to accommodate the religious commitments of their employees within the limits of what is reasonable and short of undue hardship. As Bruce Ryder explains the principle, “Facially neutral rules that have adverse effects on the basis of creed or religion are a violation of the right to religious equality unless the employer has taken reasonable steps, up to the point of undue hardship, to accommodate religious observance.”<sup>33</sup> In 1999, the principle received an expansive interpretation in *Meiorin*,<sup>34</sup> a case about gender and fitness tests for firefighters, and *Grismer*,<sup>35</sup> which concerned standards of vision impairment and driver’s tests. More recently, the Court has reasserted a minimalist interpretation of reasonable accommodation.<sup>36</sup> In 2006, the principle of reasonable accommodation was used in the *Multani* case, which dealt with whether Sikh students can be prohibited from wearing their *kirpans* (ceremonial swords or daggers) when they attend public schools.<sup>37</sup> At the Supreme Court, the conflict was framed as one

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32. See e.g. *Ontario (Human Rights Commission) v Simpson Sears*, [1985] 2 SCR 536, 23 DLR (4th) 321; *Bhinder v CN*, [1985] 2 SCR 561, 23 DLR (4th) 481 [*Bhinder*].
33. “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, *Law and Religious Pluralism*, *supra* note 12, 87.
34. *British Columbia (Public Service Employee Relations Commission) v BCGEU*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin* cited to SCR]. Here, the issue is whether a fitness test for firefighters discriminates against women.
35. *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer* cited to SCR]. Here, the issue is whether a standard set for healthy vision unfairly discriminates against employees with vision impairment who can nevertheless pass the driving and road safety test required by the employer.
36. Gwen Brodsky, Shelagh Day & Yvonne Peters, *Accommodation in the 21st Century* (March 2012) at 42, online: Canadian Human Rights Commission <[http://www.chrc-ccdp.gc.ca/pdf/accommodation\\_eng.pdf](http://www.chrc-ccdp.gc.ca/pdf/accommodation_eng.pdf)> [*Accommodation*]. Brodsky, Day, and Peters trace the jurisprudence on accommodation and discuss the slide back to a minimalist interpretation.
37. *Multani*, *supra* note 2. For discussions of this case, see Colleen Sheppard, “Inclusion, Voice, and Process-Based Constitutionalism” (2013) 50:3 Osgoode Hall LJ 547 at 568-73 and Sujit Choudhry, “Rights Adjudication in a Plurinational State: the Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation” (2013) 50:3 Osgoode Hall LJ 575 at 602-05. Sheppard notes that, in contrast to the constitutional law approach, an administrative law approach to the duty to accommodate (as Justices Deschamps and Abella describe in their concurring opinion) requires both a process of dialogue and reconciliation between the parties to a dispute and consideration of the specific details of the circumstances of the case. Such an approach is part of a broader movement to interpret constitutional rights in ways that emphasize process, negotiation, consultation, and entitlement to participate in democratic governance. Whereas resolving disputes such as *Multani* through dialogue between the parties has significant benefits, Sheppard notes the



about whether the school's no-weapons policy could be adapted to accommodate *kirpans* without causing undue hardship. The majority of the Court agreed that it could. Accommodation was reasonable and could be managed with minimal risk to school safety as long as *kirpans* were enclosed in a wooden sheath, which was sewn inside a cloth envelope, which was in turn attached to a shoulder strap worn under the student's clothing.<sup>38</sup> The Court emphasized that the principle of accommodation helps in the realization of multicultural values by demonstrating "the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities."<sup>39</sup> Then, in 2007, as a result of several conflicts in Quebec about the *kirpan* and other minority practices, the provincial government established the Commission on the Accommodation of Practices Related to Cultural Differences, led by Gérard Bouchard and Charles Taylor, who were mandated to take stock of accommodation practices, consult extensively, and formulate recommendations to ensure that current accommodation practices conform to Quebec's core values.<sup>40</sup>

In each of the foregoing contexts, the principal idea behind reasonable accommodation is that treating individuals equally requires sensitivity to their differences, including differences related to their identities. Reasonable accommodation is a means of recognizing that norms and rules can unintentionally disadvantage minorities by reproducing worldviews and values specific to the majority culture—worldviews and values that reflect the historical struggles of majorities and sometimes of groups with which majorities have historically interacted. Even if laws today do not exclude, *a priori*, any group or individual, they can nonetheless lead to discrimination on the basis of specific features of identity such as gender, religious belief, cultural practice, and physical disability. It follows that strict application of legislation and regulations will not guarantee fairness. In their report, Bouchard and Taylor explain that the appropriate measure of fairness and equality is one that reconciles the rules with the differences among people and thereby attempts to ensure that all people have equal access to the public sphere, including to employment, housing, and public services, in full light of their differences.<sup>41</sup> So from the perspective of accommodation, the solution to seemingly neutral rules that can nonetheless disadvantage some groups

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risk, also discussed here, that resolutions may be conservative in the sense that they will not disrupt the status quo and may fall short of achieving substantive equality and inclusiveness.

38. *Multani*, *supra* note 2 at para 8.

39. *Ibid* at para 79.

40. *Building the Future*, *supra* note 2.

41. *Ibid* at 161.

unintentionally is to adjust the rules to accommodate the difference. This means that the aim of reasonable accommodation is not to abandon the rule but to mitigate its discriminatory effects by making provision for an exception to the rule or for a specific adaptation of it.

Yet, despite the proposed aim of accommodation being to adapt existing rules and institutions in order to eliminate discrimination and inequality, this framework can fall well short of embracing genuine equality. One reason for this is that the reasonable accommodation framework has been interpreted as endorsing the idea that majority rules are basically sound even though they sometimes have to be altered in order to accommodate those whose practices are outside the norm. The presumption that the law is sound can seem endemic to the framework of accommodation and is facilitated by how reasonable accommodation positions the law in relation to culture. The law is neutral, flexible, and adaptable to cultural difference as long as those differences are reasonable. In this way, the law stands apart from culture. As Benjamin Berger explains it, advocates of reasonable accommodation envision that the law “sits in a managerial role” where it is used to decide whether or not the state can remain indifferent to cultural difference.<sup>42</sup> On Berger’s view, the law remains indifferent to cultural difference as long as minority conduct is considered “reasonable” or not so different as to pose serious challenges to “the organizing norms, commitments, practices and symbols of the Canadian constitutional rule of law.”<sup>43</sup> But in cases where the law cannot remain indifferent, it must deem minority conduct intolerable and thereby unreasonable. Either way, on Berger’s view, the law risks nothing of itself when confronted by cultural difference. It positions itself above culture and, from this vantage, is shielded from scrutiny as to whether it provides the basis for genuine equality.

When legal accommodation shields the law in the way that Berger suggests, the framework appears to condone the failure of dominant groups to design laws that are inclusive in meaningful ways and further disincentivizes genuine inclusion by permitting passage of laws that exclusively reflect dominant interests as long as dominant groups are willing to adapt these laws to those who are excluded.<sup>44</sup>

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42. Benjamin L Berger, “The Cultural Limits of Legal Tolerance” (2008) 21:2 Can JL & J 246 at 246-47.

43. *Ibid* at 259.

44. *Meorin*, *supra* note 34 at para 41. McLachlin J, as she then was, takes aim at this conservative tendency in legal accommodation:

Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself.

The law is unlikely to reflect genuine equality when majorities have no incentive to transform exclusive laws and when minorities, who are disadvantaged by the law, are co-opted by the prospects of accommodation in the majority's legal framework. Gwen Brodsky and Shelagh Day explained in 1996 (in the context of employment accommodation) that the accommodation framework prevents majorities from confronting

the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. . . . We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness.<sup>45</sup>

Whereas the framework may be intended as a corrective for unjust, exclusive laws, it often creates conditions that perpetuate exclusion by undermining the incentives for minorities to demand truly inclusive laws and for majorities to design inclusive laws.

Perhaps even more seriously, reasonable accommodation can further entrench the power of dominant groups by requiring accommodation only to the degree that it is reasonable and does not cause the majority undue hardship.<sup>46</sup> In effect, this means that the more fundamental a rule or norm is to the dominant group's way of doing things, the less likely accommodation will appear to be reasonable even if it causes minorities serious disadvantage. The lessons that can be drawn from actual cases of accommodation show, for instance, that the costs of accommodating those who are unfairly excluded vary considerably depending on the degree to which prevailing norms and governing rules have been exclusive of cultural, religious, gendered, and other forms of difference. For instance, it is one thing to accommodate an employee who believes Friday to be a day of rest and wishes to be absent from work on that day, and quite another for a business to accommodate an employee who requires wheelchair access in an inaccessible workplace, or for a business partnership to accommodate an employee who requires maternity leave for an extended period of time. Whereas these examples are similar in that they illustrate how the design of rules and institutions can impede the realization of equality, they differ with regard to the degree of hardship they cause an employer, and they illustrate that sometimes accommodation is expensive or requires a fundamental transformation of existing arrangements because institutions and

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45. Shelagh Day & Gwen Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75:3 Can Bar Rev 433 at 462.

46. An approach that required comparing how much each side in a case about accommodation had to adapt was suggested by Chief Justice Dickson in the context of *Bhinder*, but Dickson's approach was not adopted in the majority's decision. See *ibid* at 439; *Bhinder*, *supra* note 32.

rules have been so thoroughly designed in socially exclusionary ways. And yet only if accommodation is interpreted in a way that draws into question disputed standards, rather than merely assessing the hardship to mainstream groups, can it possibly be used to dismantle discrimination and transform rather than tinker with socially exclusionary rules. As Justice McLachlin (as she then was) wrote in *Meiorin*, in the absence of legal interpretation that aims at transforming the disputed standard:

The right to be free from discrimination is reduced to a question of whether the 'mainstream' can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.<sup>47</sup>

With a view to justice, the presence of undue hardship can be a poor test of whether accommodation is unreasonable and, instead, may indicate the degree to which the dominant group's position of power is written into the way that social institutions work or are viewed as working well.<sup>48</sup> The framework of legal accommodation can thereby be interpreted in a manner that preserves dominant norms.<sup>49</sup>

So whereas the aim of reasonable accommodation is to prevent social exclusion by ensuring that minorities can participate in the public sphere fully and as equals, without having to choose between their religious and cultural commitments and where they work or choose to live, the practical effects of accommodation may shield the status quo from deeper kinds of scrutiny that can reveal injustice and bias built into the structural foundations of current institutions. The dilemma for minorities created by reasonable accommodation is whether to advance claims that force majorities to adapt, albeit in modest ways, to the commitments and practices important to the minority's identity or to engage in struggles for the

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47. *Meiorin*, *supra* note 34 at para 42. See also *Grismer*, *supra* note 35 at para 19. The ideals spelled out by Justice McLachlin (as she then was) in these two earlier decisions have been reiterated by the Court. See *Moore v British Columbia (Ministry of Education)*, 2012 SCC 61 at paras 61-62, 351 DLR (4th) 451.

48. Young offers a discussion of the construction of merit as a social exclusionary value. See Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) at 200-06.

49. A more conservative interpretation of reasonable accommodation is also reflected in legal argumentation that establishes the grounds for accommodation on the basis of comparator group analysis, which has the effect of entrenching dominant group norms as the standards against which minority practices are assessed. See *Accommodation*, *supra* note 36 at 33-36, fn 104.

wholesale transformation of existing institutions, which can be more difficult and less likely to succeed.

Both the identity approach and reasonable accommodation hold out the promise of being useful in tracing social exclusion and responding to injustice suffered by minorities. Ideally, both approaches illuminate what it means to treat individuals as equals, with equal dignity and respect, in full recognition of their identity-based differences. But, in practice, the approaches carry considerable risks. One risk is that legal decision makers will apply their own conservative attitudes—or the conservative norms and values found in the law—thereby essentializing identities, deepening harmful stereotypes, and entrenching elite power within minority groups. A second risk is that, within a framework of accommodation, identity claims can strengthen dominant groups' norms as the standards against which minority accommodation is assessed, thereby shielding dominant practices from serious interrogation. Together, these two risks suggest that, as a potential site of identity politics, the *Charter* can be used to perpetuate cultural domination and elite power rather than advancing the legitimate claims of minorities for just social change.

To summarize, many of the above-cited studies of the social, political, and legal processes that underlie the mobilization of groups on the basis of identity show that the real-world manifestations of identity politics can deepen the vulnerability of minority groups and subvert the potential of identity approaches to advance just aims. Unsurprisingly, some of these studies conclude that identity politics and identity-based claims are too risky in real-world settings to provide an adequate basis to advance the equal and just treatment of minority groups.<sup>50</sup> Despite the promise of theories of recognition and accommodation to advance democratic citizenship and human rights, the concern is that these benefits are often lost when identity claims are translated into legal argumentation, court decisions, and political decision making. According to this view, political and legal institutions as well as models of analysis and decision making should be designed to discourage—rather than encourage or facilitate—identity politics and claims making.

Whereas the risks of identity-based claims are important and serious, the conclusion that identity politics ought to be suppressed or that institutions should discourage political and legal claims that are framed in terms of identity is unrealistic and unwarranted, perhaps especially in relation to *Charter* adjudication and

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50. Whereas this conclusion is implicitly suggested by many studies, Phillips draws it explicitly. See Phillips, *Multiculturalism without Culture*, *supra* note 5. In relation to the use of the concept of identity in political analysis, see Rogers Brubaker & Frederick Cooper, "Beyond 'identity'" (2000) 29:1 *Theor & Soc* 1.

Canadian politics. Identity politics is, after all, neither a new nor a transient kind of politics in Canada; rather, it is woven into the very political fabric of the country and its history of settlement and dispossession, nation building, federalism, immigration, and religious pluralism.<sup>51</sup> Throughout Canadian history, minorities have mobilized on the basis of religious, linguistic, ethnic, racial, and Indigenous identity to wage political struggles and to secure protection and resources from the state. In some cases, groups have enjoyed considerable success.<sup>52</sup> But in many cases their grievances have not been fully resolved, so there is no reason to suppose that these claims are going away any time soon. The question to ask is not whether Canadian public institutions should respond to identity claims, but rather how they can respond to the legitimate grievances that are advanced through these claims while avoiding some of the problems that can accompany this kind of politics.

Another reason to resist broad condemnations of identity politics is that such risks as essentialism, elite manipulation, and co-optation are not unique to identity politics or to decision making that facilitates identity-based claiming. For instance, the risk that judges and legislators will deploy narrow and stereotypical understandings of identities in their decisions is neither a novel nor a more serious problem today than it was fifty or one hundred years ago when, for example, policy makers portrayed Indigenous people as child-like, savage, and uncivilized in order to justify assimilatory policies, or when racist stereotypes were used to establish a set of “colour-coded” legal precepts.<sup>53</sup> Well before a time when identity-based rights were legally recognized and accommodated, public decision makers

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51. From debates over the “fragment theories of political culture” to the more recent studies of Canadian constitutionalism’s “deep diversity,” “reimagined community,” “strange multiplicity,” “multicultural citizenship,” and “social citizenship,” iconic works about Canadian law and politics have attempted to grapple with Canada’s identity-based multiplicity. See e.g. G Horowitz, “Conservatism, Liberalism, and Socialism in Canada: An Interpretation,” (1966) 32:2 Can J Econ & Pol Sc 143; Kymlicka, *Multicultural Citizenship*, *supra* note 6; Taylor, *supra* note 6; Tully, *supra* note 6; Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen’s University Press, 1994).
52. Studies that document the successful mobilization of groups to advance *Charter* rights on the basis of identity claims include Alexandra Dobrowlosky, *The Politics of Pragmatism: Women, Representation and Constitutionalism in Canada* (Don Mills: Oxford University Press Canada, 2000); Matt James, *Misrecognized Materialists: Social Movements in Canadian Constitutional Politics* (Vancouver: UBC Press, 2006); Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971–1995* (Toronto: University of Toronto Press, 1999); Vanhala, *supra* note 18.
53. See e.g. Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900–1950* (Toronto: University of Toronto Press, 1999).

entrenched damaging stereotypes about minorities into Canadian law. Sometimes they did so with the help of academic and community-based experts who had their own political and methodological axes to grind.<sup>54</sup> Nor is a commitment by policy makers to ignore cultural or other identity-based differences universally successful at immunizing public officials against distorting minority identities and using these distorted views to obscure policies of co-optation and assimilation.<sup>55</sup> Indeed, a common criticism of individual rights is that, when stripped of any attention to group difference, rights can obscure the domination of one group by another.<sup>56</sup>

Similarly, courts face challenges about how to use the testimony of elite experts, such as religious leaders and theologians, or how to assess social scientific evidence that categorizes people on the basis of class, gender, or interest, in a whole range of cases in addition to those that are directly about culture, race, or Indigeneity. From cases about climate change to cigarette advertising, border disputes to human rights abuses, courts and legislatures can confront elite opportunism and manipulation, the need to distinguish between legitimate differences in interests, and the challenge of protecting dissenters. These challenges are not unique to identity politics but rather are found wherever the strategic concerns of groups and their leaders are deployed in struggles for political ends. It should come as no surprise to discover that identity politics attracts strategic and opportunistic actors as well those who simply attempt to advance their interests in the most effective ways they can. Indeed, we should expect this to be true of almost any form of real-world political contestation. The challenges that are often associated with identity approaches are also problems in a wide variety of political and legal cases, including ones where policy makers and judges directly reject giving any consideration to cultural or other features of identity. To treat these risks as unique to identity approaches can distract us from the broader problems at issue and mislead us about what constitutes an effective strategy to respond to these problems.

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54. Debates about methodology in the discipline of anthropology have infamously had an impact on the kind of evidence that anthropologists present in cases about Indigenous legal claims. See Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*" (2000) 5:2 Rev Const Stud (2000) 119 at 127-29.

55. For example, Trudeau's 1969 White Paper, which promised to extend equal rights of citizenship to Aboriginal peoples and in return aimed at eliminating Indigenous entitlements to land and self-determination, advanced assimilatory ends by denying cultural difference. Canada, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Ministry of Indian Affairs and Northern Development, 1969).

56. See e.g. Young, *supra* note 48.

## II. TWO WAYS FORWARD: INSTITUTIONAL HUMILITY AND DEMOCRATIC SPACE

The question that remains is how best to respond to the challenges and risks that have come to be associated with identity-based claiming and decision-making approaches. What practices can be developed to minimize and mitigate the distorting and limiting features of identity-based approaches and accommodation frameworks? What lessons can be drawn from Canadian experiences that are useful in steering a course between the risks and benefits of using identity as a means to protect *Charter* rights?

One of the most obvious lessons to draw from studies about the protection of rights in Canada is that institutions make a difference to the mobilization of identity groups and the interpretation of identity claims. Specifically, the *Charter* has made a difference in expanding the capacities of courts and the willingness of judges to reflect on the ways in which their decisions advance ideals of inclusiveness and group-based equality. To take one example, the Court's approach to religious freedom has changed over the last thirty years from one that essentialized religion and openly maintained a "sectarian Christian ideal," as Chief Justice Dickson described the *Lord's Day Act* in 1985,<sup>57</sup> to one that recognized, as the majority decision in *Big M Drug Mart* did, that state support for one religion can undermine equal democratic citizenship and signal the social exclusion and second-class status of adherents to other religions. Recent court decisions about freedom of religion have also reflected a strong awareness amongst the judiciary of the potential risks of essentializing religion and indicate how courts struggle to avoid legally sanctifying canonical interpretations of a faith over the individual's lived understandings of religious commitment;<sup>58</sup> nevertheless, judges feel obliged to acknowledge the important connection between the practices of an individual believer and those of a religious community as prescribed by its doctrines.<sup>59</sup> Even legal scholars who are skeptical that judges are

57. *Big M Drug Mart*, *supra* note 13 at para 97.

58. Two recent examples include *Multani*, *supra* note 2; and *Syndicat Northcrest v Amselem*, 2004 SCC 47, 2 SCR 551.

59. For example, referring to *Amselem*, Beaman argues

there is a sense in the judgment that, although the individual's lived experience and practice is important, it must link to something that is recognizable as religion, which inevitably involves the sedimentation of doctrine and a group of people who adhere in one manner or another to that doctrine through practice.

Lori G Beaman, "Assessing Religious Identity in Law: Sincerity, Accommodation, and Harm" in Eisenberg & Kymlicka, *supra* note 1, 238 at 246.



free to grapple with the normative values of collective identity and group-based differences within a framework of liberal constitutionalism nevertheless recognize a tension in some *Charter* decisions between an interpretative framework that recognizes the relevance of the collective- and identity-based features of culture and religion, and one that “collapses the focus back onto conceptions of [individual] autonomy and choice.”<sup>60</sup> This tension suggests that the normative values associated with identity claims have an impact on the interpretation of *Charter* rights, even though this impact is far from uniform, nor are its implications fully developed in the existing decisions.

Whereas institutions can make a difference, it is often not evident whether they can resolve tensions between different dimensions of identity or whether resolving these kinds of tensions is even legally feasible or politically desirable. Given the kinds of values often at stake in cases involving identity claims, it may be that courts, although often called upon to assess the validity of identity claims, are the wrong kinds of institutions to resolve the dilemmas that typically follow from them. This seems especially apparent in contexts in which the norms of transparency and accountability are weak, in which members of the judiciary are heavily drawn from the elites of dominant groups so that their decisions are more likely to reflect the concerns of these elites or the concerns of dominant publics who are anxious about the impact of recognizing and accommodating minorities.

For those who take the view that courts are driven by narrow concerns about protecting their own legitimacy or privilege,<sup>61</sup> are unduly influenced by the political and strategic concerns of legislative elites, or take their direction from self-seeking interest groups,<sup>62</sup> the potential for judges to critically reflect on the values that ought to guide a normatively defensible assessment of identity claims will appear unrealizable. But in most democratic contexts, such sweeping and skeptical views about how courts work are unrealistic. Public institutions are not so monolithic. They interact with each other and with other organizations and groups, all of which have different aims and many of which work at cross-purposes to each other in ways that can have an impact on the direction of political and

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60. Berger, *supra* note 42 at 277.

61. For instance, some legal scholarship argues that institutional legitimacy is a central concern of the Supreme Court of Canada and a leading influence on the direction of judicial decisions. See e.g. Vuk Radmilovic, “Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec *Secession Reference* and Beyond” (2010) 43:4 Can J Pol Sci 843.

62. See in particular FL Morton & Rainer Knopff, *The Charter Revolution & the Court Party* (Peterborough, Ont: Broadview Press, 2000); Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (Albany: State University of New York Press, 2002).

legal decision making.<sup>63</sup> Forms of identity politics that serve legitimate and desirable human rights ends can be viewed as a threat to economic projects or to the electoral objectives of sitting governments. And legal actors, even if they are drawn from similar social groups, hold a variety of different sympathies and motives that lead them to pursue different aims in their professions. These factors alone can make legal decision making unpredictable. At a more principled level, legal reasoning is open to critical reflection, and judges are obligated by constitutional principles to reflect on whether the principles they apply treat the diversity of citizens as equal in real-world contexts. Therefore, the potential exists for judicial forums to play a creative and leading role in developing principled guidelines for distinguishing between identity claims that advance core values of justice and human rights and those that jeopardize these values. Whether this potential can be realized depends, in part, on whether public decision makers are willing to counteract the risks of identity politics. When they lack the incentives or, indeed, work in ways that entrench forms of essentialism and co-optation, identity politics will be riven with problems. But when institutional actors are subject to appropriate forms of accountability and transparency, and when minorities may challenge how their identities are being characterized, the potential exists for institutional actors to counteract distortions such as essentialism, co-optation, and social exclusion in order to identify and address legitimate grievances that identity claims raise.

#### A. INSTITUTIONAL HUMILITY

To imagine how this might be possible, it is worth considering two frameworks for thinking about policies that can enhance the capacities of public decision makers to address legitimate grievances while minimizing the risks of identity politics.<sup>64</sup> The first framework includes policies that engender “institutional humility,” or the capacity of public institutions to reflect on their own limitations and develop avenues that can overcome narrow and faulty interpretations of

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63. For instance, dialogue approaches map various ways in which courts and legislatures influence each other despite holding different motivations and aims. See Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue Between the Courts and the Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35:1 Osgoode Hall LJ 75. Pluralists have also traced the trajectory of decision making contexts where courts and legislatures influence each other while often seeming to work at cross purposes. See Robert A Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker” (1957) 6 J Pub L 279.

64. These frameworks are, admittedly, broadly sketched here, are underdeveloped, and are the subject of my ongoing research.

principles, rules, and procedures. For example, policies that aim to diversify the judiciary by recruiting women, Indigenous peoples, and members of under-represented minority groups into the judicial ranks display institutional humility insofar as they reflect an attentiveness to the ways in which a diversity of experiences and circumstances can generate different legitimate perspectives on how the abstract principles of constitutional and other forms of law translate in practical terms and diverse contexts. Instead of treating difference as something that can flourish only in the private domain, recruitment programs that aim to diversify decision makers establish methods by which the manifestations of difference can be confronted.<sup>65</sup> At the same time, the presence of different voices enhances the capacity of courts to identify and (one hopes) to avoid entrenching stereotypes or essentializing minority groups. The aim, as the word “humility” indicates, is to call attention to the contextual and “on-the-ground” factors that should inform legal and political decision making if the values protected by abstract rights are going to be effectively translated into the real-world circumstances in which people lead their lives.

Institutional humility may also include policies that motivate judges to adopt disciplined methods to acknowledge the partiality of the law and legal principles and to reassess legal norms in light of circumstances of known and yet-to-be-known complexity and diversity while paying special attention to those who have been excluded and disadvantaged.<sup>66</sup> In this regard, institutional reforms that encourage public decision makers to be open to the limitations of past decisions, processes, and rules, and to be attentive to the diversity of experiences and circumstances in which principles apply, can display institutional humility. Such reforms could, for instance, create opportunities for members of the public to intervene in constitutional adjudication by presenting briefs that represent points of view not fully understood or considered by the judiciary. In the decade following the introduction of the *Charter*, the Supreme Court expanded the opportunities for intervenors to present briefs in constitutional cases and, since that time, the number of cases in which intervenors participate has steadily grown, with *Charter* cases attracting the most interventions.<sup>67</sup> Intervenors can bring an important measure of transparency and accountability

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65. See Anne Phillips, *The Politics of Presence* (New York: Oxford University Press, 1995) at 1-27.

66. In the context of scientific problem solving about complex issues such as climate change, Sheila Jasanoff identifies the aims of what she calls technologies of humility. “Technologies of Humility” (2007) 450:7166 *Nature* 33.

67. Benjamin RD Alarie & Andrew J Green, “Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance” (2010) 48:3 & 4 *Osgoode Hall LJ* 381 at 398.

to otherwise non-participatory processes and their participation can serve as an effective means by which identity groups can challenge narrow or stereotypical ways in which their identities are characterized. At the same time, each intervenor represents only a partial and limited perspective on an issue; therefore the risk is that intervenors will merely displace one kind of bias for another. In short, intervenors can engender institutional humility, especially where they enhance the courts' understanding of the potential impact of their decisions on a community; at the same time, their participation in decision making carries risks and can marginalize points of view relevant to the case at hand. This risk points to the inevitable partiality of decision making, no matter how expansive and inclusive. Though institutional humility, as a policy ideal, can create a disposition and an awareness that allow decision makers to be more open to the complexities of decision making in diverse societies and to be motivated to address those complexities fairly, it is not be a panacea for poor decision making.

## B. DEMOCRATIC SPACE

Whereas the framework of institutional humility includes policies that create incentives for courts to develop internal methods of decision making that are more attentive to the risks of identity-based claiming, the framework of democratic space includes innovations that look beyond the courts for external means to identify and respond to legitimate identity claims. Sometimes the best way to avoid the risks associated with identity-based claiming is to strengthen democratic spaces where people can contest how their identities are being defined. The framework of democratic space includes policies that harness the mobilizing power of identity politics while subjecting identity groups to democratic accountability, transparency, and inclusiveness. The risks that identity-based claiming will entrench stereotypes, elite hierarchies, and narrow and distorted understandings of group-based beliefs and commitments are greatest when people are unable to challenge inherited categories, canonical interpretations, and elite-inspired scripts about what their identity consists of. Judges, bureaucrats, and legislators may be less inclined to lend credence to stereotypes about a group if they are confronted with evidence about the diverse and pluralistic nature of group values and the hybridity of group members. A framework of policies that creates democratic space aims at enhancing the capacities of public institutions to identify circumstances in which mechanisms of consultation, deliberation, and intra- or inter-community participation can be useful in providing information about groups and the often contested meaning of their practices.

In Canada, democratic space of this general sort has been successfully

created by some commissions of inquiry, including the 2004 Boyd Commission on religious arbitration in Ontario<sup>68</sup> and the 2009 Bouchard–Taylor Commission on Reasonable Accommodation,<sup>69</sup> both of which have been helpful at identifying identity claims and the risks associated with them. Courts and legislatures can enhance democratic space by taking special notice of community-based solutions to disputes that display fidelity to broad and inclusive forms of participation and thereby strengthen attempts by citizens to sort out conflicts in a manner consistent with democratic values.<sup>70</sup> Democratic space can also be bolstered through initiatives that require governments to consult communities when legal or political decisions are likely to affect the community’s organization, practices, and commitments. A formal legal duty to consult is recognized in relation to government policies and land-use projects that affect Indigenous communities.<sup>71</sup> When land use projects have proceeded without adequate consultation, courts have found the government in violation of its procedural obligations and are, in principle, willing to rescind approval for these projects.<sup>72</sup>

Much like identity politics itself, efforts by courts to enhance democratic spaces can lead to other challenges, not least of which is the need to establish criteria for what counts as meaningful consultation. Similarly, if courts are going to have a role in enhancing democratic spaces and processes, they need guidelines for what constitutes legitimate democratic space. These guidelines are especially important where the parties to a dispute have unequal power, causing one party to be less effective at advancing its interests. The likelihood that such inequalities will characterize most democratic spaces points to one of the risks of addressing

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68. Boyd, *supra* note 2.

69. *Building the Future*, *supra* note 2.

70. See e.g. *Regina (SB) v Governors of Denbigh High School*, [2006] UKHL 15, [2007] 1 AC 100. Here, the House of Lords endorsed the decision of the Governors of Denbigh High School to restrict a female student, Sabina Begum, from wearing a veil, known as a *jilbab*, to school instead of the school uniform. The Court noted that the school’s dress code, which allowed some kinds of veils but not the *jilbab*, was developed after broad consultation with parents, students, staff, and the Imams of the three local mosques. Also see Anver M Emon, “Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural Accommodation” (2008) 87 Can Bar Rev 391 at 422-25. Anver Emon shows how legal recognition could have enhanced democratic dialogue in relation to disputes about religious arbitration. Emon argues that legal recognition of religious arbitration could be structured to create multiple Muslim family service organizations with competing visions of Islamic law some or all of which have incentives to enter into dialogue with the state. His vision is, in these respects, consistent with a vision of how policies create democratic space.

71. See Sheppard, *supra* note 37.

72. See *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at paras 57, 68, 3 SCR 388.

identity claims using an approach that rests solely on resolving conflicts through democratic mechanisms—namely that democratic solutions will favour dominant interests and can marginalize minorities. And yet this risk is much greater where no democratic space exists for minorities to contest identity claims. In short, democratic space may be necessary, even if it is not a sufficient condition for responding to identity claims fairly and in ways that can best advance their normative value while mitigating some of the risks that accompany them.

### III. CONCLUSION

Legal and political scholars, within and outside Canada, have pointed to the rights entrenched in Canada's *Charter* to illustrate how the recognition of identity can be deployed in the service of justice. Some of the *Charter*'s provisions are sensitive to identity. These provisions have the potential to help courts address structural injustice and to track discrimination against women, gay and lesbian individuals, individuals with disabilities, Indigenous peoples, as well as linguistic, cultural, and religious minorities. The hope that follows from an optimistic view is that the constitutional recognition of identity categories will mobilize groups to advance claims for the recognition and protection of their identity and motivate courts and other public institutions to develop capacities to reflect on these claims in a transparent and accountable manner. In this way, the hope is that *Charter* rights can become effective in advancing Canada's commitment to the values embodied in human rights in the age of diversity.

And yet, we can see that, in real-world settings, identity-based claiming is often accompanied by serious risks such as the risk that group identities will be essentialized and stereotyped, that elite power will become entrenched through decisions that legally validate patriarchal or other inegalitarian cultural and religious practices, and that efforts to accommodate minorities will end up offering only modest and tokenistic kinds of recognition and protection that, paradoxically, strengthen dominant group norms. In the real world, identity-based claims cannot be divorced from these and other features of the strategic politics of identity. Whereas identity claims are grounded in normative values that can be helpful in advancing equality, human rights, democratic citizenship, and respect for minority groups, it is not possible to divorce the strategic from the normative features of this form of politics—or, for that matter, of any form of politics. Instead, public institutions have to develop capacities to mitigate the risks and maximize the benefits of identity, as well as other forms of politics—which is, after all, what they ought to be designed to do.