Democratic Equality and Responsibility: the Opportunity Costs of Primary Goods

By

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ABSTRACT

This thesis first critically analyzes John Rawls's second principle of justice as a democratic conception of equality and the challenge posed to that conception by Ronald Dworkin's 'Equality of Resources.' Democratic equality is defended over luck egalitarianism as an articulation of liberal egalitarianism. However, where Rawls deems social primary goods to be unconditionally regulated by institutions, Rawls is largely silent about the fair assignment of costs and burdens that correspond to the fair provision of opportunities and primary goods. Dworkin's notion of 'opportunity costs' is argued to improve on the role of responsibility in democratic egalitarianism by making clear that the provision of primary goods creates costs and burdens within a system of social cooperation. The second section illustrates this argument by considering claims to self-government by Canadian Aboriginals. By formulating a distributive criterion that treats Aboriginal self-government as a primary good, I show that claims of culture and identity can be resolved responsibly within the framework of distributive justice.

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Introduction

Since John Rawls's *A Theory of Justice*, much progress has been achieved in clarifying the normative aims of distributive equality. Rawls's extension of a starting-gate ideal of equality of opportunity (EO) to a broader theory of fair equality of opportunity (FEO) that seeks to mitigate the influence of undeserved circumstances has in particular been the object of intense critical scrutiny. Though much clarity has been achieved, and a greater range of egalitarian theories is now available, the role of responsibility in a political theory of equality remains controversial.

Throughout this thesis, EO will refer to starting-gate conceptions of equality. Rawls's fair equality of opportunity, which I will refer to as FEO, is part of what Rawls labels a democratic conception of equality. FEO is to be contrasted with EO in the following way. EO favors efficient outcomes benefiting everyone so long as institutions secure a competitive principle of careers open to talents. This is argued to ensure the fairness of distributive outcomes whatever overall allocation results because under EO, background conditions confer responsibility on individuals for the use of their opportunities and share of scarce valuable resources. Rawls rejects EO as an adequate articulation of equality and as properly accounting for the influence of undeserved factors on distributive outcomes. For Rawls, institutions ought to play a greater role in regulating the conditions under which individuals pursue available opportunities and life chances.

Ronald Dworkin's 'Equality of Resources,' which in Will Kymlicka's words seeks, "a distributive scheme that respects the moral equality of persons by compensating for unequal circumstances while holding individuals responsible for their choices,"[1]

provides a complex criticism of Rawls's FEO. On this view, it follows that individuals are responsible for their social position and resources only when background conditions eliminate the influence of arbitrary factors on the distribution of resources and track individual ambition: an endowment-insensitive and ambition-sensitive distribution. According to Kymlicka, Dworkin's theory better fulfills the basic aim of Rawls's theory. Indeed, according to G.A. Cohen, "Dworkin has, in effect, performed for egalitarianism the considerable service of incorporating within it the most powerful idea in the arsenal of the anti-egalitarian right: the idea of choice and responsibility."[2] This thesis is centrally concerned with the challenge posed by Dworkin's equality of resources to a democratic conception of equality. The main argument of this thesis is that while Dworkin's two mechanisms, the auction and the insurance scheme, are impracticable and, in any case, undesirable, Dworkin's notion of 'opportunity costs' is compatible with and improves upon the role of responsibility in Rawls's democratic conception of equality. By 'opportunity costs' I mean the distribution of burdens and costs that correspond to the provision of social primary goods, in other words, the social and financial costs of providing fair conditions of equality and fair distributive outcomes.

In Part One I critically analyze the three parts of Rawls's second principle of justice - FEO, the difference principle and social primary goods - and assess whether critics are right to charge that that principle is deficient regarding the role of responsibility. In particular, I assess and reject the claim by Dworkin and Cohen, and defended by Kymlicka, that Rawls insufficiently spells out the normative aim of mitigating the influence of undeserved circumstances on distribution. I then outline the two main mechanisms Dworkin uses to articulate an ambition-sensitive and endowment-

insensitive distribution in his essay ‘Equality of Resources,’ namely, the auction and the insurance scheme. However, Elizabeth Anderson, a democratic egalitarian, makes explicit the contrast between democratic equality and what she labels Dworkin’s luck egalitarianism.

After considering Anderson’s criticisms of Dworkin’s luck egalitarianism, I argue that Dworkin’s equality of resources cannot fulfill its own aims: the rationality of the two mechanisms is far too specific to serve the normative commitment to equality required for a liberal democratic politics. However, Dworkin’s notion of ‘opportunity costs’ is more complex than Anderson acknowledges and indeed captures much of what is at stake in contemporary democratic politics. In particular, I argue that Dworkin’s major contribution to egalitarian theory is to make explicit the financial and social costs of securing fair shares of social primary goods.

Indeed, a major feature of democratic equality, as defended by Rawls and Anderson, is the claim of citizens to a set of unconditionally regulated social primary goods. In order to show that Rawls’s account of responsibility is not deficient, I examine Rawls’s account of how primary goods give responsibility an embedded role in a theory of democratic equality, what Rawls labels a social division of responsibility. In fact, on the basis of a distinction made by Michael Blake and Mathias Risse between ‘direct’ theories of distributive justice, of which Dworkin’s is an example, and Rawls’s ‘indirect’ theory of distributive equality, I reject Dworkin, Cohen, and Kymlicka’s claims that an individual notion of responsibility is continuous with Rawls’s FEO. However, Dworkin's notion of opportunity costs makes explicit a deficiency in Rawls's account of primary goods and social division of responsibility, namely, that claims of justice create costs and

burdens within a system of social cooperation. Rawls is largely silent about the fair assignment of costs and burdens that correspond to the fair provision of opportunities, expectations and primary goods.

Part Two attempts to illustrate the democratic features of Dworkin's notion of opportunity costs. In order to provide an illustration of how Dworkin's notion of opportunity costs might play a distinct role in resolving contemporary democratic challenges to the basic structure, I incorporate into my analysis a major criticism of Rawls. Kymlicka builds a liberal case for culture as a primary good, arguing that self-determination for national minorities is a fundamental case of justice consistent with Rawls's egalitarianism. However, Kymlicka also defends a practical institutional argument about equal access to a societal culture, the institutions required to sustain the right to self-determination.

Taking the case of Canadian Aboriginals, I argue in that both luck egalitarianism and Kymlicka's theory of minority rights express insufficiently what is at stake in the claims of a national minority for self-government. I then analyze a recent string of Canadian Supreme Court decisions showing a strong link between cultural recognition and a unique, or sui generis right to land and property. It quickly becomes clear that we need an account not only of the financial but also the social opportunity costs of minority self-government since the social, political and economic institutions of the majority are also at stake.

In accordance with a democratic view of equality, I identify two sets of primary goods at stake to Canadian Aboriginals: the devolution of opportunities, authority, and responsibility to independent institutions, and the democratic conditions of autonomy

under which those goods are to be provided, namely, as members of a multinational citizenship. Ultimately, I formulate a two-part distributive criterion that I believe largely resolves the tension between democratic claims to equality by Aboriginal communities in Canada and the demand for attention to the opportunity costs of self-government as members of a multinational state. The devolution of powers and goods to Aboriginal institutions must reasonably be tied to the capacity to govern as a nation; recognition of nationhood ought to be tied to socioeconomic conditions, or a standard of living, not lower than the least-advantaged social position of the majority culture, Canadian society. This criterion is not intended as a principle of justice nor is its formulation intended to provide an independent argument of the conditions of democratic equality. In accordance with the main argument, the aim is simply to illustrate how Dworkin's notion of responsibility can be productively applied to the provision of primary goods. A secondary and related concern is to argue that recognition theorists need to consider more carefully the opportunity costs of culture and identity.

PART ONE

1.A. Conceptions of Equality

The theories discussed attempt to improve on a commonly accepted principle of justice, equality of opportunity (EO), that, as Roemer states, in one form or another is probably the most universally accepted conception of justice. The simplest form of EO, known as the starting-gate theory, or level playing-field conception of equality, relies almost exclusively on the potential of market exchanges to distribute benefits and burdens among individuals. That is, the distribution of rewards and costs is fair when, "there are no constraints on the structure of opportunities generated by free markets."[3]

Since Rawls, starting-gate conceptions of EO have been challenged by various conceptions of *fair* equality of opportunity (FEO). Rawls's understanding of FEO falls under what Rawls labels 'justice as fairness', which is captured by a set of principles: 1. An equal scheme of rights and liberties which are to be guaranteed their fair value; 2.A. Social and economic inequalities must be attached to positions and offices open to all under conditions of fair equality of opportunity; 2.B. Inequalities are to be to the greatest benefit of the least advantaged members of society.[4] Rawls arranges these principles lexically, that is, in order of priority; a lower principle cannot be fulfilled before a higher one. Other than 2.B., also called the difference principle, these principles are familiar within liberal democracies, and Rawls believes his ordering of all three principles best reflects the weight attached to each within those societies.

An equal scheme of liberties is a feature of any plausible understanding of liberalism. What is disputed is how these rights are to be protected and fulfilled. For the

purposes of this thesis, I will leave aside any very detailed discussion of equal liberties or rights. It suffices to say that Rawls's understanding of rights apply to the basic structure of a society. Unlike the simple view of EO that focuses on one institutional relationship, state and market, the basic structure involves the total institutional arrangements of a political society, including the, "rules and practices that define the political constitution, legal procedures and the system of trials, the institution of property, the laws and conventions which regulate markets and economic production and exchange, and the institution of the family."[5] The reason for focusing on the institutional arrangements, argues Rawls, is due to the profound and pervasive influence of those institutions on and over the course of the lives of persons, their ambitions, expectations and opportunities. As Rawls argues, it is, "[t]his structure [which] favors some starting places over others in the division of the benefits of social cooperation."[6] As we will see however, the focus on institutions does not exclude the dispositions or identities of persons. In fact, as Rawls himself came to argue increasingly in his later work, in particular, *Political Liberalism*, there is a tension between the inequalities produced by the institutional structure, which principles of justice are to regulate, and an ideal characterization of the relations among free and equal citizens. That is, Rawls now argues that where his distributive theory 'justice as fairness' applies to the basic structure, that basic structure is now seen to depend crucially on *fair* terms of social cooperation between citizens that endure over time. In particular, Rawls argues that the distributive arrangements of a society depend on the extent to which persons understand each other as free and equal citizens: free, "in the sense that they regard both themselves and each other as having a conception of the good, and as entitled to make claims on their political institutions to be in a position to advance

their respectively own conception of the good," and equal, "in the sense that they are capable of engaging in social cooperation over a complete life as one among equal citizens."[7] I do not intend to resolve this tension between justice as fairness and political liberalism. The point I wish to emphasize in this thesis is that Rawls's concern with sustaining fair terms of social cooperation over time complicates the role FEO is to play in a distributive egalitarian theory.

1.B. Meritocratic to Democratic Equality

As Kymlicka interprets Rawls's principle of FEO, "it is fair for individuals to have unequal shares of social goods if those inequalities are earned and deserved by the individual, that is, if they are the product of the individual's actions and choices. But it is unfair for individuals to be disadvantaged or privileged by arbitrary and undeserved differences in their social circumstances."[8] It is worth analyzing this account of Rawls's FEO since in TJ Rawls explicitly rejects desert as a basis for entitlement and indeed the fairness of a meritocratic society.

Rawls argues that the problem with EO is that distributive outcomes are at any given time strongly influenced by natural and social contingencies. In one of his most well-known and controversial accounts of inequality, Rawls claims that, "[t]he existing distribution of income and wealth,... is the cumulative effect of prior distributions of natural assets - that is, natural talents and abilities - as they have been developed or left unrealized, and their use favored or disfavored over time by social circumstances and such chance contingencies as accident and good fortune."[9] But why should we assume that existing inequalities follow from chance? What reasons do we have to see existing inequalities as necessarily arising unfairly from undeserved advantages, especially in light of the opportunities afforded by a thriving free market? Rawls provides a very strong assessment of market distributions. But to see how Kymlicka's interpretation of Rawls's FEO is flawed, we must look at Rawls's position in some detail.

Rawls equates meritocracy with the idea that an individual's social position, wealth and income depend on undeserved natural and social circumstances, which are

then used to justify rights and privileges of authority for unequal social positions. In a free market system, social positions that depend on such circumstances result in unjust disparities between social classes. EO's principle 'careers open to talents' seeks to mitigate the extent to which distributive shares depend on social contingencies such as race, class, and family. But as Rawls states: "[t]here is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historical and social fortune."[10] Once we are troubled by the influence of one, we are bound on reflection to be troubled by the other; according to Rawls, the two seem equally arbitrary. Specifically, the extent to which capacities develop and even the willingness to make a deserving effort is affected by all kinds of social conditions into which we are born. So even though EO rectifies meritocratic inequalities by upholding legal barriers against discrimination, Rawls argues that EO allows the unfair influence of social and natural contingencies on *access to* social positions and resources over time, the cumulative result of which is, "an equal chance to leave the less fortunate behind in the personal quest for influence and social position,"[11] and wealth.

Rawls's proposal is that background conditions must do more than promote nondiscrimination in the pursuit of positions of authority, careers and personal advantage. According to FEO, some form of redistribution or compensation is required to mitigate the influence of undeserved social and natural circumstances that generate unfair disparities. That is, rules regulating the influence of social circumstances and natural endowment, as well as the rules governing competition, are a concern for a theory of equality. In Norman Daniels's words, FEO, "requires that we not only judge people for jobs and offices by reference to their relevant talents and skills, but that we also establish

institutional measures to correct for the ways in which class, race, and gender might interfere with the normal development of marketable talents and skills."[12] The institutional structure should not only work actively to create conditions of fair market competition for valuable social offices and positions, but should work to level a range of existing social and natural circumstances that affect the ability of disadvantaged social groups to compete for those positions in the first place.

Despite this analytical distinction, Andrew Mason argues that these two forms of equality are so intimately linked that, "we cannot give a justification of the meritocratic view that does not draw upon some broader account of equality of opportunity or justice."[13] To illustrate, consider a white candidate applying to a workforce prejudiced against blacks. In this case, being white ought not to count as a qualification for a job, yet this may be consistent with notions of merit that Rawls's FEO rejects. We need a way to distinguish legitimate from illegitimate ways of distinguishing persons and EO is meant to provide further guidance here. But while a rejection of EO for a theory of FEO has been used to justify affirmative action, that rejection does not necessarily lead to compensatory background conditions or redistribution. The point is that neither performance-related criteria nor fair background conditions constrain the favoring of certain characteristics, nor is it always clear which criteria are desirable in certain contexts.

1.C. Natural Endowments

While compensatory background institutions can feasibly mitigate the influence of unequal social circumstances, the distribution of natural assets - endowments - is largely beyond the control of institutions. This would seem to limit the role of institutions in mitigating their influence. According to Rawls, however, the difference principle transforms in fundamental respects the aims of a society in which endowment differences influence distribution. Examining the extent to which the difference principle transforms the meritocratic principle of desert, of greater gains for greater endowment, provides part of the basis for understanding Dworkin's critique of Rawls, and the extent to which Rawls's account of primary goods does or does not provide an adequate role for responsibility.

On the one hand, inequalities arising from talents are clearly arbitrary, the result of what Rawls calls natural fortune. Specifically, Rawls's claim is that natural endowments are arbitrary in the sense that the effect of their influence on distributive shares is 'undeserved.' On the other hand, because the distribution of endowments is largely beyond the control of institutions to regulate, Rawls acknowledges that distributive inequalities are bound to arise from unequal natural endowment.

According to Rawls, then, although arbitrary, the advantages and benefits arising from natural endowments, skills and talents, are not *necessarily* undeserved; that is, "the more advantaged [in talent] are entitled to whatever they can acquire in accordance with the rules of a *fair* system of social cooperation [emphasis added]."[14] Rawls's understanding of 'fair' in an ideal characterization of the terms of social cooperation

characterizing the basic structure, and how that term distinguishes Rawls's conception of equality from EO, is complex and will take up a great deal of the discussion in Part 1 of this thesis. At present, however, there are two senses in which Rawls argues the influence of talents is allowed by the principles of justice. First, according to Rawls, distributive inequalities arising from differences in talent would be allowed in a society in which natural endowments are viewed as crucial to the integrity of persons protected by the basic liberties. Talents ought legitimately to play a role in shaping the opportunities made available to individuals and in forming their identities within a social system. Second, although both EO and FEO allow inequalities that result from differences in endowments, one way Rawls distinguishes a democratic society from a meritocracy is the democratic concern with reciprocity among its members. As Rawls states, in a democratic society, just as, "it is not in general to the advantage of the less fortunate to propose policies which reduce the talents of others,"[15] neither do the endowment advantaged, "have a right to a cooperative scheme that enables them to obtain further benefits in ways that do not contribute to the advantages of others."[16] So, interestingly, although Rawls concedes that the influence of endowment on distribution may be legitimate, Rawls denies outright that the notion of desert applies to his democratic conception. Given this complex stance, it is worth inquiring into the extent to which Rawls's democratic equality transforms a meritocratic society and the principle of EO.

Rawls's solution to the influence of talents and, specifically, to the greater advantages gained from their influence, is that endowment advantages ought to be considered a common asset to be used for the common advantage. Rawls's general argument here is that, "[o]ne is not allowed to justify differences in income or in

positions of authority or responsibility on the ground that the disadvantages of those in one position are outweighed by the greater advantages of those in another."[17] In this general view, injustice is simply inequalities that are not to the benefit of all. The specific argument, stated here in its strongest form, from the point of view of citizens, is that it must be reasonable for each representative person to prefer their prospects with an inequality to their prospects without it.[18] This specific notion of reciprocity, which ensures that inequalities among social positions work to benefit the worst-off, is one of the strongest requirements of Rawls's egalitarianism: differences in natural assets are shown to be used for the common advantage when an inequality in the expectations of the worst-off satisfies an independent principle of justice, what Rawls labels the difference principle. According to this principle, social and economic inequalities are to be to the greatest benefit of the least-advantaged members of society, or, in a weaker version of that principle, further inequalities must be shown not to make the representative worst-off group worse than they are presently.

The reason Rawls is led to the difference principle as a way of constraining the influence of arbitrary natural endowments, Kymlicka claims, is that Rawls defines the worst off in terms of primary goods. Primary goods, the total set of social benefits unconditionally regulated by institutions under Rawls's FEO, include an equal scheme of liberties such as freedom of thought and conscience, political liberties and association; fair background conditions of opportunity; the powers and prerogatives of positions of authority and responsibility; the social basis of self-respect; income and wealth. Primary goods are Rawls's answer to the question of how inequalities are to be measured. Rawls's argument for primary goods as a basis for interpersonal comparisons is, one, that

inequalities among citizens should be measured, "solely by reference to things which it is assumed they all need to carry out their plans."[19] Primary goods are justified publicly by their instrumental value to the interests of each individual. Two, if an objective list of social primary goods can be established, argues Rawls, we need only justify inequalities to a single representative group. That is, only inequalities in social primary goods need to be justified to the least advantaged, the position from which inequalities in the basic structure are to be judged.

But primary goods and the difference principle satisfy the democratic demand for reciprocity. For Rawls, the reasons we have for allowing the influence of talents, and indeed the extent to which the difference principle transforms the aims of a meritocracy, depend a great deal on an account of how inequalities are to be measured, in what persons are to be deemed unequal. According to Philippe Van Parijs, however, a crucial misunderstanding of the difference principle is that some index of the worst-off's actual advantages, such as actual income levels, should be maximized. As Van Parijs explains, the difference principle aims to maximize the lifetime opportunities and expectations of a representative group of persons, namely, the representative incumbents of the social position with the lowest such expectations. In Van Parijs's words, "[t]he difference principle does not require us to equalize or maximin these outcomes [in wealth and resources] but only to maximize what the representative incumbent of the worst social position can expect, that is, the average lifetime index of social and economic advantages associated with a position accessible to all the least fortunate."[20] As Van Parijs makes clear, the difference principle is a principle of opportunity, which emphasizes advantages, "in terms of lifetime expectations of categories of people rather than in terms of particular

individual's situations or goods at particular times."[21] As an egalitarian-opportunity principle concerned with expectations associated with social positions, the difference principle distinguishes democratic equality from a meritocracy in at least two ways: one, by avoiding comparisons of others on the basis of their actual wealth and income resources, as well as their levels of endowment, and two, by denying that one's situation in the social system at any given time is necessarily a matter of justice. The aim of invoking the metric of primary goods is to provide a common perspective from which the distribution of opportunities and expectations produced by the social system can be assessed over the course of the lives of all persons.

FEO and the difference principle, as well as primary goods, constitute what Rawls labels the 'democratic' interpretation of equality, which is to be contrasted with EO and its argument for simple efficiency. Like EO, Rawls agrees with a principle of efficiency, which states that, "[a]n arrangement of the basic structure is efficient when there is no way to change this distribution [of primary goods] so as to raise the prospects of some without lowering the prospects of others."[22] So Rawls allows that those with greater natural endowment ought to expect greater advantages on the whole, and that those with similar talents and skills and the willingness to use them should have roughly similar prospects regardless of their initial place in the social system. But it is crucial to Rawls's view that because greater overall advantages, or moves to more efficient outcomes produced by these undeserved advantages, do not distinguish between fair outcomes, the principle of FEO takes priority over the difference principle. This priority ensures that, "*the reasons* for requiring open positions are not solely, or even primarily, those of efficiency [emphasis added]."[23] In other words, efficiency gains arising from undeserved

endowment advantages are legitimate only after institutions secure a principle of non-discrimination and open access to social and career positions. This priority rule ensures that the productivity and efficiency gains arising from the influence of talents preserves the integrity of individuals – their self-respect and confidence in their own worth, what Rawls argues is the most important primary good[24] - and their place in the social system - the realization of self[25] - while justifying the resulting inequalities in resources as working for the common advantage.

1.D. The Range of Arbitrariness

However, two major problems arise from Rawls's concern with arbitrary, or undeserved advantages and disadvantages. The first, which is connected to the second, is how are we to understand Rawls's reference to the 'arbitrariness' of undeserved social and natural circumstances? To what extent should institutions mitigate their influence? The second problem is: Just what are background conditions supposed to track?

Regarding the first, Rawls denies that, "the ordering of institutions is *always* defective because the distribution of natural talents and the contingencies of social circumstances are unjust [emphasis added]."[26] Talents can be excepted from the range of undeserved factors influencing distributive outcomes provided that the added social productivity and individual benefits work to the advantage of the worst off. Richard Arneson argues, however, that the lexical priority Rawls gives to FEO over the difference principle is otiose at best. According to Arneson, the degree to which the difference principle allows for the influence of talents shows that the value of mitigating undeserved endowments is merely instrumental to, and indeed justifiable in the light of, greater overall social benefits. In fact, in the area of endowments that concerns Rawls, the normal range, "the two principles [FEO and the difference principle] do not conflict at all."[27] According to Arneson, maximizing the worst off in terms of primary goods automatically rules out unfair discrimination that would disadvantage the worst off. More specifically, although the reasons we have for endorsing open positions may not be limited to arguments for efficiency, a concern for the worst off already mitigates harmful discrimination and the unfair influence of natural endowment on the distribution of social

primary goods. According to Arneson, then, in Rawls's hands, the principle of FEO provides little guidance in identifying harmful effects of discrimination that a concern for the socioeconomic position of the worst-off would eliminate. A concern for the worst off does most of the work in transforming a meritocratic society and in removing harmful discrimination that would result from efficient outcomes.

Kymlicka's criticism of Rawls's FEO takes this ambiguity further. What are the background conditions of equality supposed to track? Recall part of Kymlicka's characterization of FEO above (p.4, section 1.B.), "that it is fair for individuals to have unequal shares of social goods if those inequalities are *earned and deserved* by the individual, that is, if they are the product of the individual's *actions and choices* [emphasis added]."[28] Does Kymlicka think that inequalities must be earned or deserved, or is it that inequalities are fair if they are the result of choice? An argument against Rawls here, it seems, would have to focus on the extent to which Rawls can distinguish his democratic conception of equality from a meritocracy, or the extent to which his second principle of justice transforms efficient outcomes. In other words, we might focus on types of society or distinguish between distributive outcomes. But Kymlicka instead attributes to Rawls a distinct normative aim: "[o]ne of Rawls's central intuitions… concerns the distinction between *choices* and circumstances [emphasis added]."[29] Surely Kymlicka is right to ask what, precisely, institutions ought to track if the influence of arbitrary factors are to be mitigated. Throughout TJ, Rawls points to several features of the person relevant to distributive justice, including voluntary action, talent, effort and ambition. In particular, Rawls wants to rule out simple measures of welfare satisfaction, or preferences, as a measure of inequality. But is Kymlicka right to transform the

problem of distributive equality into a general problem of agency?

According to Kymlicka, "Rawls seems not to have realized the full implications of his own argument against the prevailing view of equality of opportunity."[30] Kymlicka's most convincing argument supporting the significance of choice derives from his claim that the difference principle makes sense only if we accept primary goods as the measure of inequality. For example, because the difference principle is applied subsequently to the influence of talents on distribution, "two people are equally well off for Rawls… if they have the same bundle of social primary goods, even though one persons may be untalented, physically handicapped, mentally disabled, or suffering from poor health."[31] However, as Kymlicka argues, a handicapped person with the same set of primary goods as the well endowed is not treated equally. The handicapped person is faced with extra costs, such as medical and transportation costs, as a result of arbitrary factors, an outcome allowed rather than removed by the difference principle. Because primary goods are not capable of measuring inequalities arising from individual differences in natural endowment, the difference principle and primary goods restrict the role individual choice plays in the pursuit of opportunity and advantage.

Whatever ambiguities lie in Rawls's position, Kymlicka is wrong to say that Rawls is not aware of the problems of his democratic conception of equality. For one, as we have already seen, Rawls is concerned with persons of *roughly similar* natural endowment, that "those with similar abilities and skills should have similar life chances."[32] Second, despite his strongly stated concern with arbitrary factors, Rawls is very clear about the *possibility* of transforming the influence of endowment differences: "The effort a person is willing to make is influenced by his natural abilities and skills and

the alternatives open to him. The better endowed are more likely, other things equal, to strive conscientiously, and there seems to be no way to discount for their greater good fortune. The idea of rewarding desert is impracticable."[33] In fact, as Rawls states elsewhere, "[I]t is impossible in practice to secure equal chances … for those similarly endowed."[34] It is impossible to distinguish that part of a person's situation resulting from talent and that part following from effort, choice or ambition which, in any case, as Rawls states, are themselves influenced arbitrarily by unequal social circumstances, such as the family. The centrality Kymlicka wants to attribute to the role of choice in Rawls's FEO is misleading.

In my view, Rawls's central aim is to distinguish his democratic conception of equality from the aims of a meritocracy and challenge the acceptability of starting-gate conceptions of EO by securing a range of outcomes that a strict concern with desert and efficiency would, respectively, otherwise allow. Primary goods in particular define the basis for interpersonal comparisons of inequality and the terms of reciprocity from a public point of view. The important point here is that although Rawls argues that primary goods are accepted as the measure of inequality by virtue of their instrumental good to all individuals as free and equal citizens, he does not rule out the influence of endowments or the arbitrary influence of social circumstances. In one sense, it can be argued that Rawls does not distinguish clearly enough the relevant features of persons, referring to preferences, voluntariness, ambition, effort, and a range of endowment differences such as capacities, talents and skills. As we have seen, Rawls is very aware of the practical limitations of distinguishing sharply between deserved and undeserved features of individuals as a way of determining fair shares. Nevertheless, it is clear that attributing to

Rawls a strict concern with the influence of choice misses the complexity of the problems to which Rawls does appear sensitive. Kymlicka's arguments imply that there is a definitive feature of persons which just societies must track, namely, their choices. But wholehearted pursuit of a single feature of persons would surely result in a very particular kind of society. It follows from Rawls's conception of equality that a range of democratic societies might legitimately meet the aims of his principles of justice. If we take Rawls's concern with the distinction between, say, meritocratic and democratic societies, the crucial point is that we be able to distinguish a democratic society from societies that ascribe social positions and wealth solely on the basis of desert, the moral worth of persons, or by justification of natural authority, all of which lead unacceptably to the reproduction of social hierarchies and unjustified inequalities in wealth. Kymlicka's mistaken emphasis on the radical implications of Rawls's FEO dismisses the fact that Rawls's principles provide for a range of acceptable democratic types of societies. In fact, the aims Kymlicka attributes to Rawls conflict with the quite general aim of a democratic conception of equality, to mitigate the extent to which advantaged social positions and a greater share of distributive goods can be justified by reference to undeserved natural endowment and social circumstance.

We can now see why Arneson's dismissal of the principle of FEO does not take seriously enough the reasons we have for upholding democratic norms of equality. A concern for the worst off may remove some harmful cases of discrimination. But judging between efficient outcomes solely on the basis of the well being of a single representative group ignores a common perspective or principle that applies equally to all.

But there is another aspect of Kymlicka's concern with choice that is more

difficult to respond to: “Paying for choices is the flip side of our intuition about not paying for unequal circumstances.”[35] Imagine two persons equally endowed *and* sharing the same social and family circumstances. Where one chooses a life of work and the other a life of leisure, the difference principle tells us to redistribute to the worst off. In this case, although the stated aim of the difference principle is to mitigate arbitrary circumstances, the difference principle unfairly penalizes the better-off by redistributing to the worse-off as a result of differences in choice: “Rather than removing a disadvantage, the difference principle simply makes her subsidize his expensive desire for leisure.”[36] This is the problem of expensive tastes. In other words, just as the handicapped person’s opportunities to lead a life in line with her choices are reduced by the cost of endowment disadvantages, the difference principle does not distinguish among the beneficiaries of redistribution whose position can be attributed to choice. As Kymlicka argues, Rawls does not adequately hold individuals responsible for the costs of their choices.

1.E. Primary Goods

The problem of choice and responsibility again concerns primary goods as the measure of inequality. In TJ, Rawls makes the argument that primary goods would be chosen by persons because they are what any rational person would require in order to pursue their opportunities and conceptions of the good; primary goods are instrumental to the lives of all persons. As I will argue below, like the significance of 'arbitrariness' and 'choice,' we should be careful how we interpret that statement. At the very least, we should take seriously Rawls's revision to that argument in PL, that primary goods are what persons need in their role and capacities as citizens to sustain fair terms of social cooperation. As I argue below, Rawls's argument that primary goods are the appropriate measure of inequality is best understood in terms of a theory of fair shares, that is, by appeal to those goods required by persons as free and equal citizens and by appeal to the capacities of persons, for a sense of justice as well as rational advantage. This view is only partially worked out but nevertheless implicit in TJ's account of primary goods.

As Rawls states in a later essay:

> As moral persons citizens have some part in forming and cultivating their final ends and preferences. It is not by itself an objection to the use of primary goods that it does not accommodate those with expensive tastes. One must argue in addition that it is unreasonable, if not unjust, to hold such persons responsible for their preferences and to require them to make out as best they can. But to argue this seems to presuppose that citizens' preferences are beyond their control as propensities or cravings which simply happens… The use of primary goods…

relies on a capacity to assume responsibility for our ends.[37]

Is this, as Kymlicka thinks, an appeal to choice, ambition or autonomy? I do not believe it is, but Rawls's arguments in *A Theory of Justice* give us reason to think so. In this passage, however, Rawls clearly rules out any reference to choice based on simple preferences. But the difficulties Rawls confronts in distinguishing clearly between undeserved circumstances and features of the person relevant to distributive justice continue to elicit criticism. For one, according to Rawls, citizens have 'some part' in forming their ends. Rawls does not specify any single feature, such as choice, effort or talent, that institutions ought to track. Two, individuals have some part in forming *their ends.* Rawls does not specify which ends are relevant but, again, mentions several, including careers, conceptions of the good, self-interest, an interest in primary goods, plans of life. The ambiguity Kymlicka points out regarding choice and responsibility is explained as follows: Rawls holds persons responsible only to the extent that their actions and pursuit of their goals and ends affects the distribution of primary goods.

Kymlicka recognizes that in Rawls's defense of primary goods there is an implicit argument about the instrumental value of choice. Primary goods provide the all-purpose means for persons to pursue their opportunities and ends. Ultimately, Kymlicka subsumes both the question of which features of the person are relevant to distributive justice and which ends are relevant under a single instrumental argument for the significance of autonomy. Choice is valuable for the pursuit of our ends and to the ability to revise those ends without coercion or penalty. But despite greater simplicity, this is not entirely helpful.

Rawls's major claim about the significance of the basic structure was the

profound and pervasive influence of institutions on the expectations and outcomes of individuals. Institutions play a great role in determining which aspects of the person are favored over other aspects, and the range of ends that individuals have the opportunity to pursue. Where FEO addresses the common reasons we have for regulating the ways in which natural and social circumstance may be used to regulate access to social positions and distributive shares, the difference principle addresses the range of acceptable inequalities. In other words, we need a common, or public measure of inequality precisely because social positions and distributive shares are so closely linked to natural and social circumstance that can be used to justify and uphold those advantages. A strictly instrumental concern with autonomy simply avoids the difficulty of determining a public point of view from which inequalities in the ability to pursue available opportunities may be judged. Primary goods define the range of goods individuals are entitled to as citizens and responsibility is an issue because primary goods are the product of social cooperation. *Fair* terms of social cooperation and *just* institutions, however, demand of individuals that the pursuit of their rational advantage does not diminish a fair share of primary goods for all.

G.A. Cohen points to a difficulty with Rawls's position: "it is not easy to reconcile what Rawls says about effort with what he says about tastes."[38] Rawls denies that it is possible to distinguish the extent to which talents influence distribution, yet wants to mitigate their influence. At the same time, Rawls avoids the question of whether preferences are within the full control of individuals, yet deems persons fully responsible for their preferences, tastes and ends. In order to make sense of Rawls's claims about responsibility for preferences, Cohen appeals to Scanlon's interpretation of Rawls's

understanding of agency: we do not have immediate control over our preferences, but we do have some control over their formation over time,[39] and this capacity is part of what it means to choose our ends or plans of life. This helps to make sense of why it is accurate to say with Rawls that citizens have *some part* in determining their ends and preferences despite the fact that institutions are bound to favor some aspects of persons and range of ends at any given time. Neither the principles of justice regulating institutions nor the institutions themselves can adequately determine or sustain fair outcomes over time. Individuals must bear some responsibility for their rational interest in social goods because the terms of social cooperation are linked to the capacities of persons.

Rawls's reference to the fact that agents not only can but ought to revise and adjust their ends is crucial to how Rawls views the link of primary goods to responsibility. Primary goods underline a commitment by citizens to take responsibility in their public role as free and equal citizens, over the course of their lives, that the pursuit of their self-interest does not undermine a fair distribution of those goods that all persons need as citizens, namely, the primary goods. As goods persons require in their capacity to adhere to fair terms of social cooperation, social primary goods define those things that individuals understand and openly acknowledge is at stake in maintaining fair as well as efficient terms of social cooperation and mutual benefit. In other words, because social primary goods are the products of a cooperative political community, it cannot be expected of citizens to adhere to fair terms of social cooperation absent a fair share of those goods.

Kymlicka's argument was that the difference principle unfairly burdens the better off by redistributing to the worse-off whose position can be attributed to choice. But this

follows only if we take the concern with mitigating arbitrary factors as absolute and as applying to specific individual cases. The determinacy demanded by Kymlicka seems better suited to the implementation of specific redistributive policies. The main conclusion to be drawn from Rawls here is that institutions cannot plausibly track responsibility at the individual level. The problem is that institutions cannot plausibly track individual choice: it is impracticable and indeed undesirable to attempt to unravel the reciprocal influence of the range of undeserved advantages and disadvantages to the degree suggested by Kymlicka's examples, especially among the least-advantaged.

Cohen's concern is similarly addressed. The reason Rawls is willing to assign responsibility for tastes and preferences is that individuals have a great deal more control over the formation of their interests and preferences over time than they do the distribution of endowments. That is why Rawls can attribute a degree of responsibility to institutions for regulating the influence of endowment on distributive shares and to individuals for the formation of expectations and shares of primary goods. Indeed, the idea of using the greater endowment advantages of some for the common advantage emphasizes, "the productive roles that people occupy, in recognition of the fact that society attaches economic benefits to performance in a role rather than to the possession of talent in itself."[40] The concern with greater determinacy is unwarranted and does not stand as a weakness of Rawls's conception of equality. Again, institutions and the division of labor favor some starting points over others and that is why Rawls avoids characterizing a single ideal type of society. There is bound to be indeterminacy in fulfilling the principles of justice, a range of democratic societies whose institutional structure and terms of cooperation characterizing those institutions fall acceptably within

Rawls's principles of justice.

2.A. Dworkin's Auction

The criticisms leveled against Rawls thus far are derived from what, following Elizabeth Anderson, has become known as 'luck egalitarianism'. Ronald Dworkin's version of luck egalitarianism, 'equality of resources,' is regarded as the first theory to significantly advance the claim, attributed to Rawls, that institutions should work principally to eliminate endowment disadvantages so that a person's life chances depend solely on ambition, or choice. Dworkin's call for an ambition-sensitive and endowment-insensitive distribution differs most significantly from Rawls's FEO and difference principle in that Dworkin rejects equality of outcomes secured by the difference principle and any principle securing equal outcomes. This does not mean equality of resources is not concerned with outcomes, however. For Dworkin, unequal individual outcomes are legitimate if they arise from conditions that track as closely as possible the cost to others of the pursuit of individual ambition. Dworkin articulates his normative aim with two mechanisms: the competitive, or free marketplace and insurance markets. We have seen the kind of difficulties Rawls's FEO, and any theory that seeks to interpret what it means to mitigate arbitrary or undeserved circumstances, must confront. The purpose here is to investigate further the possibility of a theory of fair shares and, specifically, the extent to which institutions can track responsibility.

Dworkin's resource egalitarianism focuses on the strengths of a competitive market. As he notes, however, throughout its history, free markets have been associated with everything from individual liberty, the promotion of community-wide goals, such as prosperity, efficiency, and utility, and have even been proclaimed an enemy of equality.

Dworkin's idea of an ambition-sensitive and endowment-insensitive distribution aims to provide a different interpretation of the market that tracks the equal concern of individuals, and is distinguishable from what Dworkin calls a simple 'economy of consumption.'

Dworkin presents his argument in a familiar way, from an initially equal position of equality from which point inequalities are to be judged. But Dworkin aims to sharpen Rawls's cut between deserved and undeserved inequalities. For Dworkin, there are two kinds of resources of concern for a theory of distributive justice between which Rawls does not distinguish sharply enough. First, resources may refer to differential *internal* features of a person, their talents and ambitions. The problem for Dworkin, as it is for Rawls, is that physical and mental powers are resources whose distribution is not within the control of social institutions. Significantly, Dworkin's equality of resources focuses solely on mitigating arbitrary differences in endowment, citing two main kinds, talents and handicaps; social circumstances are not mentioned in the essay. Secondly, there are external resources, such as valuable career positions and material goods and wealth. These resources are scarce and are in general gained competitively, and that is why individuals ought to compete for external resources only on the basis of their morally relevant internal resources. The challenge, according to Dworkin, is to link the distribution of scarce external resources to an individual's ambitions while eliminating the influence of morally irrelevant internal resources, such as talents, which should not affect an individual's fair share. For Dworkin, if we are to maximize the conditions under which we can attribute to individuals responsibility for their circumstances and share of external resources, inequalities are properly legitimated by an ambition-sensitive and

endowment-insensitive distribution of external resources. Another way of stating the aim is that the state is to provide background conditions in which such judgments are made possible. For Dworkin, this is the central aim of an egalitarian political philosophy.

Dworkin's auction begins by asking us to imagine a hypothetical situation in which an 'executor' distributes to each individual equal spending resources enabling persons to bid for a fixed stock of desired scarce (external) goods, which have been divided up into roughly equal bundles. From here, individuals are given the opportunity to compete with others for their preferred set of goods. If each individual spends their resources on the bundle of goods that they prefer most, eventually, through a competitive bidding process, all goods should clear markets, that is, all the goods will be bought and acquired at precisely the price each individual is willing to spend. Although the auction clearly results in an unequal distribution of goods in the sense that no individual may get the precise set of goods they desire, the outcome is fair to the extent that no one envies any other person's goods.

One way Dworkin distinguishes his resource egalitarianism from EO is the standard for an equal distribution, the envy test, which says that a distribution is fair and equal when no one prefers another's bundle of goods. To be sure, the envy test does not require that persons do not envy another's resources at any particular time; that is inevitable and in any case impossible to fulfill. Put this way, the envy test distinguishes Dworkin's auction from a simple economy of consumption in which inequalities in external resources are not ruled out as a reason for envy. Like Rawls, Dworkin sees resources as instrumental to the lives of individuals. The important point is that Dworkin's auction is not primarily concerned with the distribution of goods, but the

impact of that distribution on and over the lives of individuals. The envy test requires that no one prefers another's life and total resources held over the course of another's life. More importantly, then, Dworkin argues against starting-gate conceptions of the market that it is simply arbitrary to equalize resources at one point in time but not another, and in any case begs the question of why it was required in the first place. An envy free distribution of resources invokes the equal good of each individual's life plans in accordance with the resources required to lead that plan.

According to the auction, since each person had an equal opportunity to bid for their desired bundle of goods, could have bid more for goods not obtained and indeed, could have bid for another bundle of goods, the competitive bidding process is able to track closely the ambitions of individuals, what they are willing to spend on a particular bundle of scarce goods. As Kymlicka puts it, "people are treated with equal consideration, for differences between them simply reflect their different ambitions."[41] According to Dworkin, the auction generates a distribution more consistent with Rawls's notion of social equality, or fair shares. An unequal distribution generates legitimate inequalities when individuals are held responsible for their share of scarce external resources.

The notion of responsibility supporting the envy test can be spelled out more clearly. The distributive problem Dworkin wants to solve is that, "it is not an equal division of social resources when someone who consumes more of what others want nevertheless has as much initial resources left over as those who consume less."[42] One appealing aspect of Dworkin's auction is the common sense notion that individuals ought to pay for the costs of their ambitions, or life plans. For Dworkin, the idea of 'opportunity

costs' is used specifically as a way to confer responsibility on individuals for their share of scarce resources, and the costs of the life they choose to lead with those resources. The mechanism of the auction illustrates how the pursuit of one's preferences imposes costs on others and potentially limits the range of goods and options available to others: the greater the demand for a bundle of goods, the higher the cost. Put another way, markets set, "the value of any transferable resource one person has as the value others forgo by his having it,"[43] what could be characterized as a process of elimination through possessive ambition. Much has been made of the idea that Dworkin views his articulation of the auction as an improvement on the sense Rawls gives to the idea of fair shares. Dworkin's claim is that his auction enforces what primary goods cannot do without the difference principle, namely, force the individual, "to take responsibility for the true costs of his own choices."[44]

Many view Dworkin's auction as an appeal to what is today the status quo, the acceptability of a highly commercial society, and specifically, that market value is the primary measure of value. Heath argues that the normative aims Dworkin attributes to his auction are in fact confused. As Heath explains, Dworkin's auction consists of two distinct distributions; the executor's initially equal distribution and the final, envy-free distribution resulting from persons themselves. According to Heath, however, the auction, "does not serve to create equality, since the initial allocation is already perfectly equal and envy-free."[45] In other words, if an unequal but legitimate distribution is one in which there are no complaints for reasons of fairness, the executor's initial distribution of spending resources already solves the major problem stated by Dworkin. Indeed, simply by virtue of the executor's equal distribution of resources, there is no basis for the claim

that anyone has been treated unequally. In fact, beyond this initial distribution, "any equality of bidding power must be a function of the equality of the initial distribution."[46] Put another way, the auction does not make the resulting distribution *'more equal'*; the auction is neither more nor less equal than it was from the situation of initially equal resources. Rather, "[t]he problem with the initial allocation is simply that it is inefficient."[47] As such, argues Heath, market transactions in Dworkin's equality of resources do not serve the value of equality at all, but serve, rather, the value of efficiency, and indeed, this is precisely the aim of a perfectly competitive market in the real world. Dworkin simply substitutes the goal of a perfectly competitive market with the value of equality.

Dworkin claims that, "the idea of an economic market, as a device for setting prices for a vast variety of goods and services, must be at the center of any attractive theoretical development of equality of resources."[48] As Heath points out, the social value of competitive markets is well-established, and the claim that markets necessarily tend either to equality or inequality is in general mysterious if not suspicious. Dworkin at one point even argues that under equality of resources, 'efficiency is fairness.'[49] According to Heath, this is deeply misguided. The assumptions underlying Dworkin's auction are well-settled among economists and do not support the egalitarianism Dworkin attributes to the idealizations of a perfectly functioning market. Moreover, the fact that the auction - a perfectly competitive market - does achieve a high level of efficiency is a relatively trivial implication: the idealizing assumptions enable precisely this result. Once we see this, it is hard to appreciate how Dworkin's auction contributes to equality.

Heath is right to question the extent to which a free market can attend to equality.

But I think it is false to view Dworkin as merely advocating a simple view of the free market. In any case, I do not think Dworkin's insights are limited to arguments for the value of competitive markets. As Dworkin makes clear in his essay 'Equality of Resources' it is truly an intellectual curiosity, and perhaps bizarre, that the accumulation of wealth should become the mark of a successful life and that persons who have arranged their lives in pursuit of wealth should be the proper object of envy within societies having the level of wealth and prosperity currently enjoyed, except where that wealth is so unevenly distributed. As Dworkin goes on to say:

> We are so ignorant of the complex genealogy of the implausible attitudes about wealth that we find among us, which those who point to the moral costs of the market system deplore, that we would do wrong to assume in advance that these same attitudes will arise in a market system whose very point is to encourage the kind of reflective examination about costs and gains under which these attitudes would seem most likely to shrivel and disappear.[50]

This thought-provoking statement places a great onus on Dworkin to distinguish his view of the market. I want to suggest two ways in which Dworkin's auction may be developed further.

Recall two ways Dworkin distinguishes his auction. First, the envy test applies simply to resources, or levels of wealth, over the course of the life of individuals. That is, Dworkin denies that one's resource levels at any given time are necessarily significant as a matter of equality. This is a complex standard for a claim of justice, for it undermines defenders of unregulated market inequalities as well as those who would wish to claim redistributive benefits on the basis of immediate resource inequalities. But a more

expansive reading of the envy test might apply the aims of that test, its application over the lives of individuals, to claims other than resources which would, in turn, alter what that test is to measure. Heath's reading, while pointing out the obvious flaws in Dworkin's account of the auction, does not even attempt to tease out its uses and applications. Heath does not even tell what other ideal theories Dworkin's auction might be contrasted with in order to convey its limitations. That is, despite its internal problems, it may in fact be better than the alternatives. Second, Dworkin's notion of 'opportunity costs' demonstrates clearly that even if the free market is not central to the pursuit of equality, the ideal conditions of the auction simply put in the starkest of terms how claims of justice create costs and burdens within a system of social cooperation. Along with the claim to a fair share of primary goods, the opportunity costs of their provision is a defining feature of a theory of fair shares and of political life generally. Moreover, this tension is clearly not necessarily limited to market transactions or to simple claims to resources. There are many other areas relevant to equality to which the concept might apply, such as the provision of goods that are either inefficiently or inappropriately distributed by market competition such as Rawls's primary goods.

However, the ability of Dworkin's auction to track fully an ambition-sensitive and endowment-insensitive distribution rests largely on the adjustments Dworkin makes to the market. Specifically, an endowment-insensitive distribution, Dworkin admits, is not possible through the mechanism of the market alone.

2.B. The Insurance Market

Notice that the auction by itself does not remove the influence of talents or the extra cost to persons of handicaps. One problem is that the envy test rules out the legitimacy of gains from talents at the auction, yet those with greater natural talent or skills can be expected to either earn more or to be more productive over time. In other words, the auction fails the envy test because those less fortunately endowed will envy the lives of those whose talents unfairly reaped greater opportunities and resources. According to the envy test, we need to know how much extra resources are a result of undeserved talents. But just as Rawls was, we are thwarted by the reciprocal relation between talents and ambition and as such, "Rawls's refusal to compensate for natural disadvantages makes sense."[51] The link between talent and resources is simply too close to allow such fine-grained assessments of individuals. Because the development of talent over time is partly determined by ambition, effort and social circumstance, it is both implausible and infeasible to track that part of a person's extra resources attributable to natural, rather than chosen skills and talents.

A second problem is the effect of endowment disadvantages on an initially equal distribution. If we imagine what the severely handicapped will have to spend on expensive medical costs in order to compete effectively in the market, the amount of redistribution required to reach an initially equal starting point could result in an inordinate amount of resources being transferred from the talented to the handicapped.

One solution is to pay the costs required for the untalented and handicapped to compete at an equal starting point before the auction and then divide the remaining

spending resources. Dworkin dismisses this option, arguing that while some disadvantages can be appropriately compensated, "that goal is impossible to achieve in other cases, for no amount of social goods will fully compensate for certain natural disadvantages."[52] No amount of money can equalize the effects of all inequalities in natural endowment, and indeed, eliminating differences in natural endowment in a world of finite spending resources, even if possible, would leave very little resources to track in any meaningful sense the ambitions of individuals. This is in itself, claims Dworkin, a source of unfairness. In any case, argues Dworkin, "The problem is, rather, one of determining how far the ownership of independent material resources should be affected by differences that exist in physical and mental powers."[53] We must avoid conflating the equalizing of endowment with equalizing differences in wealth and income gained from those differences, which is the proper aim of a theory of distributive equality.

Dworkin concedes the problem handicaps pose to his theory: if the role of the state is to mitigate the influence of endowment disadvantages on distribution, we must find a way to counteract the unfair internal disadvantages of some while leaving enough spending resources to track the ambitions of all. If we pay for the full costs of equalizing endowments, there will be little left with which to run the auction and hence, track ambition. If we do not redistribute enough, the endowment-disadvantaged will be unable to compete fairly at the auction and increasingly over the course of their lives. Although Dworkin proposes two separate hypothetical insurance markets for talents and handicaps, I will discuss them together since, in any case, Dworkin proposes the possibility that the two be merged.

The insurance scheme is intended to set a level of redistribution that resolves the

conflict between ambitions and endowments, and in a way that tracks opportunity cost, as does the auction. The idea is to imagine that prior to the auction, no one knows their place in the distribution of endowments. After the total finite spending resources are divided equally among all, an insurance market is set up that gives individuals the option to purchase insurance. The insurance scheme might operate at the hypothetical level by posing the following question to individuals: What, out of your initially equal stock of resources, would you spend to insure against the odds that you will end up with more rather than less natural disadvantage? Dworkin recognizes that in practice the response is likely to be settled by a few public officials. But if we can imagine what each individual would likely spend, we can arrive at an aggregative figure that, though will not compensate fully, like the auction, compensates fairly in the sense that at the hypothetical level, the insurance scheme pays out for endowment disadvantages that individuals chose to insure against. Even this degree of sensitivity to individual circumstance is, however, unnecessary. As Dworkin points out, like insurance markets in the real world, levels of compensation need only be set according to categories of risk against which people would insure in a general way.[54]

The problem with the insurance scheme is that it alters Dworkin's initial concern with opportunity costs in the auction. Where the auction tracks the costs of pursuing one's preferences at the cost to others, the insurance scheme tracks willingness for risk. The initial problem with the auction is its inability to mitigate the effects of *brute luck:* "Brute luck is a matter of how risks fall out that are not… deliberate gambles,"[55] such as the effects of endowment on distribution. But the insurance scheme invokes a different type of luck, *option luck*: "Option luck is a matter of how deliberate and calculated

gambles turn out - whether someone gains or loses through accepting an isolated risk he or she could have anticipated and might have declined."[56] The purpose of the insurance market is to provide persons the *option* to insure against *brute* luck circumstances that detract from one's fair share of external resources with which to pursue chosen life plans. That is, the insurance market is meant to arrive at a rough measure of the resources persons would be willing to spend or, more accurately, risk on insuring against categories of brute luck endowment disadvantages. According to Dworkin, the insurance market mitigates endowment disadvantages in a way consistent with ambition sensitivity. We mitigate unfair gains and costs resulting from endowment by redistributing from those with good option luck to those with bad brute luck.

But this quite different kind of ambition introduces a different way of tracking cost, what we may call 'opportunity risk.' The 'opportunity' is simply the option to protect against losses resulting from unforeseen circumstances and in particular, endowment disadvantages. The 'risk' results from the hypothetical supposition that prior to the auction, no one knows how much or how little natural advantage they will end up with. The rationality of opportunity risk is more complex than opportunity cost in the auction because, as Dworkin remarks, standard insurance markets are rarely good gambles. This detracts from Dworkin's claim that the insurance market is sensitive to ambition, however, for the insurance market forces upon persons, not so much a choice, but a very delicate and information-dependent risk assessment. Individuals are forced to weigh the costs of giving up initial spending resources, the means for pursuing ambitions competitively in the auction, for a redistributive benefit package that is sensitive to the level of disadvantage a person ends up with, but which may not fully compensate for the

amount of initial resources spent no matter how bad the disadvantage turns out to be. Specifically, the risk against expected losses resulting from a purchase in the insurance market make sense, "only when it protects, not just against having less wealth than one otherwise might, but against being in such a significantly worse position that it is worth a technically bad investment to avoid any chance of it."[57] As Dworkin makes clear again, the insurance market makes clear the stakes of pitting scarcity against fair opportunity for gain. For those whose choose not to gamble at all, "the price of a safer life,… is precisely forgoing any chance of the gains whose prospect induces others to gamble."[58]

Although it is clear enough that persons will be inclined to risk as little as possible against brute luck, Dworkin argues that it would be imprudent for any individual not to insure at all. This is significant. Despite the concern with individual responsibility, Dworkin denies that his theory provides only a minimal role for the state. The very rationality of the insurance market ensures that each person receive some level of guaranteed coverage against endowment disadvantages arising from brute luck. Nevertheless, the plausibility of the insurance market depends on the equal option of each to take a similar risk, for only then is the distribution resulting from differential option luck justified.

3.A. Anderson and Democratic Equality

Elizabeth Anderson provides one of the most incisive criticisms of the position defended in various forms by Dworkin, Kymlicka and Cohen, what Anderson labels 'luck egalitarianism.' Anderson rejects the claim that those who refuse an available and reasonable insurance gamble no longer have claims on others. As Anderson argues, those who suffer bad option luck under Dworkin's scheme are potentially thrown into the very forms of destitution and exploitation that democratic struggles for equality historically have sought to eliminate. In Anderson's view, a society that abandons its citizens through reasonable choice does not treat persons as equals. In Anderson's words, "the reasons luck egalitarians offer for refusing to come to the aid of the victims of bad option luck express a failure to treat these unfortunates with equal respect and concern."[59] There is a clear rationality to the insurance market, which many authors have criticized. But a central reason luck egalitarians have focused on Rawls's second principle of justice and, specifically, his theory of fair shares, is to improve upon the role of responsibility in a theory of distributive equality. As Kymlicka states, "equality teaches us how much by way of resources we have to pursue our projects, and how much is rightfully left for others."[60] According to Cohen, however, although Dworkin's equality of resources appeals to ambition in a way that Rawls rejects, in fact, "[c]hoice is in the background, doing a good deal of unacknowledged work."[61] Anderson's article is particularly important for drawing out the political and social implications of luck egalitarianism in its various forms. When Anderson asks: What is the point of equality?, she is not merely concerned with distributive rationality, but with the reasons we have for supporting an

egalitarian politics.

From a general perspective, the aims of luck egalitarians seem distinctly eminent: "[o]nly when everyone faces a sufficient range of acceptable options can we say that individuals can live their lives in accordance with their voluntary choices,… and claim that individuals may justifiably be held responsible for the outcomes of their actions."[62] A closer look reveals that, as an accurate account of egalitarian politics, the rationality of that view is limited and flawed. The fundamental condition by which the insurance scheme can legitimate resource inequalities resulting from endowment differences is *the equal opportunity to run a similar risk*. But it remains unclear to what degree option luck, or opportunity risk, tracks individual ambition. In fact, the insurance scheme leads predictably to a narrow range of reasonably rational choices: "[t]he only lotteries that one would like to retain in the opportunity sets, because they are clear cases of option luck, are bad lotteries, those that nobody should take."[63] The obviously rational gambles provided by the insurance market would involve clear cases of brute luck, such as severe and costly disabilities. Risk sets involving, say, a lack of talent, would appeal only to risk takers whose bad luck transforms unreasonably costly risks into noncompensable cases of option luck. According to Fleurbaey, then, option luck entails a paradox: "the more it conveys responsibility, the less valuable it is for opportunity sets."[64] According to Anderson, however, opportunity risk cannot transform brute into option luck no matter how rational the gamble. In a case, "[b]etween two people who responsibly assume the same risk, where one person won and the other lost, the only difference is one of brute luck."[65] In other words, the insurance scheme cannot eliminate the incidence of brute luck simply by offering an opportunity to insure against the odds of suffering a particular

effect. Those who suffer bad option luck are still in fact victims of brute luck.

Given these difficulties with the rationality of the insurance scheme, Dworkin's general strategy might be seen to beg the question. If the point of the insurance scheme is to provide a roughly equal opportunity to take a similar risk, through categories of risk, then correcting the overall distribution of wealth is arguably prior to asking whether individuals can afford to purchase an adequate level of coverage or what individuals would purchase. To what extent is this tension a liability to Dworkin's theory of equality? It is clear that Dworkin's insurance scheme cannot maintain the normative aims he sets out for that scheme. I want to draw on some policy examples provided by Dworkin to illustrate that although the results of the hypothetical insurance scheme are roughly predictable and the conditions for an equal opportunity to insure largely a product of institutional regulation rather than choice, the insurance scheme does make clear the consequences of taking seriously the opportunity costs of providing scarce goods.

Anderson wants to press the question of whether the rationality of the insurance scheme is an example of responsible social planning or abandonment of the least advantaged. As Dworkin states in the case of welfare reform, a theory in which opportunity costs are central will want to avoid two evils: "a welfare program so porous that it allow extensive abuse and one so stringent that it denies welfare to many people who need and deserve it."[66] As is clear, however, this is far from tracking the ambitions of individuals. In the area of social policy that concerns Dworkin, the insurance scheme leads predictably to a middle position. The rationality of opportunity costs can in practice rule out only the most extreme positions and this undermines Dworkin's stated aim of tracking individual ambition.

But Dworkin's approach is not without further theoretical resources. As Dworkin points out, it is not an argument to say that we spend too little or too much on a particular social program since that presupposes that we know how much we should spend. On the one hand, then, is the conservative position that persons should be left with the coverage that they can afford. On the other hand, Dworkin refers to popular views supporting health care programs, such as the rescue principle, the view that each human life is valuable no matter the cost. According to Dworkin, state-funded provision under the rescue principle provides more than what people would spend if they had to pay the full costs themselves. We cannot provide all with the medical care that the richest can buy, but nor can we avoid the question of justice: "what is 'appropriate' medical care depends on what it would be unfair to withhold on the grounds that it costs too much."[67] In one of his most pointed statements about the consequences of adopting the opportunity costs imposed by the hypothetical insurance market, Dworkin asks whether people would change their view of the rescue principle and the level of spending appropriate for a health care program if it were known that the majority of health care dollars were spent in the last six months of life. In Dworkin's view, most of us would agree not to spend a greater amount of our overall resources over the course of our healthy lives in order to prolong an extremely expensive six months. This kind of difficult questioning is, I think, extremely valuable. It avoids the conservative position that persons ought simply to receive coverage for which they can pay, but forces even advocates of universal coverage to consider the costs of provision. Dworkin's approach demonstrates that we do not necessarily need to correct the overall distribution of wealth prior to the fair provision of a social good under conditions of scarcity. This is, in my view, a major contribution to

egalitarian theory. In my view, then, Dworkin does address the reasons we have for treating persons as equals, and these reasons are generated by applying the notion of opportunity costs to the provision of social goods.

Anderson's second main criticism posits a strong separation between the aims of a theory that is concerned with choice and luck, and one that is properly concerned with institutions. Anderson argues that because Dworkin's theory guarantees equality only ex ante, that is, hypothetically, "before one has made any adult choices,"[68] the rationality of option luck conflicts with equality. For example, "people who have an extremely rare but severe disability could be ineligible for special aid just because the chances of anyone suffering it were so minute that it was ex ante rational for people not to purchase insurance against it."[69] The rationality of the insurance scheme, and the available options, determine to a great extent the ambitions of reasonable and responsible persons. Moreover, the hypothetical conditions do much of the work of transforming preferences into responsible choice. For example, the insurance scheme entitles a risk-averse blind person to aid that a risk-loving blind person would be denied, simply because the latter probably would not have insured against being blind, given the probabilities.[70] Here, the same handicap is treated different on the basis of individual characteristics rather than the social or financial costs of that disadvantage. The insurance scheme cannot solve the problem of determining when endowment differences are so bad as to require compensation.

Anderson spells out the problem quite precisely: "In focusing on correcting the supposed injustices of nature, luck egalitarians have forgotten that the primary subject of justice is the institutional arrangements that generate people's opportunities over time."[71]

There are two ways to read Anderson here. On the one hand, Anderson argues that equality just is about social relationships and the institutions that regulate the life chances of people, and this has nothing to do with regulating the effects of fortune and chance. Anderson argues that, in fact, the distribution of natural endowments is neither just nor unjust; how institutions deal with those differences can be judged just or unjust. Interestingly, this is consistent with Rawls argument for FEO in TJ, that, "[t]he natural distribution is neither just not unjust; nor is it unjust that men are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts."[72] Would Anderson, and Rawls, then argue that their institutional view of equality would necessarily prevent the consequences of Dworkin's approach so well teased out in Anderson's examples? In my view, Anderson shows convincingly that the concerns of luck egalitarians are misplaced: inordinate weight is given to the causes of outcomes over the question of the kinds of goods that are to count as primary. This is a major distinction between the two approaches affecting the way institutions regulate the distribution of goods, resources and opportunities. But although the reasons for compensation diverge, I think it could be shown that in the area of redistributive social policy the institutional approach could not further improve upon the socioeconomic circumstances of the endowment disadvantaged.

But there is a different way to approach the distinction Anderson draws between institutional and luck egalitarianism. Where for luck egalitarians, "[s]ocial relationships are largely seen as instrumental to generating… patterns of distribution,"[73] Anderson argues that distributive patterns governing the distribution of external resources are *one aspect* of the total institutional arrangements that fall within the purview of equality,

including fixed and mutable traits, divisible resources, social relations and norms, the structure of opportunities, public goods, and public spaces.[74] I think this second interpretation is the better one. In other words, egalitarians do not need to determine whether the natural distribution of endowment is inherently just or unjust. The question remains which approach provides better reasons for compensating the disadvantaged. Where the institutional approach is more appropriate to determining the social costs to individuals of their disadvantages, Dworkin's approach is better suited to determining financial costs and burdens.

3.B. Defending 'Opportunity Costs'

In order to illustrate this contrast further, I want to draw out responses to three of Anderson's criticisms. First, Anderson criticizes the kind of judgements made by luck egalitarians that determine compensation. According to Anderson, those who truly lack talent or who are severely handicapped must, under luck egalitarian standards, demonstrate publicly their inherent inferiority in order that the costs of their disadvantage are equalized. I reject Anderson's strong claim that a concern with distributive patterns necessarily creates social relations that treat individuals instrumentally. In fact, because the community that adopts the insurance strategy of equality treats the counterfactual questions as statistical and impersonal, Dworkin has some basis for the claim that his theory removes the influence of hierarchical social relations. Dworkin specifically mentions how the formulations arrived at by way of hypothetical determinations remove the opportunities for insurance adjusters and governments to unfairly deny policy coverage or discriminate against those who, say, are believed or can be shown to be endowment disadvantaged or genetically predisposed to an illness. The real problem is that even minimum coverage, however provided, will be unfairly unavailable to many of the worst–off. As Dworkin argues, a universal program that weighs the actual costs of disadvantages will unfairly burden the choices of others. In any case, it is impossible to equalize the social or financial costs of endowment disadvantages among the worst-off.

Second, does equality of resources necessarily violate the equal treatment of persons by allowing those who suffer bad option luck to fall into destitution or exploitation? I think Dworkin has a case against this charge. As Dworkin makes very

clear in *Sovereign Virtue*, even if unfair social circumstances such as class and prejudice could be eliminated, it would still be true that some persons would be endowment disadvantaged through no fault of their own. The argument that the worst-off who suffer bad option luck are not treated as equals is no argument against a cost-effective policy. As I argued, this is really a criticism that the *existing distribution of wealth is unfair*. Dworkin states this quite clearly: "a just distribution is one that well-informed people create for themselves by individual choices, provided that the economic system and the distribution of wealth in the community in which these choices are made are themselves just."[75] Anderson might charge that Dworkin's theory applies only if wealth and power were distributed equally. To the extent it is not now, the hypothetical aspects of Dworkin's theory do a lot of the normative work. But as we saw above, the hypothetical aspects of Dworkin's approach to social policy effectively eliminate unacceptable options, the conservative's 'pay what you can afford', and implausible and possibly irrational attitudes like the rescue principle. This might lead to a policy option in which the worst-off will predictably suffer the social and financial costs of their disadvantages. But it is no argument to say that implementing a social policy with its true costs in mind does not treat persons equally. As Dworkin astutely points out, social conditions of equality and a fair distribution of wealth undermine the reasons people have for denying responsibility and support the reasons persons have for accepting social and financial burdens caused by scarcity. To put this another way, under a fair social system in which wealth and power were distributed more equally, persons would be much more willing to accept discrepancies between their needs and their resources, and they would do so not simply as a compromise or as a result of coercion, but as required by justice.

Third, Anderson convincingly argues that egalitarians ought to be just as concerned with the range of goods that fall within the purview of justice as much as they are with the pattern by goods or resources are distributed. Ultimately, in Cohen's strict version, the choice/chance distinction leads to simple and clearly formulated rules: "when deciding whether or not justice… requires redistribution, the egalitarian asks if someone with a disadvantage could have avoided it or could now overcome it."[76] To be sure, Cohen concedes that though not a simple question, it is the right question to ask. But this is a causal judgement. Surely, as one type of judgement, causality has some public role to play. But the weight Cohen attaches to the choice/ chance distinction is clearly not warranted. Indeed, given that Cohen admits that a strict adherence to the cut breaks down any particular equilisandum, were Cohen to apply his rule of thumb to the kinds of situations addressed by Anderson, he would quickly see that causal judgements are applicable to very few problems of fundamental justice. Anderson is right to claim that causality is in general the wrong form of judgement for the distribution of goods people need as citizens. Most fundamental claims of justice concern the institutional arrangements of a society and, specific to distributive justice, the regulation of expectations and opportunities. I think there is some room in an egalitarian theory for causal judgements regarding responsibility, but Anderson shows that there is reason to place the choice/chance distinction within its proper context. As Matravers puts it, as citizens, "we are neither normally prepared to allow those who choose badly to bear the entire consequences of their choices,… nor are we such that we allow claims for compensation from people for any and every unchosen disadvantage."[77] Anderson is also right to insist that a more significant concern for egalitarians is to, "distinguish between

guaranteed and unguaranteed types of goods… and to insure individuals only against the loss of the former,"[78] an argument that echoes Rawls's claim about primary goods. But again, the virtue of Dworkin's notion of opportunity costs is to press upon citizens the problem of fairness and scarcity even among primary goods deemed unconditionally to fall within the regulative authority of institutions. In other words, there is no reason to suppose that the state should not impose the costs of a social policy simply because of the *kind* of goods required by citizens. That is the context in which Dworkin's theory is best suited, and contemporary political life is rife with these types of contexts.

So while there is good reason to reject a strict concern with brute luck as the proper object for a theory of equality, Dworkin provides compelling illustrations of how the notion of opportunity costs can transform the aims of a social policy. But if Anderson is right about the significance of the need of citizens for an unconditional set of goods, we need to look more closely at Rawls's argument linking responsibility to primary goods as the measure for the position of the worst-off. Blake and Risse provide a good development of Anderson's criticisms. According to them, and in accordance with Anderson, the significance that critics place on Rawls's concern with undeserved, or arbitrary circumstances is in fact *discontinuous* with Rawls's theory of justice. On Blake and Risse's view, it is misleading to see Dworkin's normative aim as following from Rawls, as Kymlicka and Cohen argue. To get at this discontinuity, Blake and Risse put forward a distinction between *direct* and *indirect* theories of distributive justice. Where direct models take the problem of justice to be a fit between a measure of inequality - some currency of justice – and the correct grounds for its distribution, the indirect model, which Blake and Risse argue corresponds to Rawls's theory, understands that the

equalization of some currency depends upon a broader understanding of justice. Blake and Risse argue that the exaggerated significance Rawls's critics give to Rawls's concern with mitigating arbitrary circumstances is mistaken. The direct and indirect models of distributive justice are incommensurable, "because in the one case we are talking about considerations pertaining to the basic structure to be decided in the original position, whereas in the other we are talking about matters arising within society."[79]

4. Social Division of Responsibility

We are now in a better position to see the broader context in which Rawls's notion of responsibility operates. I will not be concerned with whether Rawls's account is correct, but with whether Rawls's understanding of responsibility is deficient regarding the role of primary goods. First, and contrary to what many critics allege, Rawls does have an account of responsibility, which Rawls links to an account of primary goods. That account can be summarized as follows. Because primary goods are chosen as the currency in virtue of what individuals need as citizens and with regard to their being free and equal,

> the citizens as a collective body, accepts the responsibility for maintaining the equal basic liberties and fair equality of opportunity, and for providing a fair share of the other primary goods for everyone within this framework, which citizens (as individuals) and associations accept the responsibility for revising and adjusting their ends and aspirations in view of the all-purpose means they can expect, given their present and foreseeable situation.[80]

First, Rawls's reference to citizens as a collective body contrasts sharply with Dworkin's two mechanisms, which takes sensitivity to individual choice and circumstance as central. To the extent external resources can be tracked to individuals, having acted responsibly means, simply, that "no compensation is owed for disadvantages one could have avoided."[81] Individuals are to be held responsible for their preferences and choices made in awareness of the social consequences and costs to others. Rawls, on the other hand, determines three kinds of relationships, between citizens and the basic structure,

between citizens, and between citizens and state, which together produce what Rawls labels a 'social division of responsibility'.

The choice of primary goods as the measure of inequality is crucial to all three of these relationships and generates a theory that is vastly broader than what luck egalitarians mean by distributive responsibility. Rawls, like Dworkin, agrees that we ought not to gain unfairly from the work of others. The difference is that where Rawls says we ought not to unfairly gain from the *cooperative* work of others,[82] Dworkin's claim is that the preferences of persons ought not to be subsidized by the work of *individual* others. Like the concern with individual responsibility, Rawls states that, "society is not responsible if individuals form goals they cannot meet with their share of goods."[83] In Scanlon's words, individual responsibility means that "it is up to individuals, operating within this framework, to choose their own ends and make use of the given opportunities and resources to pursue those ends as best they can. How successful, unsuccessful, happy or unhappy they are as a result is their own responsibility."[84] Rawls and Dworkin deny that welfare or, in short, levels of individual happiness, provide a suitable basis by which to judge persons unequal. A sustained analysis of this claim is beyond the scope of this thesis. For our purposes, it suffices to say that where Dworkin sees preferences as relevant internal resources to the extent that the costs of pursuing those preferences are imposed, Rawls dismisses preferences outright.

For Rawls, the choice of primary goods as the metric of equality means persons are completely responsible for their preferences, or overall happiness, in the sense that they are responsible for cultivating their ends with the expectation of a fair share of primary goods. It is because Rawls assumes that persons as citizens are capable of

revising their ends and preferences that they can take responsibility for adhering to principles regulating a set of unconditional goods. It is this sharp distinction between individual preferences and social primary goods required as citizens that, “individuals receive their respective shares of primary goods without needing to show themselves worthy or deserving of it.”[85] In Dworkin’s scheme, individual preferences are transformed into ambitions when the true costs of their choices are imposed. However, as I have argued, not only is this aim theoretically impracticable, a strict demand for individual responsibility is far too specific, and indeed unnecessary, to serve as central to a liberal egalitarian politics.

To illustrate, the luck egalitarian concern with individual outcomes leads to the elimination of the influence of endowment on distributive shares. Yet, in one of her most pointed criticisms, Anderson “calls into question the very idea that inferior native endowments have much to do with observed income inequalities in capitalist economies.”[86] As Anderson argues, most of the inequalities in resources that luck egalitarianism sees as arising from differences in natural endowments, “are due to the fact that society has invested far more in developing some people’s talents than others and that it puts very unequal amounts of capital at the disposal of each worker.”[87] The idea that “to credit specific bits of output to specific bits of input by specific individuals represents an arbitrary cut in the causal web that in fact makes everyone’s productive contribution dependent on what everyone else is doing. Each worker’s capacity to labour depends on a vast array of inputs produced by other people - food, schooling, parenting.”[88] This yields a very different understanding of responsibility that considers persons in their socially productive role. In fact, the demand for greater specification of

Rawls's concern with undeserved, or arbitrary factors evidences the confusion Dworkin's theory, and luck egalitarianism generally, exhibits toward the aims of social justice. In any case, that aim does not follow from Rawls's egalitarianism. Under Rawls's view, FEO, rather than eliminating endowments, gives individuals and groups a fair opportunity to use and develop their talents and endowments. Centrally, the point of FEO and the difference principle is not to eliminate or redress for all unchosen circumstances but rather to, "undercut the dominance the best-off groups have in replicating their control over economic and social institutions."[89]

Given this much broader view of justice, it is not simply individual inequalities in resources that require justification. Like Anderson, Blake and Risse argue that the significance of resources to the lives of persons can be misleading: "distributive shares may become relevant, inasmuch as the economy is part of the basic structure - it is so to speak, a social fact, part of the set of things we as citizens make together. In order to justify what we do to one another through the basic structure, we have reason to ensure that we have some equilization of the benefits and burdens that basic structure creates. [Primary goods]… are ultimately the product of a political community that stands in need of justification."[90] That is why Rawls, in his restatement of justice as fairness, argues that the most fundamental idea in the conception of justice is the idea of society as a fair system of cooperation over time."[91] Fair terms of cooperation address all three relationships within a political community, which requires the use of citizen's two powers, the capacity for a sense of justice as well as the rational pursuit of self-interest. The inability of Rawls's principles to track individual shares is no argument against the democratic conception of equality because, "if inequalities arise because of unequal

starting points, they do so regardless of whether they are maintained by voluntary or involuntary actions."[92] It is precisely because any number of voluntary and involuntary individual actions may undermine the fairness of the relations over time and, hence, the reasons we have to revise our expectations in accordance with fair shares that institutions are the primary object of justice. In other words, the conditions under which it is rational to cooperate and which justify cooperative action in a political community are sustained primarily by institutions that are responsive to demands for justice. That is why institutions take precedence over distributive patterns regulating individual shares of goods. Absent a common and public set of reasons to cooperate, secured by a coercive institutional structure, fair terms of social cooperation cannot even get started. Political life is then governed solely by rational advantage.

Finally, criticizing the regulation of primary goods by the difference principle, Dworkin complains that the concept of the worst-off group is too malleable since we have to make decisions about who to include and how large that group should be. In particular, Dworkin and Kymlicka argue that because the difference principle, "fails to inquire whether individuals are among the worst-off due to their voluntary choices or due to unfortunate developments beyond their control,"[93] the difference principle unfairly subsidizes some at the expense of others. We need to look closer at these criticisms.

First, the difference principle is meant to shape inequalities of the basic structure, the purpose of which is to produce an overall tendency to equality and maintain conditions of reciprocity however individually responsible persons are for being among the worst off. From this perspective, corresponding to a social division of responsibility, "[i]ndividuals need not earn the privilege of benefiting from the difference principle, in

particular not through acting responsibly."[94] As Anderson points out, the inordinate effort given by luck egalitarians in sorting out the morally relevant features of persons, and in particular, the problem of expensive tastes as a fundamental problem of justice, is unwarranted and misguided: "It is not a moral accident that beach bums and people who find themselves slaves to their expensive hobbies are not organizing to make claims of justice on behalf of their lifestyles."[95] Indeed, according to Dworkin, it is precisely bbecause individuals will differ so widely in tastes, ambitions and conceptions of the good life that Rawls is led to primary goods, for primary goods are, "the only dimension on which they can, as groups, possibly differ."[96] But this trivializes the significance a lack of fair shares of cooperatively produced goods and opportunities has on the identities of disadvantaged groups as citizens. The difference principle, and a democratic conception of equality, is rightly concerned with fundamental cases of injustice and disadvantage, aims at justice among, rather than within, groups. As the history of democratic politics shows us, "The emphasis on groups reflects the historical context of the political struggle for equality, which has always been rooted in the demands of groups."[97] Groups generally self-define; only subsequently do the claims of disadvantaged individuals within groups become technical or statistical problems for state bureaucracies.

Secondly, it is misleading to say that the difference principle does not distinguish among the worst off social positions. The difference principle may *potentially* result in some cases of unfair subsidization, but, as Van Parijs points out, "[a]mong individuals sharing the same social position,… actual lifetime performance in terms of this index [primary goods] can differ considerably."[98] In fact, then, we should *expect* variation

among individuals in shares of primary goods within the least-advantaged group, and the degree to which we ought to distinguish further among individuals of that group is in practical terms a bureaucratic matter of welfare policy, not a fundamental case of justice. In any case, Rawls is not concerned with each individual's actual shares of resources but with the total lifetime expectations of social primary goods among disadvantaged groups. Moreover, because Rawls is concerned with inequalities in primary goods among rather than within social groups, "[t]here is no reason… to adopt considerations of responsibility with the intention of distinguishing among individuals covered by the difference principle."[99] Dworkin's notion of opportunity costs does not depend on, nor is it limited to individual assessments of responsibility. In my view, Dworkin captures a fundamental problem of political justice underdeveloped by Rawls, namely, a fair assignment of the costs and burdens generated by the fair provision of opportunities and primary goods required by persons in their capacity as citizens. This, it seems to me, is why Cohen is right to say that Dworkin's incorporation of the idea of responsibility has aided and, in my view, strengthened egalitarianism.

As we have seen, the two parts of Rawls's second principle, FEO and the difference principle, as well as an account of primary goods, provides for fair terms of social cooperation for the basic structure of a political society. The terms of social cooperation are characterized by three relationships: 1. among citizens, 2. between citizens and the basic structure and 3. between citizens and the coercive state. Rawls agrees that individual responsibility is significant but only to the extent that the pursuit of one's rational advantage affects a fair share of primary goods. A fair share of primary

goods ensures that citizens have reason to pursue their rational advantage fairly, that is, they should be provided with reasons to cooperate fairly and that is in part the responsibility of institutions to enforce as the influence of social and natural circumstances changes over time.

The concerns of luck egalitarians were not found to be fundamental cases of justice but were, rather, developments of Rawls's FEO. I argued that the formulations of luck egalitarians, and in particular Dworkin's resource egalitarianism, are in fact discontinuous with Rawls's democratic conception of equality. Although Dworkin's two mechanisms fail to express adequately the aims of liberal democratic societies, the notion of opportunity costs makes explicit the absence in Rawls's account of primary goods and social division of responsibility a corresponding account of a fair distribution of the costs and burdens, or financial and social costs to the fair provision of opportunities and primary goods.

PART TWO

5. Multinationalism and the Basic Structure

We have examined at some length some of the implications of Dworkin's auction and insurance scheme as a way of rendering clear a social policy that takes seriously the opportunity costs of its provision. Heath argued convincingly that Dworkin's auction does not track equality, and I argued that it is quite ambiguous whether markets can track ambition and choice. In particular, it is not clear that the opportunities, expectations and resources generated by a competitive market are not questions of institutional design rather than individual ambition. There is one implication of Dworkin's equality of resources that Dworkin's critics have not considered, namely, the extent to which opportunity costs ought to apply to social primary goods. Specifically, Dworkin's notion of opportunity costs brings into greater focus the costs of providing primary goods, and that even social primary goods may be subject to market forces.

Kymlicka argues that Rawls's theory has radical implications that follow whether or not Rawls acknowledges them. Kymlicka attributes these implications to Dworkin's theory of equality, which Kymlicka sees as a refinement of Rawls's second principle. The main argument of this second section is to show that the choice / luck distinction is, at best, in tension with a democratic conception of citizenship and at worst, has little analytical force in resolving contemporary political conflict involving fundamental cases of justice. Indeed, Anderson's criticisms can be seen as part of a broader debate between distribution and recognition. Distributive theorists, notably Brian Barry, have dismissed the significance of identity claims, instead emphasizing the fundamental significance to

equality of citizen's socioeconomic conditions, a claim echoed by Tom Flanagan's analysis of Canadian Aboriginals. Even at first glance, however, this is an odd claim since, as we have seen, the most important primary good protected by Rawls's two principles is self-respect and the sense of self-worth that one is part of a cooperative democratic social system. Even in the case of endowments, Rawls argues that it is not only impracticable but also harmful to the integrity of individual's self-respect to deny the role of talents in shaping the opportunities and identities of persons.

As I will show below, Kymlicka's work has challenged the scope of distributive egalitarian theory and his analysis of national minorities in particular provides a good case with which to develop the democratic implications of Dworkin's notion of opportunity cost. As we will see, recognition theorists, or theorists of identity politics, need to take a closer look at the costs of culture as a primary good if their claims are not to be dismissed as expensive preferences or as violating fair shares. As the case of Canadian Aboriginals illustrates, the financial resources and social costs required to sustain equality in even fundamental cases of justice are enormous. These costs create a great tension between Kymlicka's theory of minority rights and his defence of Dworkin's distributive theory, a tension that is entirely unaddressed by Kymlicka.

Where Kymlicka distinguishes between immigrant groups and national minorities, I will, for the purposes of this thesis, assume that immigrant groups and citizen groups can be dealt with under the discussion of citizen politics. For the purposes of this argument, I will focus on Kymlicka's theory on the rights of national minorities and, specifically, his characterization of the normative problems that arise between majority and minority cultures. Using the case of Canadian Aboriginals, I structure my

argument around five claims central to Kymlicka's view:

1. Culture is a primary good; autonomy depends on access to a societal culture.

2. We need to break the link between nation and state or, as Tully puts it, the idea that the single-nation state is the only or best form of citizenship; in Kymlicka's terms, the central idea is that citizenship is inherently group-differentiated.

3. Majority and minority nation-building are morally equivalent.

4. Cultural survival depends primarily on institutions run in a common language.

5. The opportunity costs of nation-building are unequal. The majority gets for free what the minority must pay for.

Kymlicka's criticisms of post-Rawlsian distributive theory can be divided into three stages. Kymlicka's early criticism was the inability to accommodate culture as a primary good. Kymlicka developed his view further to say that the debate over principles of justice is really a debate about the conditions in which autonomy is exercised, the rules, laws, norms, and practices by which persons are treated as equals. Kymlicka's most recent view is that the terms of citizenship are primarily at stake in debates over distributive justice. As Kymlicka has argued, it is a mistake to view the aims of a political union in terms of a search for consensus on political or distributive principles or an abstract principle of liberty. The equal rights and opportunities that provide the conditions for the exercise of autonomy are secured by *the institutions of a societal culture*. As Kymlicka argues, the powers, benefits and responsibilities that come with rights are not distributed to just anyone, rather, "these rights are typically reserved for citizens,"[1] that is, "to protect people's cultural membership."[2] If autonomy depends on

securing the institutional terms of citizenship, then what matters crucially is access to a societal culture, specifically, the range of options made available by membership in a societal culture. It is clear that distributive theorists have misleadingly developed distributive principles solely in terms of either a world citizenry or nationally undivided citizenry. According to Kymlicka, however, if, "[c]itizenship…is an inherently group-differentiated notion,"[3] then, "distributing rights and benefits on the basis of citizenship is to treat people differentially on the basis of their group membership."[4] Kymlicka's major claim is that it has become increasingly clear that the value of liberal autonomy depends less on a set of rights or distributive principles than crucially on the value of, "language, nationality, [and] ethnic identities within liberal democratic societies and institutions."[5]

National minorities further challenge the institutional structure of a society, and its terms of social cooperation. In Kymlicka's words, national minorities are, "historical societies, more or less institutionally complete, occupying a given territory or homeland, sharing a distinct language and societal culture."[6] In particular, national minorities are, "groups that formed complete and functioning societies on their historic homeland prior to being incorporated into a larger state."[7] It is clear that few if any societies are composed of just one nationality. Yet, while the idea of a multicultural society is well-accepted, the idea of a multinational society is recent and highly contentious. According to James Tully, multinational societies are, "constitutional associations that contain two or more nations or peoples. The members of the nations are, or aspire to be, recognized as self-governing peoples with the right to self-determination."[8] However, what it means to be recognized as a self-governing nation is, by itself, ambiguous and varies among minority groups. Crucially, Tully draws a distinction between nations that seek to

exercise autonomy ‘internally’, by altering existing associations so as to be better accommodated or recognized, and nations that seek ‘external’ autonomy, by asserting an independent, single nation-state or through secession.[9] To be sure, multinational societies are not “confederations of independent nation-states [or] plural societies of separate peoples.”[10] Rather, the members of the independent nation participate in the political institutions of their own nation *as well as the larger multi-nation*.

Kymlicka argues that where a national minority seeks self-determination, or self-government, majority and minority nation-building are equivalent. Indeed, Kymlicka argues that, “[t]he two seem on a par, morally speaking.”[11] According to Kymlicka, national minorities have been overlooked as a fundamental case of justice because of the belief that equality requires identical treatment when in fact equality, “is derived from a prior commitment to the ideal of common nationhood.”[12] The sense in which both groups are equal is that both, “want the right to decide for themselves what aspects of the outside world they will incorporate into their cultures,”[13] that is, how they reproduce their culture over time. This is the specific sense Kymlicka gives to the idea of self-determination, which is of fundamental importance to equal nationhood. That is, once we see that the rights, liberties and distributive principles defended by liberals apply to citizens as members of a community, argues Kymlicka, we see that disputes over equality are derivative of a deeper dispute over nationhood. As such, in order to see that citizenship is consistent with a multi-nation state, we need to break, “the link between nation and state - to challenge the presumption that an independent state is the only or the best form for national self-government.”[14]

For those who defend the morality of individual liberal rights, however, minority

rights enabling groups autonomy violates an ideal of equality which says that citizens ought to be treated identically, as individuals, rather than on the basis of, say, race or ethnicity. In particular, minority rights are said to undermine the, "strict separation of state and ethnicity,"[15] that individual rights and liberties have traditionally upheld. Mel Smith and Tom Flanagan each argue that minority rights allow precisely what a liberal defence of individual rights succeeded in eliminating, the belief that race ought to be a constitutive factor of self-government.[16] Indeed, given the choice of accommodating minorities on the basis of race or assimilation, Flanagan argues that assimilation is really the better option.[17] I don't think accommodating national minorities as equals forces us to make race or ethnicity a constitutive feature of their self-determination.

According to Kymlicka, there is no strict separation between ethnic and civic forms of nationality because, "both ethnic and civic nationalisms have a cultural component."[18] So while, "[i]t is indeed one of the tests of a liberal conception of minority rights that it defines national membership in terms of integration into a cultural community, rather than descent,"[19] the significance of a community to its members is to provide a range of ways of life, or meaningful opportunities in which autonomy may be exercised. Cultural membership in a liberal community does not depend crucially on whether a nation is civic or ethnic. As Kymlicka explains, "nations - civic or ethnic - are cultures that provide their members with meaningful ways of life across the full spectrum of human activity (economic, political, educational, recreational, religious, and so on)."[20] So equal autonomy, and the capacity for self-government, does not depend on the character or features of a peoples. What distinguishes a culture is its demand for separate institutions run in a common language. To make this distinction clearer, Kymlicka is

careful to distinguish *culture* from a *societal culture.* "Citizens of a modern liberal state do not share a common culture in such a thick, ethnographic sense. But if we want to understand the nature of modern state-building, we need a very different, and thinner, conception of culture, which focuses on a common language and societal institutions."[21] A societal culture for Kymlicka is a thin, public basis for a common identity, or institutional basis for citizenship.

As Simone Chambers points out, "Kymlicka explicitly emphasizes that lifestyles, religions and customs are not part of the societal culture,"[22] nor does the concept include the family or non-public spheres of life. "Indeed, the institutions that Kymlicka mentions as forming part of the societal culture are essentially public institutions: government, schools and the media."[23] Kymlicka's main point here is that the most important aspect of a societal culture is the operation of public institutions in a single official language absent which a culture cannot sustain itself as a societal culture; presumably, this includes securing the conditions for distributing the benefits and burdens of citizenship. This, more precisely, is the sense in which for Kymlicka majority and minority nation-building are morally equivalent. But the process of maintaining the terms of cultural membership through common institutions is not only a regulative process of securing or protecting the equal rights of citizenship. As Kymlicka points out, the societal culture that liberal rights promote ensures that state actions will not only differentially affect certain cultural groups but also, argues Kymlicka, potentially create unfair disadvantages.

In my view, Kymlicka's insights properly complicate what is at stake in debates over equality and provide an important point of reference between recognition and

distributive theorists who typically have either looked past each other or disagreed outright with the other's purposes. On the one hand, distributive theorists have not paid enough attention to the effect that the claims of national minorities might have on distributive criteria. On the other hand, many theorists of recognition either eschew distributive criteria or deny the significance of distributive criteria to resolving identity claims.

. But we can already see that Kymlicka's account of the relations between minority and majority nations is strained. This is due primarily to Kymicka's claim that majority and minority nation-building are equivalent. It may be that citizenship is *inherently* differentiated, that the rights, liberties and distributive principles defended by liberals depend on membership in a societal culture. But to say that minority and majority nation-building is morally equivalent begs the political question: how does self-government satisfy the demand for self-determination by a national minority within an existing societal culture? It is more accurate to say that multinational citizenship is consistent with, or not unreasonably connected to, liberal equality. Indeed, according to Tully's definition of a multinational state, minorities participate in their own institutions as well as those of the majority nation. Kymlicka obscures the fundamental point that although the demand for national self-government in a multinational state adds to the complexity of the terms of social cooperation, even full minority self-government does not negate the obligations of a common citizenship with the larger society. That is, if participation in a shared set of institutions is to take place with status as a self-governing nation, the obligations of membership in a broader system of social cooperation and the distributive criteria that result normally from mutual dependencies under a shared and fair system of

social cooperation also obtain.

Asserting the morally equivalency of minority and majority nation-building leads to a truncated understanding of the distributive problems both nations must face and the range of solutions that are possible. The question Kymlicka's insights lead to is whether a multinational citizenship also has any consequences for egalitarian distributive criteria, whether distributive principles apply equally, in the same way, to the nations of a multinational society. On this question, Kymlicka's distributive criteria and his theory of minority rights conflict. Indeed, Kymlicka vacillates between a Dworkinian view that institutions be ambition, or choice sensitive, and a Rawlsian view in which national minorities have a claim to an institutionally secure societal culture as an unconditional primary good. In fact, however, neither approach captures what is at stake.

To demonstrate this claim, I will explore how the case of Canadian Aboriginals poses problems for Kymlicka's theory of liberal equality. Canadian Aboriginals are a clear case of a society unjustly incorporated into a larger society whose legitimate claims for self-determination conflict with the kinds of distributive criteria analyzed in the first section. Specifically, I outline a string of recent Supreme Court cases that clearly link the identity of Aboriginal communities to the distributive benefits and burdens at stake for both Aboriginals and the broader Canadian citizenry, of which Aboriginal communities are inextricably a part. If egalitarian standards of political cooperation and distributive fairness cannot accommodate the demands of Aboriginal communities, then that is a fault of liberal equality.

6. Canadian Aboriginals

The constitutional protection of Aboriginal rights in Canada under The Constitution Act 1982, s.35(2), including Indian, Inuit and Metis, is clearly compatible with Kymlicka's theoretical assertion of the significance of culture to autonomy, the ability to reproduce that culture over time. For the purposes of this thesis, I leave aside the claims of Inuit and Metis peoples, and focus on the claims of a dispersed and fragmented Aboriginal population. In Kent McNeil's interpretation of that section, then, "[t]he term 'Aboriginal rights' is used in Canadian law to refer to the rights the Aboriginal peoples have as a result of their existence as peoples with distinctive cultures and traditions, and their occupation and use of the lands prior to European colonization."[24] A brief history of several Aboriginal cases reveals fundamentally what is at stake in defining and implementing the terms of cultural autonomy within an established sovereign nation-state. However, the Canadian courts have in fact never addressed the issue of Aboriginal self-government directly. According to McNeil, the courts have, "been reluctant to embrace the concept of self-government, let alone accept that the aboriginal peoples have territorial rights with sovereign dimensions."[25] Indeed, the courts have treated title and self-government as completely distinct issues. As I will argue, analyzing the legal interpretation of those rights undermines Kymlicka's unchecked assertion of a right to self-government on the basis of an institutionally complete societal culture. As we will see, a justification of the rights of minorities on the basis of autonomy reveals the inadequacies of distributive principles and criteria that have been aimed at regulating one or more of the three relationships distributive justice

deems individuals significant. Kymlicka does not consider these consequences at all.

Four understandings of what the Supreme Court labels the Aboriginal right, or 'interest' in land can be traced historically through the major court decisions: historical occupation, Aboriginal law, societal organization, and customary practices. However, the core of the legal problem facing Aboriginals with regard to securing land for self-government derives from two broadly competing perspectives on land title. The first sees land rights based in Aboriginal relations with Europeans; the second, views those rights as grounded in an understanding of property that distinguishes between pre- and post-sovereignty of the Canadian state.

The first acknowledgement under Canadian law of Indian rights to land is *St. Catherine's Milling and Lumber Company v. The Queen*, 1888. Aligned against Ontario, the Canadian government and the St. Catherine's Company asserted that Aboriginal title amounts to complete ownership except for a restriction on alienation, or sale of land, which is limited to the Crown. This view was rejected in favour of Ontario on the grounds that "Aboriginal title was based entirely on an interpretation of the Royal Proclamation which their Lordships regarded as the sole source of Aboriginal land rights."[26] The Royal Proclamation, establishing sovereignty on the basis of discovery, was thereby held to serve as the source of Aboriginal title. As such, Aboriginal land rights were established as usufruct rights, "the right to use and dispose of the produce of a piece of land without being able to sell the land,"[27] a right dependent on the good will of the Sovereign. As Flanagan states, "[a]lthough the case led to an authoritative definition of Indian property rights, Indians were not involved in it and probably did not even know about it. Judicial interpretation might have been different if the aboriginal peoples had

had a chance to state their own understanding of property before the courts."[28]

The first challenge to the doctrine of discovery as the source of title was *Calder v. AGBC*, 1973, "in which the Nisga'a people tried to obtain a declaratory judgement that their aboriginal title had never been extinguished."[29] In that ruling, the Nisga'a argued successfully that the legal right of Aboriginals to their land does not depend on whether title had been extinguished by or surrendered to the Crown: title does not depend on the Royal Proclamation of 1763, nor is it dependent on any other governmental act, including any claim to derive from European legal systems. As Judge Judson J. stated, agreeing with the Nisga'a, "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land."[30] However, as McNeil notes, because the relevance of being organized and occupying the land was not explained by Judson, the shift in debate from the source of Aboriginal title to its content can be attributed to Calder.

In *Guerin v. The Queen* 1984, Justice Dickson drew on Judson's unexplained assertion, interpreting Calder as having recognized title as a legal right deriving from historical occupation and possession of tribal lands. Ultimately, Dickson rejected the claim that the Aboriginal interest is best described as simply a beneficial or personal usufruct right, stating that the Aboriginal interest in land is a class or category of its own. This was the first articulation of the claim of a unique right to land, or sui generis interest, a concept that provided for subsequent Canadian courts the opportunity to explore beyond common law definitions of property. To be sure, though in Calder and Guerin a pre-existing right to title was accepted, the relevance of Aboriginal law to land title remained uncertain. In general, then, sui generis is characterized by a general

inalienability of land and the Crown obligation, a fiduciary obligation, to take up the Aboriginal interest in land should that interest be surrendered.

Nevertheless, the scope of sui generis has since been limited in two ways. First, in 1980, Justice Mahoney, in *Baker Lake v. Minister of Indian Affairs*, held that the title of the Inuit plaintiffs, "was limited to a right to hunt and fish as their ancestors had done."[31] effectively limiting the Aboriginal interest to uses of land at the time of Crown assertion of sovereignty. In Mahoney's words, the common law, "can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before."[32] In other words, the right to the land itself is limited to the uses the land was put by a particular band at the time of contact with Europeans.

Second, Mahoney provided a four-part test for sui generis claims to title that is revealing of the significance the courts have attached to the notion of culture, what constitutes culture, and how culture attaches minorities to their land. One, in order to make the claim to title, it must be shown that the community and their ancestors were members of an organized society; two, the organized society must have occupied the specific territory over which title is asserted; three, occupation must have been to the exclusion of other organized societies; four, occupation must have been an established fact at the time sovereignty was asserted by England. For Mahoney, this test is a reasonable onus of proof demanding a minimal content necessary for legal interpretation: "there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory."[33] Despite Mahoney's

confidence in it, this test is profoundly revealing of the difficulty of constructing a notion of culture that has clear legal and distributive implications. And though the sui generis right gives weight to the views of Aboriginals, the test appears to place the burden of proof on Aboriginals. Nevertheless, this test has since held up as a prerequisite for proof of Aboriginal title.

This interpretive problem carried over into *Delmaguukw v. British Columbia*, in which the Gitksan and Wet'suwet'en, both of BC, sought territorial title and recognition of the authority of traditional governments, thus pressing the question of the relevance of Aboriginal law to establishing title. The case went through three phases beginning in 1984 and was decided by appeal to the Supreme Court of Canada on December 11, 1997. In its first phase, BC Chief Justice Alan McEachern, in a blunt and highly controversial ruling, determined that land title and any governmental powers held prior to colonization had been extinguished by the inclusion of the province of BC to Canada; the right to land is usufruct. Yet, at the BC Court of Appeal, Macfarlane ruled that although governmental powers had been extinguished, Aboriginal rights to land title had not been extinguished. Macfarlane, developing the view of title as grounded in proof of social organization, concluded that land rights are specific to Aboriginal practices that the land supports and must be resolved case by case, depending on the specific Aboriginal society in question. Moreover, title is limited to the distinctive uses to which a society put the land *prior* to colonization. In other words, cultural practices that arose as a result of European influence could not count as distinctive; rather, "the common law will give effect to those traditions regarded by an aboriginal society as integral to the distinctive culture, and existing at the date sovereignty was asserted."[34] Again, it is noteworthy that MacFarlane

is willing to count as proof of distinctiveness those practices regarded by Aboriginals as integral. But the notion of an integral practice remains a very limited account of the role of Aboriginal law in determining the content of title requiring, moreover, a great deal of complex and controversial historical evidence.

However, Justice Lambert J.A., dissenting in part, and seeing further problems, took a more complex approach. An interpretation of rights that links a proprietary interest in land with its degree of connection to a distinctive cultural practice effectively denies Aboriginal societies, "the right to change and adapt to the new conditions which inevitably resulted from the process of colonization."[35] If this is right, MacFarlane's view clearly undermines what Kymlicka argues is the fundamental justification for minority rights, autonomy, which depends on the ability of the members of a culture to determine over time their relationship to the outside world. Moreover, while Lambert accepted the view that rights have their origin in distinctive practices which precede sovereignty, Lambert rejected the view that title is necessarily tied to tradition, arguing that "aboriginal rights are evolving rights. They are not frozen at the time of sovereignty or at any other time. The evolution which occurred before sovereignty and the evolution which occurred after sovereignty are both relevant to an understanding of the rights."[36] In other words, if Aboriginal title is dependent on practices and uses of land distinctive to a particular Aboriginal society, any change to or adoption of a specific practice in response to European colonization and influence would no longer count that society as distinctly 'Aboriginal', as having a distinct Aboriginal culture. Ultimately, Lambert concluded that Aboriginal practices, customs and traditions give rise to a right on the part of the Crown to protect Aboriginals in their exercise of their sui generis title to land, acknowledging

that the possibility of establishing title on the basis of a 'right', as understood by the courts and by common law, might in fact be impossible.

This appeal decision also was appealed and, on the basis of a completely new trial, overturned by the Supreme Court of Canada. Again, Lamer C.J.C. explicitly stated that this case could not resolve the question of self-government, but could serve only to address the content and proof of title. However, several important cases were decided by the Supreme Court between the second and third phases of Delmaguukw that had notable consequences for the final ruling.

In *R. v. Van der Peet*, Chief Justice Lamer developed a long-awaited test of proof for distinct practices, focusing the basis of title in *integral* customs, practices or traditions tied to land and 'distinct' to a community that need not be unique to that society.[37] The problem at court was whether Dorothy Van der Peet, a member of the Sto:lo in BC, had a right to exchange fish caught for money or goods. Here, the test for 'integral' is whether a practice - selling fish - can be traced to pre-sovereign contact and whether that practice "was one of the things that truly made the society what it was."[38] On these tests, Lamer ruled that the exchange of fish for money was not found to be integral.

L'Heureux-Dube and McLachlin dissented from Lamer in Van der Peet, arguing that a focus on practices specific to a community was a narrow view of Aboriginal title. According to L'Heureux-Dube and McLachlin, it is the significance of the practice to the community, and the distinctive culture which such practices, customs and traditions manifest, rather than the activities themselves, that should be protected by Aboriginal Charter rights."[39] Further, and following from this, L'Heureux-Dube rejected Lamer's opinion that the exercise of Charter protected rights depends on continuity with the past -

tracing a practice to pre-contact times - arguing that Lamer's view effectively freezes Aboriginal culture in time in two ways. First, pointing to a distinction before and after sovereignty divides an Aboriginal society, effectively giving rise to the false notion that the authenticity of a culture depends on whether a practice pre-dates European arrival and assertion of sovereignty. Indeed, Lamer's decision ignores the Sto:lo capacity to exercise their practices in ways that accord with crucial changes that occurred over time around them, crucially, the development of a commercial society. As L'Heureux-Dube argued, "aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, traditions and customs change and evolve with the overall society in which they live."[40] Second, L'Heureux-Dube argued that such a test is useless because it is unlikely in any case that contact dates could accurately be established for any Aboriginal community. Not only would the relevant moment of contact differ between communities, but such a test unfairly places a burden of proof upon Aboriginals to demonstrate pre-contact exercise of a practice or custom. As McNeil pointedly argues, Lamer's, "approach compels Aboriginal peoples to choose to live in the past in order to preserve their aboriginal rights, or to adapt to modern Canadian life and forgo those rights."[41]

So how did these distinctions affect Lamer's Supreme Court of Canada decision in the third and final phase of Delmaguukw? Lamer's ruling addresses both the claims of the Gitksan and Wet'suwet'en to inalienable fee simple ownership - the concept of property law upheld under Canadian and English common law - as well as the arguments of the governments of BC and Canada, that Aboriginal rights have no independent content, that any rights protected by the Constitution just are constituted by integral

practices. The final decision is in some sense a compromise between the positions of the two appellants. In Lamer's view, "[t]he content of aboriginal title, in fact, lies somewhere in between these positions."[42]

Lamer argues that prior occupation is relevant to a sui generis interest in land in two senses. First, the physical fact of occupation provides an independent claim to possession before the assertion of sovereignty and shows, second, that there was a "relationship between common law and pre-existing systems of aboriginal law."[43] Avoiding his definition of rights in Van der Peet, Lamer proposed instead that Aboriginal rights be viewed along a spectrum. The crucial point remains the connection of a practice or custom to the land. Lamer distinguishes between Aboriginal title, which is a right to the land itself, and independent rights which are practices, traditions, and customs integral to a society, but which are not connected to the land; that is, rights which are related to land but insufficient to support title. Indeed, the source of Aboriginal title is held by Lamer "to be grounded both in the common law and in the aboriginal perspective on land."[44] In Lamer's decision, the Aboriginal interest in land is not an independent right nor simply limited to integral practices, but involves, "a broad right to use the lands for a variety of purposes in accordance with the present-day needs of reserve communities."[45] Lamer also made two changes to the test of proof in Van der Peet for satisfying a sui generis claim to title. For one, where occupancy was exclusive, occupancy overrides the demand that a practice must be integral. That is, exclusive occupation, rather than the connection of a practice to the land, is sufficient to make a claim, though this need not rule out joint occupancy. Two, it is sufficient to establish a practice at the assertion of Crown sovereignty, rather than to pre-contact times. This ruling, meant to take into

consideration both the common law and Aboriginal perspectives, gives as broad and generous an interpretation of the content of Aboriginal title as had yet been given. As should be clear, however, very little certainty was provided. As Tom Flanagan argues, the only guarantee for Aboriginal communities and government provided by the Supreme Court's decision in Delmaguukw is a long and continuing process of litigation.

Again, the aim of the above has been to get a summary but nonetheless clearer view of the complexity and significance of producing a definition of culture that has clear practical legal and distributive implications. The opportunities of Aboriginal communities to reproduce their practices and indeed their societies over time have been shown by the courts to depend to a great degree on putative links between culture and property interests. Not only have these interests been shown by the courts to challenge accepted and well-established concepts of property under common law, but as one justice remarked, it may be impossible to accommodate sui generis rights to land under common law. This cannot but challenge the distributive principles and criteria set out by Rawls and Dworkin and defended by Kymlicka. Moreover, though unstated, it should be clear that the cultural autonomy of a national minority potentially threatens the economic, social and political stability of the majority society. Indeed, no Canadian court has yet ruled on whether assertion of sovereignty extinguished the possibility of Aboriginal self-government, or the independent authority over land and resources.[46]

The above analysis also shows that, although the empirical basis of Kymlicka's claims is underdeveloped, there is no simple empirical or historical explanation of the link between Aboriginal culture and property interests that produces a clear

understanding of Aboriginal rights. In fact, as we saw, such attempts potentially create further burdens - burdens of proof - for already disadvantaged groups. An important conclusion, then, is that we should be wary of empirical generalizations about the content of culture that could be used to generate distributive principles and criteria across cases. In my view, we must look to the specific claims of particular communities. So although historical evidence may be available and hence of some aid, there remains a crucial role for normative analyses of equality.

At first glance, this conclusion supports Kymlicka's focus on the significance to national minorities of institutions for their autonomy. Yet despite Kymlicka's theoretical innovations, Kymlicka does not address distributive criteria that might resolve minority claims. One major problem is that the courts have held that Aboriginal title is essentially communal in nature, vested in an Aboriginal community as a whole.[47] As Lamer ruled in Delmamuukw, "Decisions with respect to land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests."[48] Presumably, group-specific property rights limit the applicability of an ambition-sensitive and endowment-insensitive distributive criterion aimed at individuals. But does this mean we ought, with Kymlicka, to turn to issues of nationality, language and group-specific rights when dealing with the claims of minorities? Kymlicka comments that once we see that equality is a debate about nationhood we should expect that language rights would be the first thing theorists look at. But why does Kymlicka not consider developing further the implications of Dworkin's notion of opportunity costs as a way of handling the challenges national minorities pose to Rawls's distributive principles? An analysis of Supreme Court rulings shows, in my view, the urgency of

formulating rules and procedures for distributing benefits and burdens within multinational states. Adding urgency to the need for such distributive criteria is the fact that sui generis Aboriginal title, though not a full property right, is the only proprietary interest protected under the Charter. Indeed, would Kymlicka's theory of minority rights justify a concern for Aboriginals such that they have the potential to override the constitutional rights of other Canadians?

7. The Opportunity Costs of Citizenship

The case of Canadian Aboriginals undermines an ambition-sensitive and endowment-insensitive distributive criteria and, in my view, the centrality to distributive justice of the problems addressed by luck egalitarians. Specifically, it is clear that the circumstances of national minorities are not due to luck - brute or option - or endowment disadvantages. It is true, as Kymlicka argues, that Aboriginals were 'involuntarily incorporated' into the larger majority society. But the case of Canadian Aboriginals, which is a fundamental case of injustice, reveals the deep confusion of luck egalitarian distributive criteria. For it is perverse to say that the circumstances of Canadian Aboriginals are due to brute luck or to circumstances beyond their control. It is, moreover, deeply misguided to suppose that whatever compensation is due Aboriginal communities, they should be subjected to luck egalitarian standards of responsibility meant to apply to individuals. The relationship between national minorities and an existing majority society is more complex than can be accommodated by luck egalitarians.

The criticism I develop in this section derives from Kymlicka's claim that minority and majority nation is equivalent, namely, that we should abandon the concept of liberal neutrality for a nation-building model. However, Kymlicka's rejection of liberal neutrality overlooks two things, first, that problems of recognition can be addressed at the level of a multinational but, nevertheless, common citizenship. Although the claims of Canadian Aboriginals clearly challenge Rawls's notion of fair terms of social cooperation for the basic structure, Kymlicka exaggerates what is required of equality in

accommodating national minorities. Second, the distributive criteria Kymlicka elsewhere defends are not consistent with the obligations of citizenship that support neutrality. Indeed, Kymlicka's only mention of the opportunity costs associated with the accommodation of a minority societal culture is to say that the majority gets for free what the minority must pay for. This is a confusing claim. Presumably, Kymlicka thinks that the majority ought to provide for the social and financial costs of self-determination, yet provides no guidance as to what constitutes fair shares of the costs between majority and minority. Minority rights may provide national minorities with a degree for control over specific policy areas But as I will argue, Aboriginal self-government is an institutional question involving the devolution of responsibility, authority and, ultimately, opportunities. Although these goods are a matter of the relations between cultures, their distribution is properly addressed by distributive criteria. So instead of abandoning neutrality altogether, I argue for redistributive criteria that address Canadian Aboriginals as citizens, that is, as equals, while taking into account responsibility for the opportunity costs of self-government. Overall, then, Kymlicka overlooks simpler and obvious ways to handle the challenges posed by national minorities seeking powers of self-government. In short, what we need is distributive criteria consistent with multinational citizenship. However, as we will see, it is not clear to what extent Aboriginal communities are at present capable of bearing the opportunity costs of self-government.

Central to Kymlicka's defence of minority rights is that state action presupposes some degree of discrimination between ways of life. But as Kymlicka argued in an early paper, supporting and subsidizing some ways of life does not necessarily violate neutrality. Where in 'Liberal Individualism and Liberal Neutrality' Kymlicka argues that,

“[s]tate neutrality ensures that the culturally subordinate group has as many options as possible concerning that interaction [with the majority],”[49] he now rejects neutrality entirely for a nation-building model that views minority and majority nation-building as equivalent. Indeed, Kymlicka’s early claim was that if culture is a primary good, a theoretically productive distinction does not lie between perfectionism - the promotion of a specific conception of the good toward which citizens must strive - and neutrality - allowing individuals the choice of ends. The relevant distinction is between social perfectionism, in which individuals take responsibility for sustaining valuable ways of life, and state perfectionism, in which the state supports what otherwise would not survive.[50] This formulation of the problem highlights the opportunity costs of sustaining a culture as a primary good, and provides a powerful conceptual distinction challenging defenders of a neutral state and starting-gate conceptions of EO.

But, highlighting the necessarily discriminatory actions of the state, Kymlicka abandoned this view. It is true that attempts by the state or majority culture to integrate individuals of different cultures into a single nation-state are bound to have differential effects on those individuals and cultural groups, which may create injustices for national minorities. On this basis, Kymlicka now argues that, “group-specific rights can promote equality between the minority and majority,”[51] where there is a clear, “disadvantage with respect to cultural membership, and if the rights actually serve to rectify the disadvantage.”[52] In one sense, minority rights might simply correspond to the ways(s) in which a national minority is disadvantaged, namely, “through such things as language rights, land claims, as asymmetric distribution of powers, and the redrawing of political boundaries,”[53] as well as policy areas like education and immigration, “territorial

autonomy, veto powers, guaranteed representation in central institutions, land claims, language rights."[54] Indeed, part of Kymlicka's argument for minority rights is the rejection of the idea of state neutrality for a 'nation-building' model that, beginning from the idea that majority and minority nation-building are equivalent, asks, "whether majority efforts at nation-building create injustices for minorities."[55] That is, once we see the moral equivalence of nation-building for cultural groups, Kymlicka tells us, there is no reason to hold to neutrality: "[t]he real question is, what is a fair way to recognize languages, draw boundaries, and distribute powers?"[56] Kymlicka's work is important precisely because he has challenged the domain of goods that fall acceptably under egalitarian distributive principles and criteria. Kymlicka has provided one of the most thorough cases for including identity claims within the domain of distributive equality. In particular, Kymlicka denies that determining the range of goods significant to sustaining a meaningful societal culture can adequately be captured by consensus on a set of principles. We must look to the particular claims of groups in order to assess which rights rectify a given disadvantage.

So it is odd that elsewhere Kymlicka claims that, "[w]hether justice requires common rules for all or differential rules for diverse groups is something to be assessed case-by-case in particular contexts, not assumed in advance."[57] Here, Kymlicka does appear sensitive to the need for a set of common aims. The problem is that undermining a prior basis for deciding on neutral or differential treatment undermines the reasons we have to abandon neutrality for a nation-building model in the first place. Kymlicka's most recent claim is that what has changed is the burden, or onus, of the debate over the rights of national minorities. It is no longer incumbent on those who advocate differential

treatment to demonstrate that their policies do not result in harm or unfairness; the onus is on defenders of neutrality to show that their policies do not harm some groups more than others. But this hardly counts as a guide to policy in the areas that Kymlicka has so clearly outlined as being relevant to debates over justice. The crucial feature of Kymlicka's nation-building model is the ability of a cultural group to function as a societal culture, that is, with public institutions run in the language of that culture. But surely, while this may be correct, we need some way to assess the costs to each culture of self-government, a way to assess fair shares between cultures. Recall Dworkin's analysis of the cost of endowment differences, that no amount of resources may be able to equalize all inequalities, and that the cost of full compensation may itself be an unfair burden. The problem is that there has been no discussion among theorists, policy analysts or the Supreme Court of the opportunity costs associated with minority institutions, especially among Aboriginal communities. This silence is inexplicable. Kymlicka's early claim about culture as a primary good suggests that the problem is distributive, a problem of resolving the opportunity costs of sustaining cultural identity and practices. But Kymlicka's present position asserting the centrality of institutional self-determination, deriving from the moral equivalency of majority and minority nation-building, is clearly in tension with the idea of minority rights enabling control over specific policy areas.

It is telling that although Kymlicka defends the normative aim of Dworkin's egalitarianism, an ambition-sensitive and endowment-insensitive distribution, Kymlicka does not apply Dworkin's two mechanisms to national minorities as a way of getting at the opportunity costs of minority rights and especially Aboriginal institutions that Kymlicka argues are central to the survival of a way of life. I have already pointed out

that the circumstances of Canadian Aboriginals are not meaningfully addressed by the negative injunction of luck egalitarians. The disadvantages faced by Aboriginals have nothing to do with endowment, brute or option luck. Although it is true that their present disadvantages are due to circumstances beyond their control, it is nonsensical and perverse to determine redistributive benefits by asking what level of compensation Aboriginals would have insured against being involuntarily incorporated into the larger Canadian state. This was precisely Anderson's point: we should be concerned with Aboriginals because of the ideological and social hierarchy that has been deliberately and unjustly forced upon them.

Kymlicka appears to want to protect the right of minorities in specific areas of disadvantage by asserting the moral equivalency of their nation-building project to the majority. In Canada, this may be true of Quebec which has long used the federal division of powers to assert control over cultural opportunities under threat from outside. But Aboriginals do not have such institutions. Rather, the question is, to what extent ought Aboriginals have responsibility and authority over their own institutions? Moreover, at what cost to the majority ought such authority and responsibility be devolved? Kymlicka does not even consider this problem, which is better addressed by his earlier conceptual distinction between state and social perfectionism. Why does Kymlicka abandon the former method of resolving relations between majority and minority cultures?

In my view, there is no reason to suppose that distinct societal cultures within a multinational state cannot be dealt with by distributive criteria that address the terms of a common citizenship rather than as morally equivalent nation-building projects. Kymlicka's earlier emphasis on the opportunity costs of culture as a primary good

remains attractive and appears to provide an unexplored way of resolving the institutional question of self-government that Kymlicka's defence of minority rights, aimed at control over specific policy areas, does not accommodate.

To be sure, Kymlicka provides two characterizations of the problem that opportunity costs pose to majority/minority relations. In places, Kymlicka speaks of the cultural marketplace, that national minorities do not have the same opportunities as the majority to reproduce their ways of life. What is primarily required to achieve cultural autonomy in the contemporary world, argues Kymlicka, is a societal culture run by institutions in a distinct language. In other places, Kymlicka's claim is that the majority culture gets for free what the minority culture must pay for. This points to the greater spending resources required by national minorities to sustain their culture as a societal culture. In either case, does Kymlicka mean that the majority should pay for the cost of the minority's institutions? If so, why should this result in unlimited compensation by the majority? Indeed, Kymlicka's defence of Dworkin's resource egalitarianism was precisely that his theory provided a superior articulation of responsibility for choices in accordance with the costs of those choices to others. The question arising from the claims of Aboriginal societies is not simply, what is a fair way to recognize a range of goods crucial to a minority's societal culture? Stated this way, group-specific rights provide a clear response.

But minority access to an institutional basis for the reproduction of their culture is a claim about self-government. It is odd that Kymlicka does not address the costs of minority self-government at all since he presupposes the moral equivalence of majority and minority nation-building and the significance of the institutional pre-conditions for

autonomy. An obvious question is to what extent the majority culture is obligated to pay for the costs of the minority's institutions or, more precisely, the costs of self-government. In my view, then, the distributive issue at the heart of a conception of multinational citizenship is that, "there has presumably to be some judgement made about how many additional resources it is reasonable to expend in order to keep open the possibility of a way of life."[58] Distributive criteria securing culture as a primary good need not be justified as neutral in the sense of producing a consensus the way Rawls supports his principles of justice. Indeed, this is inappropriate to Aboriginal communities whose disadvantages ought to be considered transitional. Distributive criteria should seek to spell out in publicly acceptable ways legitimate entitlements regulating the relations between an existing majority culture and the opportunities for self-government by the minority community in question.

Recall the account of responsibility Rawls embeds in primary goods. Because primary goods are things all persons need in their capacity as citizens, individuals are expected to adjust their expectations in accordance with a fair share of primary goods. The whole point of an account of primary goods is to provide a public standard against which persons can adjust their ends over time. However, it is not clear that a public standard of entitlement, by itself, can resolve the problems a national minority poses to the *basic institutional structure* of an existing society. This is significant because whether we conceive of the fair shares in terms of the institutional conditions of a societal culture or specific disadvantages requiring rights, there are enormous financial and social opportunity costs involved in accommodating Aboriginal self-government. As Kymlicka's analysis of national minorities shows, the claims of national minorities

plausibly fall within Rawls's concern with fair terms of social cooperation for the basic structure. This suggests distributive criteria that can mediate the relations between majority and minority while taking into consideration the opportunity costs to each.

8. Markets and Institutional Capacities

We have rejected the rationality of the insurance scheme as way of determining those costs. Tom Flanagan's book *First Nations, Second Thoughts*, echoing Kymlicka's distinction between social and state perfectionism, argues that Aboriginals ought to be subjected to the competitive pressures of the market. Flanagan provides a comprehensive look at the case of Canadian Aboriginals, taking seriously the idea that Aboriginals are responsible for the costs of self-government. Flanagan is sensitive to the fact that most Aboriginal communities are in no position to refuse government funding. But the level of economic development required for self-government is simply not possible in the short-term, a point which Aboriginal community leaders ought to take seriously. More controversially, Flanagan questions the extent to which the members of Aboriginal communities are at present capable of bearing the opportunity costs of self-government. According to Flanagan, the socioeconomic conditions of Canadian Aboriginal communities are so dire that the economic development of those communities ought to outweigh any interest they have in preserving their culture. If Aboriginals wish to preserve aspects of their culture, they have no choice but to adapt to the demands of the market.

Flanagan has a point. There is a great disparity between the costs of self-government and the socioeconomic conditions of Aboriginal communities. Moreover, absent certain attributes or capacities associated with functioning modern institutions, the financial costs of sustaining Aboriginal institutions will place an unfair burden on the majority - Canada. But Flanagan overlooks that the right of a minority culture to

reproduce on its own terms is linked to the terms of democratic equality as well as market costs. In the case of Canadian Aboriginals, democratic equality is not accurately characterized by competition but, in line with Dworkin's account of autonomy, by the conditions for trial and error. In contrast with Flanagan, then, Kymlicka argues that the nature of institutional governance is intimately linked to the conditions of autonomy and identity in contemporary societies. But, as I hope to have shown above, Kymlicka's emphasis on the moral equivalency of nation-building results in an underdeveloped analysis of the social and financial costs of devolving powers, authority, and opportunities, and unnecessarily limits the democratic concern with relations between cultures, the *shared* terms of social cooperation among citizens of a multinational democracy.

Flanagan is very critical of the recommendations presented in the Report of the Royal Commission on Aboriginal Peoples (RCAP), specifically, the report's conclusion that, "[t]he single most important factor in the medium term will be the restoration to Aboriginal people of fair shares in the lands and resources in this country."[59] Building Aboriginal communities through economic self-reliance is one of RCAP's leading ideas: "The desire of aboriginal peoples to be self-governing political entities can be fully realized with a transformation in their capacity to provide for themselves.[60] How, exactly, does RCAP propose that Aboriginals provide for themselves? RCAP stresses the benefits of Aboriginal regional economic development, citing four conditions for success: one, restoring control over and access to resources; two, developing enterprises, which means businesses act as collective owners and managers of natural resources and serve in partnership deals with investors; three, mastering professional and technical skills and

brokering employment, which means providing skills to work within an Aboriginal economy that can resist full integration into the general economy; four, relating income supplements provided by the government to productive activity. According to RCAP, this requires welfare reform and an end to funding without restriction so that better decisions can be made.

Flanagan argues that the focus on resources in the land is misguided. Natural resource industries are notoriously cyclical and prone to wide fluctuations in the world market. And while some wealth producing resources have resulted in very large cash flows to Aboriginal communities, the disparity between rich and poor within those communities, as well as an extremely disparate distribution of wealth among Aboriginal communities, far exceeds that in the rest of Canada. The reason, according to Flanagan, is that there has been little attempt by Aboriginals to use that wealth to support long term prosperity.

According to Flanagan, Aboriginal communities need to be opened up to market pressures and the inculcation of responsibility that comes from competition.[61] The demand for compensatory funding on the basis of an unequal ability to compete in the marketplace, claims Flanagan, is unfounded. Simply put, no one is equal in the marketplace. This is a profoundly different view of the market than that put forward by Dworkin. The question is, however, to what extent the role of government should be reduced and Aboriginal communities subjected to market pressures, and Flanagan provides little guidance other than optimism about the benefits of market competition. To be sure, Flanagan is careful to point out that Aboriginals are not unfamiliar with market competition and indeed have a long history of adapting themselves to the outside world.

But the centrality Flanagan gives to market-induced accountability risks emphasizing self-sufficiency at the cost of a view to the mutual dependencies of cooperative market relations, the broader framework under which opportunities are generated. In other words, market competition by itself unnecessarily creates undue social costs.

The most interesting of Flanagan's arguments is that, despite a complex cultural difference that needs to be recognized, there is a tension between traditional systems of Aboriginal self-government, and the capacities required one, to run the institutions of a modern government and two, to compete effectively in the marketplace in a way that sustains adequate levels of economic development. In particular, "kinship, if not the only factor, is a key one,"[62] regulating political relations in Aboriginal communities. Kinship, or familial ties continue to regulate communities governed by a single entity - the band council - which is composed of unelected familial leaders and elite groups that have no accountability to members of the broader community. Given that Aboriginals, "openly acknowledge kinship as the main principle of politics."[63] Flanagan is very specific about the possibility that Aboriginals will be able to achieve the two aims successfully with the informal cultural norms they seek to protect. In fact, Flanagan argues, under no conception of a liberal democratic society is it legal or legitimate that a, "small group of elected politicians should have control simultaneously of people's land, housing, schools, jobs, and social assistance."[64]

In Flanagan's view, the convergence of traditional forms of governance with modern bureaucratic institutions has had a very specific effect, namely, "structural features that encourage rather than constrain venality."[65] Flanagan's point is not that Aboriginal cultures are especially prone to venality but, rather, the point well-developed

in political theory over the last several centuries that *any* persons manifest venality, "when they get a chance to pursue their private interests without constraint."[66] According to Flanagan, "aboriginal governments in Canada are beset with structural features that encourage rather than constrain venality, and… these structural features are so deeply engrained as to be inherent."[67] The point is clear enough: the success of Aboriginal institutions will depend on more than a common language. Given the contemporary conditions in which Aboriginal communities must operate, we have to take seriously the claim that, "in the long run, the economic base of Aboriginal communities will be a more important determinant of the viability and success of an aboriginal government than recognition as a sovereign nation."[68] According to Flanagan, then, if Aboriginals are to attain the economic conditions for self-government, Aboriginals will have to give up certain aspects of their ways of life, though "[t]hey may not have to give it up completely or all at once."[69]

Flanagan's rhetoric is inflammatory here, yet there is much evidence to support a greater concern for accountability and responsibility. As Franks points out, the bulk of employment in Aboriginal communities is government or government related. Whether in the form of public service, government contracts, welfare, or housing, "the [nonnative] government has become the dominant decision maker affecting the economic well-being of citizens."[70] Not only is the extent of government management of Aboriginal affairs remarkable, governments within Aboriginal communities are vastly overdeveloped in relation to the size of their populations and complexity of their economy. As a result, Aboriginal leaders have, "a much greater influence over its citizens than do the governments of comparably sized nonnative communities."[71] Adding to Flanagan's

frustration is the inability of recent analyses to acknowledge this problem. For example, Flanagan points out, at the time welfare levels of reserve populations hovers around fifty percent of the population, with regional variations,"[72] RCAP recommended an annual increase in unconditional spending between 1.5 and 2 billion more over five years.[73] Moreover, as Franks argues, despite recent cutbacks affecting nearly all social programs, funding for Aboriginals was one of the only spending areas that increased. Yet, "[t]here was little evidence that bands with greater economic resources were resolving their problems more successfully than those with lesser."[74]

The point is that even though there is no cultural form democratic public institutions must take in order to promote accountability and responsibility, "[t]he liberal-democratic political rights of representative and accountable government, of citizen participation, and of due process for guaranteeing these rights are a product of a literate, cash-based transactional society."[75] Most importantly, Flanagan attributes the staggering levels of welfare dependency among Aboriginal communities to their immunity from taxation, argued by many Aboriginals to be a perpetual condition of their relationship to the Canadian state."[76] According to Flanagan, the single most constructive reform that could be made within Aboriginal communities is self-taxation.[77] Not only can taxation be used to promote accountability, a sense of opportunity costs and trade offs, but also to promote the effects of representative institutions, that members have a stake in the actions of their government.

Flanagan's detailed account of Aboriginals in Canada challenges Kymlicka's claim that equality is a deeper dispute over nationhood. As Flanagan asks: what does it mean to recognize a people as a nation, or a plurality of peoples as nations, when those

nations, "are viable only through the massive and continuing financial support of the federal government?"[78] Flanagan's demand for governmental accountability and fiscal responsibility are precisely what any Canadian, and citizen of a liberal democratic society, would expect from the institutions and officials, respectively, at any level of government. Flanagan is right that Aboriginal communities will have to adopt certain institutional characteristics and norms of democratic institutions.

Flanagan advocates a slow process of integration into the mainstream economy, and I agree. But Flanagan sees this as a way of assimilating and integrating Aboriginals, not as a way of promoting self-government. The problem is that market integration is not likely to lead to any better results than greater levels of unconditional compensation. According to Flanagan's own criteria, if the market favours those with greater economic power prior to entering a competitive environment, Aboriginals are likely to fare worst. The significance of distinct institutions is precisely to develop the capacities within Aboriginal communities in a way that supports a transition into the market on terms acceptable to Aboriginals. This is not an argument for self-sufficiency. There is little need for Aboriginals to be able to participate in the market as self-reliant nations. On this point, the RCAP is correct: "A nation does not have to be wealthy to be self-determining. But it needs to be able to provide for most of its own needs, however these are defined, from its own sources of income and wealth."[79] Flanagan's direct call for the benefits of market competition avoids the difficult analysis of the obligations of a common citizenship that sustains fair terms of cooperation for all members over time.

However, even as fierce an advocate of Aboriginal self-determination as Tully claims that while Aboriginals have the right to develop as independent communities,

“very few are in a position to govern themselves immediately.”[80] How should we respond to this problem? In my view, it is clear that the Canadian government has not gone far enough, “in accepting the right of a self-government to make its own mistakes and then live with the consequences.”[81] This, I think, is the appropriate sense in which to approach the cultural capacities of Aboriginals that figure in self-government. Consistent with Kymlicka’s account of autonomy, Aboriginals must be provided with the conditions for trial and error.

9. Financial and Social Costs

I have rejected both Dworkin's insurance scheme and market competition as appropriate for resolving the claims of Canadian Aboriginals. Yet, Dworkin's notion of opportunity costs remains an attractive part of a conception of democratic equality. Given Kymlicka's fundamental challenge to the basic structure, the significance of culture as a primary good and of a societal culture to sustaining that good over time, we need a clearer determination of fair shares, or opportunity costs. However, as Flanagan demonstrates, two main obstacles provoke concern about Aboriginal claims to nationhood: one, Aboriginals are among the least-advantaged socioeconomic group and two, there is sufficient evidence that Aboriginals are failing to bear the opportunity costs of self-government or, as the RCAP puts it, to develop the capacities to provide for themselves.

In my view, a democratic response to the circumstances of Aboriginals is an incentive structure that ties recognition as nations to a reasonably adequate level of socioeconomic and institutional development. I suggest the following criterion: in the case of Canadian Aboriginals, status as a participating nation with autonomous institutions in a multinational Canadian state should be tied to 1. a level of socioeconomic well-being that is not lower than the least-advantaged social position of the Canadian majority and 2. An institutional capacity to govern that can sustain that economic level. One consequence of this criterion is to decrease the level of funding for an Aboriginal community in accordance with self-generated income. This should create an incentive to adhere to democratic institutional norms and promote long-term thinking by community

leaders as well as a greater concern with efficiency. Where a community can institutionally sustain a level of economic development not lower than the least-advantaged group of the majority of Canadians, self-taxation should be implemented. This criterion, I believe, addresses the concerns of both majority and minority while fairly taking into consideration the opportunity costs of Aboriginal self-government to each.

Aboriginal title, though far from settled, has been established increasingly in favour of Aboriginal communities. Yet, similar progress has not been made in the area of governance. Rather, the government has relied on vague pronouncements: "We expect that Aboriginal nations will exercise their powers incrementally as they develop expertise and gain experience. They will, however, have the right to exercise those powers and will control the pace of their own political development."[82] Though vague, this approach seems right. The problem is that the federal government appears unwilling to impose a reasonable incentive structure on the funding of Aboriginal communities.

In accordance with a democratic conception of equality, the concern here is not simply with the financial costs, but with the link between funding and recognition of status as nation. On this point, the RCAP recommends that

> The Parliament of Canada enact an Aboriginal Nations Recognition and Government Act to (a) establish the process whereby the government of Canada can recognize the accession of an Aboriginal group or groups to nation status and its assumption of authority as an Aboriginal government to exercise its inherent self-governing jurisdiction. (b) establish criteria for the recognition of Aboriginal nations.[83]

> Federal and provincial governments and national Aboriginal organizations negotiate (a) a Canada-wide framework to guide the fiscal relationship among the three orders of government; and (b) interim fiscal arrangements for those Aboriginal nations that achieve recognition and begin to govern in their core areas of jurisdiction on existing Aboriginal lands.[84]

Why are these stated as two distinct problems? How can the standard for recognition of a peoples as a nation, when that status depends on a sound institutional structure, not be linked to the funding procedures that create those institutions? As Maslove et. Al. point out, "the major source of funding for Aboriginal communities are cash transfers from the federal government. *There is no clear model that determines funding to all bands; ultimately, funding is adjusted at the funder's discretion* [emphasis added]."[85] This seriously undermines the ability of Aboriginals to secure the conditions of autonomy taking into consideration the costs to Canada and to members of their own communities. The RCAP makes every effort to seek out opportunities for Aboriginal self-government and economic self-reliance. But the report does not question at all that interim financing is at the discretion of newly created agencies and officials. Indeed, the RCAP recommends an Aboriginal Lands and Treaties Tribunal, responsible for ordering interim funding.[86] This is worrying because the RCAP seems to operate on the idea of *identifying* what needs to be done - and it is a very comprehensive report - rather than on how these aims are to be achieved. Not only does there not appear to be limitations on what could be done, distributive rules that apply to Aboriginals as citizens are not even proposed, but are without question left to the discretion of bureaucrats.

While it is clear even to defenders of Aboriginal self-government is that, "methods of financing that are radically different from the current ones need to be envisaged."[87] It is very controversial what redistributive and compensatory benefits follow and how those are to be delivered. Regarding funding standards, Maslove et. Al. raise two important questions: first, what should the reference point be for equalizing each community? Second, how can the process be structured to ensure that equalization does not act as a disincentive on a community to generate its own economic development?"[88]

Many authors advocate, "[a]n equalization formula like the one that exists among provinces."89 As Alan Cairns points out, "Canadian federalism has a well-developed theory and practice of revenue sharing. The s.36(2) equalization clause of the 1982 Constitution Act is singled out as a key vehicle for providing financial support for Aboriginal governments that, at least for the immediate future, will lack adequate sources of domestic financing."[90] Maslove et. al. also suggest taking the federal funding criteria used for provincial equalization into consideration: entitlements are inversely related to the wealth or resources generated by the Aboriginal community itself. I reject the idea that the funding scheme used for the provincial equalization scheme is adequate in the case of Aboriginal communities. There is too great an economic disparity between the various communities, and it is unlikely that a single funding standard or mechanism could be applied successfully to each of the nations since they are all at different levels of self-reliance and development. For these reasons, the equalization criteria would hardly be a fair standard and as such, in my view, would create more harm and inequalities between communities. We need an approach that, "takes into account the context of a

community's average income and wealth… relative to some non-Aboriginal standard that does not involve comparisons between Aboriginal and provincial governments."[91]

For those Aboriginal communities seeking self-government, a standard for settling the opportunity costs is required. This standard should explicitly serve as an incentive mechanism that takes into consideration the opportunity costs of both sides in a way that does not violate the aim of Aboriginal self-government. The criterion I propose is in two parts. The devolution of responsibilities and authority taken over by an Aboriginal institution from a federal or provincial order of government must be reasonably tied to a level of economic development that is better than the worst-off of the majority and a degree of institutional complexity that can sustain that economic level. In effect, recognition of nationhood, in the form of powers, authority and responsibility devolved onto Aboriginal institutions, is to be tied to a standard of living roughly better than that of the representative least-advantaged group of Canadian society.

One criticism of this criterion is that it transforms the concerns of the difference principle for the lifetime expectations of the least-advantaged to a simple measure of resources, such as that proposed by Dworkin. My criterion takes into consideration more than what Dworkin has in mind in his resource egalitarianism. The criterion addresses the demand by national minorities for a societal culture, the institutional authority for the entire range of administrative, bureaucratic and distributive arrangements within Aboriginal communities in accordance with the norms and laws of Canada. In short, culture is considered a primary good. This fact also distinguishes the criterion from the equalization formula, which deals only with the sharing of financial burdens. Moreover, the criterion need not be sensitive to the lifetime expectations of minority groups for two

reasons. For one, the criterion need only be sensitive to the transitional process of self-government over time. It is not a principle of justice or of permanent redress but serves, rather, a specific and limited purpose. Two, the criterion need not address an impracticable concern for the lifetime expectations of every Aboriginal community. The purpose is simply to enforce upon both majority and minority the significance of fair shares for those communities seeking self-government.

Another criticism might ask: How can Aboriginal communities become self-determining economically if they are not already so politically? Is it not the case that political autonomy precedes, or is a pre-condition for, economic development? Why give priority to economic development over institutional autonomy? In fact, neither view accurately characterizes the criterion. The reason for tying institutional autonomy to economic development is to address the opportunity costs of recognizing and sustaining cultural identity within an existing multinational state. It is unfair for a minority to impose the cost of sustaining its way of life on a majority without limit just as it is unfair to deny a legitimate minority community the conditions for self-government. These conditions most crucially include a funding source and a reasonably democratic institutional structure.

Criticisms are better aimed at Aboriginal leaders and the Canadian government. From the perspective of Aboriginals, it seems antithetical to their own purposes that Aboriginals communities declare an inherent right of self-government as nations before they have working institutions or an economic basis to support the immense responsibilities of nationhood within and among democratic societies. Likewise, the reluctance of the Supreme Court to address self-government and of the government to

provide an incentive structure to the funding of Aboriginal communities undermines public acknowledgement of the title of First Nations. The two-part incentive criterion I propose does not diminish the claim to self-government as a nation, or community of nations, within the Canadian state, but does make explicit the social and financial costs between the three relationships identified by Rawls as essential to a democratic conception of equality. In particular, this criterion accommodates more clearly the common purposes of Aboriginals and Canadians as citizens of a multinational state than the solutions recommended by RCAP. As the RCAP states:

> The constitutional right of self-government does not supersede the right of self-determination or take precedence over it. Rather, it is available to Aboriginal peoples who wish to take advantage of it, in addition to their right of self-determination, treaty rights and any other rights that they enjoy now or negotiate in the future. In other words, the constitutional right of self-government is one of a range of voluntary options available to Aboriginal peoples.[92]

Conclusion

This thesis has defended two main conclusions. First, I have rejected luck egalitarianism as an appropriate articulation of the aims of egalitarianism. Although Kymlicka, Dworkin and Cohen each see the views they defend as a refinement of and improvement on Rawls, Blake and Risse argue, in my view correctly, that a strict concern with the influence of arbitrary factors and individual choice is discontinuous with Rawls's democratic conception of equality. Contrary to Kymlicka, then, it is simply false to say that Rawls seems not to have realized the implications of his theory of equality. I have argued that focusing on the voluntary or involuntary actions of individuals is too specific an aim to serve as central to liberal democratic societies. Rawls's concern in *A Theory of Justice* is with distinguishing conceptions of equality for the basic structure of a liberal democratic society. Part of the aim of a democratic conception of equality is to mitigate the extent to which social positions and advantages as well as distributive shares are influenced by natural and social circumstances over time. In more specific terms, this means that principles of justice regulating the basic structure, ought to mitigate the extent to which specific individuals, whose undeserved circumstances might be used to justify greater distributive shares and political authority, may replicate over time their control over institutions.

In the first section, I analyzed Rawls's FEO and the difference principle, and rejected Arneson's view that gives sole weight to a concern for the worst off and Kymlicka's claim that Rawls gives centrality to the conceptual distinction between choice and circumstance. I argued that Rawls's FEO is meant to distinguish a democratic

conception of equality from a meritocracy and starting-gate conceptions of EO, a distinction which concerns types of societies that fall within the principles of justice and the range of acceptable inequalities. The difference principle is meant to provide for a tendency to equality that does not undermine a fair share of goods among disadvantaged social groups. Moreover, as Anderson makes clear, under Rawls's principles, citizens are entitled to at least one social position to which they can productively contribute.

Although Rawls is clear about how endowment differences within the normal range ought to be handled, it is difficult to discern in Rawls's theory features of the person relevant to a distributive theory of equality. Kymlicka picks up on this and uses this ambiguity to argue for two things: one, that the burden of endowment disadvantages unfairly influences the ability to lead a life according to choice and two, that the difference principle creates rather than removes injustice by subsidizing expensive tastes; the difference principle does not distinguish among individuals in the worst off position as a result of their choices. Both objections were argued by Kymlicka not only to be deficiencies of Rawls's theory, but deficient by Rawls's own standards.

After outlining the two mechanisms of Dworkin's resource egalitarianism from which Kymlicka derives his view, I responded to criticisms of the auction and the insurance scheme. I pointed to two ways in which Dworkin distinguishes his auction from a simple free market and from a starting-gate conception of EO, by applying a redistributive criterion over the lives of individuals - the envy test - and the notion of opportunity costs. Luck egalitarianism was found to be both impracticable and undesirable. It is not practicable to expect institutions to be able to track individual responsibility for their outcomes. Moreover, a strict concern with eliminating arbitrary

factors denies individuals the opportunities to develop their talents, skills and capacities required to protect the integrity of individual self-respect and identity within a system of social cooperation. Denying this feature of a democratic society is as unjust as ignoring endowment disadvantages. It is precisely because individual actions can undermine the reasons citizens have as a collective body to form responsibly their expectations and to sustain fair terms of social cooperation over time that an indirect theory of equality can be shown superior.

However, although Anderson's democratic equality makes clear the reasons we have for treating persons as equals, that is, as citizens of a cooperative scheme, Anderson's institutional view fails in two ways. One, that view cannot rule out the worst socioeconomic cases that Anderson's examples attribute to the reasoning of luck egalitarians generally. Two, the institutional regulation of a set of goods to which citizens are unconditionally entitled does not rule out an understanding of opportunity costs as reasons pertaining to equal treatment. Contrary to what Anderson thinks, the application of opportunity costs to social policy does address the reasons we have for treating persons as equals, namely, that citizens as part of a cooperative scheme ought to be willing to accept responsibility for discrepancies between their needs and preferences, that is, for a fair share of social primary goods.

The second main conclusion is that although Dworkin's auction and the insurance scheme are far too specific to serve as central for citizens of a liberal democracy, Dworkin's notion of opportunity costs improves upon the social division of responsibility in a democratic account of equality. In particular, I argued that Dworkin's major contribution to egalitarian theory was to make more explicit the costs and burdens of the

provision of goods and opportunities that Rawls and Anderson deem socially primary or unconditionally regulated by institutions. Opportunity costs addresses more explicitly the tension between scarcity and fair shares affecting even social primary goods, which have not only a financial but also a social cost to their provision. That is, Dworkin's notion of opportunity costs was found not to depend on individual judgments of responsibility, but has useful policy implications consistent with the democratic aims of equality identified.

To defend these two main conclusions, I attempted in the second section to apply Dworkin's notion of opportunity costs to a fundamental case of justice, Aboriginal self-government. The circumstances of Aboriginals were found not to be adequately addressed by luck egalitarianism, but fall clearly within the aims of democratic equality.

The first problem in illustrating the two conclusions was showing that the claims of national minorities for self-government are a fundamental case of justice. Will Kymlicka's analysis of culture as a primary good or, more specifically, as a pre-condition of autonomy, has significantly expanded the range of goods deemed a fundamental case of justice. Kymlicka has successfully shown claims of recognition, or identity claims by national minorities, to be an under-theorized part of liberal egalitarianism. However, Kymlicka's theory of minority rights is vague about the role of responsibility as a theory of fair shares that he so sharply defends in Dworkin's distributive theory as being an improvement on Rawls. Specifically, I challenged Kymlicka's claim that majority and minority nation-building are morally equivalent.

An analysis of the case of Canadian Aboriginals, and especially the string of Supreme Court challenges, demonstrates one, that culture is not static but an evolving process of adaptation and two, that the claims of Aboriginal communities are linked in

complex and important ways to property. This link suggests that where Aboriginal title has increasingly been settled in favor of Aboriginal communities, the transition to self-government requires some assessment of the opportunity costs, or fair shares among citizens of a multinational state. Kymlicka's theory of minority rights is silent on this. In order to develop a distributive criterion, I identified as the primary good of self-government the devolution of powers, authority and opportunities to minority institutions.

Flanagan's sharp criticism of the prospects of Aboriginal self-government, and acknowledgment of the financial costs of Aboriginal self-government to Canadians led Flanagan to embrace market forces as a remedy to the dire socioeconomic conditions of those communities. I argue, however, that subjection to market forces ignores obligations on the part of the majority Canadian government to support Aboriginal cultural autonomy and institutions. Flanagan's most profound point was his interrogation of the status of a national minority that has not developed the capacities to sustain independent institutions, and whose continuing identity as a nation depends almost solely on the financial support of the majority government. Although the social costs, the threat to the social, political and economic institutions of the Canadian state of Aboriginal self-government, were found to be negligible, Flanagan provides sufficient evidence to warrant a strong incentive criterion that links status as a nation to the social and financial conditions of Canadian citizenship. I then proposed and rejected as insufficient a simple funding formula familiar to Canadian federalism, namely, the provincial equalization funding formula. Ultimately, I defended a two part criterion of justice that fairly considers the obligation to support Aboriginal opportunities for self-government and, reciprocally, the social and financial costs to Canadians. So while the claims of Aboriginal communities

for self-government, a fundamental case of justice, undermine the aims of luck egalitarianism, this criterion, rather than providing an independent argument for democratic equality, illustrates how the democratic aspects of Dworkin's notion of responsibility might be applied to policy decisions in a way consistent with democratic equality.

Endnotes

Part One

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