

National Minorities and Ethnic Immigrants: Liberalism's Political Sociology*

SUJIT CHOUDHRY
Law, University of Toronto

I. INTRODUCTION

OVER the past decade, political philosophers have increasingly focused their gaze on the complex relationship between liberalism and the claims of ethnocultural groups for the recognition by public institutions of their distinctive ways of life. Conventionally, the liberal tradition has been viewed as being indifferent or even hostile to these claims, in large part because of its commitment to neutrality. In this context, neutrality is understood as the agnosticism of public institutions in liberal democracies toward differing conceptions of the good. The stance of liberal states toward religion—one of both non-endorsement and non-interference—is often offered as a paradigmatic example. Inasmuch as ethnocultural groups aim to enlist public institutions to preserve ways of life based on a shared set of *ends*, the tension between these sorts of claims and the central liberal tenet of neutrality is fairly clear. The proposal is to extend the liberal treatment of religion to culture more generally. In Michael Walzer's memorable phrase, "the state is nationally, ethnically, racially, and religiously neutral."¹

Scholars sympathetic to the claims of ethnocultural groups have grappled with the obstacle posed by liberal neutrality in two different ways. Some have argued that as a matter of principle, liberal neutrality is an illegitimate standard for political decision-making. They claim, for example, that neutrality is an impossible ideal, since policies enacted for reasons that do not purposely seek to advantage or disadvantage any conception of the good will inevitably be non-neutral in their effects. Legislating with an awareness of the possibility of non-neutral effects is therefore tantamount to legislating for non-neutral purposes, albeit not explicitly. Neutrality becomes little more than a cruel façade which

*An earlier version of this paper was presented at the Harvard Center for Ethics and the Professions. For helpful comments and discussions, I thank Arthur Applbaum, Joe Carens, Mary Coleman, Kevin Davis, David Dyzenhaus, Bob Goodin, Pamela Hieronymi, Robert Howse, Richard Katskee, Nancy Kokaz, Patrick Macklem, Nicholas Pappaspyrou, Ira Parghi, David Schneiderman, Arthur Ripstein, Ayelet Shachar, and three anonymous referees for the *Journal of Political Philosophy*. I also thank Claire Hunter for editorial assistance and the Harvard Center for Ethics and the Professions for financial support. The usual disclaimer applies.

¹Michael Walzer, *What it Means to be an American* (New York: Marsillo, 1996), p. 9.

conceals that it itself is “highly discriminatory.”² The rejection of liberal neutrality has led some to reject liberalism itself. For others, it has led to the adoption of a perfectionist liberalism rooted in the value of autonomy.³

Other political philosophers have employed a different strategy. Instead of arguing against neutrality as a matter of principle, they have turned to the political practice of states that are widely accepted as liberal to determine whether those liberal regimes *are in fact* neutral with respect to culture. These critics argue that liberal democracies generally enshrine cultural rights, and moreover, that they do so in two dramatically different ways. Liberal states draw a fundamental distinction between two types of ethnocultural groups, ethnic immigrants and national minorities. The former become citizens of liberal states through individual and voluntary immigration, are geographically dispersed, and lack the capacity to create the institutions of social, political and economic life. Members of the latter are collectively incorporated, either involuntarily through conquest, or voluntarily through treaties of cession or federation, are territorially concentrated, and are more or less institutionally complete. These sociological factors combine to create demands for different kinds of cultural rights within each group—for ethnic immigrants, rights that facilitate their inclusion in the institutions of the broader society, and for national minorities, rights that enable them to maintain a degree of institutional separateness. The policies of liberal democracies, as a matter of fact, generally track these demands. The premise of this enterprise is that a gap between the demands of liberal justice and the practice of liberal democracies invites the questioning and recasting of the basic principles of liberalism itself, including neutrality.⁴

In this article, I examine the theory of cultural rights that Will Kymlicka develops in *Multicultural Citizenship*, because he seeks to straddle the divide between these two strategies. On the one hand, Kymlicka offers an account grounded in consent for the differential treatment accorded by liberal democracies to ethnic immigrants and national minorities. On the other hand, Kymlicka at times slips into what I term the argument from political sociology. When Kymlicka argues in this mode, he claims that the practice of liberal democracies with respect to ethnocultural groups tracks both the aspirations and

²Charles Taylor, “The politics of recognition,” *Multiculturalism and the Politics of Recognition*, ed. A. Guttman (Princeton, N.J.: Princeton University Press, 1992), pp. 25–73 at p. 43. Taylor himself does not seem to hold this position.

³Charles Taylor’s work exemplifies the former result, whereas Joseph Raz’s is an example of the latter. Compare Charles Taylor, “Atomism,” *Philosophy and the Human Sciences: Philosophical Papers II* (Cambridge University Press, 1985), pp. 187–210, and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986).

⁴The leading figure here is Will Kymlicka, although important contributions have been made by Charles Taylor. See Charles Taylor, “Shared and divergent values,” in *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal & Kingston: McGill-Queen’s University Press, 1993) pp. 155–86; Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995).

institutional capacities of those groups. The novel move in Kymlicka's account is to argue that these facts of political sociology do important normative work.

There are two larger concerns driving my analysis. The first is that accounts like Kymlicka's finesse or ignore the tensions between the two different sets of policies adopted by liberal democracies toward ethnocultural accommodation. Policies which selectively promote the survival and flourishing of the cultures of national minorities, but not those of ethnic immigrants, often appear to be discriminatory. Indeed, given that the presence of national minorities usually predates that of ethnic immigrants, these preferences can easily be construed as establishing different categories of citizenship on the basis of historical priority. But in liberal democracies, differentiating among citizens simply on the basis of prior membership, without additional justification (for example, prior sovereignty), appears to contradict the basic liberal commitment of giving equal importance to the interests of every citizen. Moreover, there may be cases where the demands of national minorities come into conflict with those of ethnic immigrants.⁵ In the face of these tensions—which will only grow as states hitherto viewed as multinational become ethnically diverse through immigration—a hierarchical distinction between different types of ethnocultural groups will become at best a source of considerable embarrassment, or at worst, a cause of moral outrage and social instability. If liberal accounts like Kymlicka's cannot adequately justify these practices, they may need to be reconsidered.⁶

The second is that Kymlicka's account of the correct stance of liberal democracies toward ethnocultural difference furnishes an opportunity to reflect

⁵As a country with a large national minority, and the highest rate of immigration in the world, Canada furnishes a number of vivid examples of these conflicts. Efforts to define Canada as a bilingual and bicultural country in the 1960s, for example, provoked a strong backlash from ethnic immigrants whose ancestry was neither English nor French. The response of the Canadian government was to distinguish language from culture, describing Canada as both *bilingual* and *multicultural*. The distinction between language and culture, though, is highly questionable, and has proved hard to sustain. Another example of the conflict between the claims of national minorities and ethnic immigrants can be found in Quebec. It is the policy of the provincial government to limit access to publicly-funded primary and secondary education in English to persons whose parents were educated in English in Canada. The distinction between old and new Canadians strikes many ethnic immigrants as highly discriminatory. For an interesting discussion of some of these issues, see Joseph Carens, "Immigration, political community, and the transformation of identity: Quebec's immigration politics in critical perspective," in *Quebec Nationalism Just? Perspectives from Anglophone Canada*, ed. J. Carnes (Montreal & Kingston: McGill-Queen's University Press, 1995); Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Toronto: Oxford University Press, 1997), ch. 5.

⁶I assume, for the purposes of the paper, the validity of the cross-cutting distinction that Kymlicka draws between two different kinds of claims that ethnocultural groups can make—claims to protection against economic and political decisions of the larger society (external protections), and claims by groups to restrict the rights of their own members (internal restrictions). Kymlicka argues that a liberal theory of cultural rights demands the former and rejects the latter. Although I largely agree, my sense is that the distinction is much more complex than he suggests. Be that as it may, the distinction is not relevant to my discussion because it applies equally to the claims of ethnic immigrants and national minorities. As a consequence, it does not figure into the hierarchical distinction that Kymlicka draws between the two types of groups.

on the place of political sociology in political philosophy. One of the notable features of the argument in *Multicultural Citizenship* is the normative work done by the political practices of liberal democracies toward ethnocultural minorities. In this respect, Kymlicka's work is part of a methodological trend in contemporary political thought. For example, Joseph Carens' recent work on culture and citizenship, Stephen Macedo's discussions of civic education in culturally diverse societies, and David Miller's new book on distributive justice all weave detailed examinations of current social practices into their normative accounts.⁷ To a considerable extent, the contextual turn in contemporary political philosophy is a reaction to the perceived abstractness of the hypothetical choice positions employed by John Rawls, Ronald Dworkin and others. My worry, though, is that in the shift to context, inadequate attention has been paid to questions of methodology—that is, what are the right and the wrong ways for political sociology to figure into normative argument? Kymlicka's theory of minority rights serves as a useful vehicle for exploring these issues.

II. THE SOCIOLOGICAL ACCOUNT

Kymlicka's argument in *Multicultural Citizenship* begins with a sociological account of ethnocultural difference in liberal states. Although many states are multicultural, for Kymlicka, that general term encompasses two patterns of cultural diversity, tied to two different sorts of ethnocultural groups. The first type of group are national minorities, previously self-governing peoples who have somehow been incorporated into states in which they do not constitute the majority group. Incorporation may have occurred involuntarily, for example, through conquest, or voluntarily, through treaties of cession or federation. Kymlicka gives a number of examples of national minorities—the Québécois, the Scots and the Catalans. The second type of group are ethnic immigrants, who typically come to live in liberal democracies through individual or familial immigration. Kymlicka focuses on instances of voluntary immigration. As a consequence, he puts persons who have immigrated involuntarily—either because they were expelled (refugees) or abducted (former slaves) from their homelands—to one side. Kymlicka notes that, until relatively recently, immigration was largely a New World phenomenon. He accordingly has in mind many of the ethnic groups that figure prominently in North American social life—Jews, Chinese, Indians, and so on.

National minorities and ethnic immigrants differ along a number of dimensions. The first, as I have mentioned, is their *manner of incorporation*—collectively and involuntarily or voluntarily; as opposed to, individually and

⁷Joseph Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford: Oxford University Press, 2000); Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, Mass.: Harvard University Press, 1999); David Miller, *Principles of Social Justice* (Cambridge, Mass.: Harvard University Press, 1999).

voluntarily. Kymlicka also considers the two types of groups to differ in their relationship to what he calls a *societal culture*, a central sociological category in his theory. Kymlicka defines a societal culture as:

a culture which provides its members with meaningful ways of life across a full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both the public and private spheres. These cultures tend to be territorially concentrated and based on a shared language . . . and they involve not just shared memories or values, but also common institutions and practices.⁸

Societal cultures, then, possess a number of features. The first is their *scope*. Societal cultures—which Kymlicka calls a “shared vocabulary of tradition and convention”⁹—cover most areas of human activity, encompassing both the public and the private spheres. This serves to distinguish societal cultures from various subcultures of the innumerable social groups that exist in liberal societies. A culture that is confined to just one or some types of activity—for example, religious, social and/or educational life—is in this respect incomplete, because it does not offer options extending across all aspects of a person’s life.

Another feature of societal cultures is their *territorial concentration*. At the very least, this means that societal cultures exist in a defined geographic space; human activity within that space is governed by the body of tradition and convention that constitutes that culture. Moreover, Kymlicka would probably claim that societal cultures are tied to place in a stronger sense—the shared vocabulary of tradition and convention is framed around social narratives that are geographically specific, for example, through references to concrete historical events. A third feature of societal cultures is a *common language*. Language would appear to be the medium through which traditions and conventions are created and transmitted. Since cultures are goods that are created and experienced by more than one person, a common basis for communication would appear to be essential. Finally, societal cultures consist of *practices* that are *institutionally embodied*. Traditions and conventions claim to be normative standards for conduct, and thus demand that people lead their lives in accordance with them. Moreover, those practices occur in institutions that reflect those practices, and whose existence enables those practices to occur.

Kymlicka’s principal point is that national minorities possess and are capable of possessing societal cultures, whereas ethnic immigrants do not and cannot. National minorities, for example, possess cultures which speak to most areas of public and private life. They typically occupied a specific territory or homeland at the time of incorporation, and despite the existence of rights of internal mobility within nation-states, continue to predominate in certain regions. National minority groups also share a common language which is usually distinct from

⁸Kymlicka, *Multicultural Citizenship*, p. 76.

⁹*Ibid.*

that spoken in the rest of the country. As well, they are institutionally complete, in that it is possible for them to engage in culturally meaningful practices in their own institutions across a broad swath of social, economic and political life. Ethnic immigrants, by contrast, presumably possessed their own societal cultures in their countries of origin. However, the brute fact of immigration has severed their links with those sources of tradition and convention. Crucially, it is sociologically impossible or infeasible for them to recreate societal cultures based on their traditions and languages in their new home. As Kymlicka states, ethnic immigrants:

bring their language and historical narratives with them. But they have left behind the set of institutionalized practices, conducted in their mother tongue, which actually provided culturally significant ways of life to people in their original homeland. They bring with them ‘a shared vocabulary of tradition and convention’, but they have uprooted themselves from the social practices which this vocabulary originally referred to and made sense of.¹⁰

The inability of ethnic immigrants to sustain a complete set of separate institutions is of crucial importance. But ethnic immigrants are also incapable of maintaining distinct societal cultures because they lack a distinct homeland within their new state.

Why does this distinction matter? Kymlicka’s theory of cultural rights is a liberal theory, and liberalism, on his account, is defined by its commitment to individual autonomy. In particular, individuals possess two fundamental interests—the freedom to lead their lives from the inside according to values that they endorse, without fear of punishment or discrimination, and the freedom to question those beliefs and examine them in light of whatever information, arguments and examples that our culture provides. These two interests justify the traditional liberal freedoms—the first, rights to privacy and security of the person, and the second, rights to expression and freedom of association. But Kymlicka’s distinctive contribution is the proposition that societal cultures are another crucial precondition of individual autonomy. Societal cultures are important because they present the options from which we choose or construct our conceptions of the good. Moreover, societal cultures attach value to different options, so that, “in the first instance,”¹¹ our beliefs about the value of ways of life are culturally conditioned.

The importance of societal cultures to individual freedom is a normative account, suggesting that membership in societal cultures is a fundamental interest—a primary good in the Rawlsian sense. However, although Kymlicka is not clear on this point, he seems to suggest that people in fact realize the importance of societal cultures, and that access to those cultures will therefore be the subject of political demands. But the dramatically different capacities of

¹⁰Ibid. at p. 77.

¹¹Ibid. at p. 83.

national minorities and ethnic immigrants to develop and sustain their own societal cultures lead them to assert their need for societal cultures in two very different ways. Unable to recreate their own societal cultures, ethnic immigrants demand access to the societal culture of the dominant society, through their inclusion in common institutions. However, institutional integration is not synonymous with assimilation. Ethnic immigrants demand the right to express their cultural particularity in family life and in voluntary associations. Moreover, they demand that public institutions not privilege the ways of life of some ethnic groups over others, and this may at times involve group-specific accommodations. National minorities, by contrast, are capable of maintaining distinct societal cultures and demand the means to do so. In practical terms, they desire a degree of institutional separateness. Indeed, these institutions are comprehensive in scope, so that national minorities are in effect “asking to set up a parallel society.”¹²

Political practice in multicultural states generally tracks these demands. Ethnic immigrants hold “polyethnic rights” which facilitate their membership in common institutions. Although traditionally confined to guarantees of non-discrimination, polyethnic rights now extend to anti-racism policies, the reform of educational curricula to reflect the histories and contributions of all immigrant groups, public funding for cultural practices, and even exemptions from laws that disadvantage ethnic immigrants because of culturally specific practices. National minorities, by contrast, hold “self-government rights” which enable them to erect separate institutions. Self-government rights might take the form of federal arrangements that provide that members of a national minority constitute the majority in a federal sub-unit, or the establishment of reserved lands in the case of small indigenous populations. Moreover, these self-governing political entities possess jurisdiction over subject matters relevant to cultural survival.

III. KYMLICKA'S NORMATIVE ARGUMENTS

Kymlicka provides a rich sociological account of the politics of ethnocultural difference in liberal states, which in no small part accounts for *Multicultural Citizenship's* influence among social scientists and legal scholars interested in questions of cultural difference. However, Kymlicka's goal is to go beyond mere description, and to provide a normative argument that seeks to justify this pattern of political practice. Upon closer examination, though, Kymlicka offers not one argument, but two. The first is an argument for the distinction between ethnic immigrants and national minorities that turns on the manner in which different ethnocultural groups were incorporated into the political communities of which they are a part. Call this the argument from consent. According to Kymlicka, ethnic immigrants have waived the right to live in accordance with

¹²Ibid. at p. 15.

their own cultures through the decision to immigrate to a society in which they knew they would constitute a minority, whereas national minorities, again because of the manner of their incorporation, have not waived that right.

The second argument is what I will call the argument from political sociology. Faced with difficulties with the argument from consent, Kymlicka at times emphasizes the fact that the practice of liberal democracies with respect to ethnocultural groups tracks both the aspirations and institutional capacities of those groups. When arguing in this mode, he takes the claims of ethnocultural groups to be exhaustive of the normative arguments worth considering for cultural rights, and as a consequence does not give much weight to claims that are absent from political discourse. As well, he regards the viability of societal cultures as a crucial variable in an account of just institutions, in that justice does not demand that we create institutions that cannot survive. The accuracy of this account matters, because of the structure of this normative argument. More fundamentally, the normative work done by political sociology in this strand of Kymlicka's argument is highly questionable.

A. The Argument from Consent

Kymlicka begins the argument from consent by examining the importance of cultural membership to the liberal self, through explaining the value of cultural membership to individual autonomy.¹³ As I mentioned earlier, Kymlicka's principal point is fairly uncontroversial—that cultures can support individual autonomy because they present options from which we construct our conceptions of the good, and render those options meaningful by assigning them some value.¹⁴ The controversial move in Kymlicka's argument is to claim that persons have a fundamental interest not only in cultural membership *per se*, but in membership in their *own* cultures. That is, membership in *a* culture is not sufficient to secure individual autonomy. The obvious objection to the importance given by Kymlicka to membership in one's own culture is that it does not yield the distinction that he draws between different categories of

¹³This is an argument that he first presented in *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989).

¹⁴However, as Andrew Kernohan has argued in *Liberalism, Equality and Cultural Oppression* (Cambridge: Cambridge University Press, 1998), a culture that devalues or debases certain identities can undermine individual autonomy.

Kymlicka is unclear at times on whether it is open to persons to reject those options, or even to reject the value that has been assigned to them by their culture. Thus, at one point, he states that "freedom involves making choices amongst various options, and our societal culture . . . provides these options" (83). However, an account of our fundamental interests that precluded the re-evaluation, or even the rejection, of culturally endorsed ways of life would not be recognizably liberal. As John Tomasi has noted (in "Kymlicka, liberalism, and respect for cultural minorities," *Ethics*, 105 (1996), 580–603 at p. 591), liberalism has historically been identified with a rejection of the *ancien regime*, and the endorsement of the possibility of personal experimentation free from the strictures of social convention. Kymlicka's point must be that cultural narratives are the inescapable *starting points* for our deliberations about conceptions of the good, although they do not definitively define the set of alternatives from which we must choose.

ethnocultural groups. Assuming such a fundamental interest to exist, by its own terms it should apply equally to all persons, regardless of the particular type of ethnocultural group to which they belong. But Kymlicka argues that only national minorities, and not ethnic immigrants, are entitled to access to their own cultures. Even worse, Kymlicka's distinction appears to embody two mutually inconsistent views on the value of cultural membership. The treatment Kymlicka accords to national minorities certainly reflects the importance that he ascribes to membership in one's own culture. But the policy he endorses for ethnic immigrants—access to the dominant culture of the society to which they emigrate, albeit on fair terms—suggests that what matters is not membership in any particular culture, including one's own culture, but membership in *a* culture. Note that one need not be a cosmopolitan, and adopt Jeremy Waldron's skepticism of the existence of distinct cultures, or of the importance of membership in one culture, to hold the latter view.¹⁵ Rather, even if we believe cultures to be distinct, and cultural membership to be a singular phenomenon, the special importance of membership in one's own culture has not been established. Indeed, the fact that ethnic immigrants often thrive in their new environments (witness America prior to the 1950s), albeit after initial difficulties of transition, is reason to doubt that an ongoing membership in one's original culture is a fundamental interest.

This contradiction over the value of one's own culture infects Kymlicka's scheme of cultural rights. If one's own culture is unimportant, it is not clear how Kymlicka can justify polyethnic rights for ethnic immigrants.¹⁶ Recall that these rights include, *inter alia*, group-specific accommodations that facilitate culturally-specific practices. Exemptions from Sunday-closing laws and the alteration of dress codes are two oft-cited examples. But if justice only demands that persons be offered membership in the dominant culture, it is not clear why these accommodations are required at all. Kymlicka might defend these accommodations on the ground that they contribute to the internal heterogeneity of the dominant culture. But this argument fails to make sense of polyethnic rights, because those rights only apply to culturally mandated practices that are group-specific, not to any and all ways of life. Thus, the promotion of preference diversity is not a sufficient rationale for polyethnic rights. Kymlicka's support of polyethnic rights, then, can only be explained if one's own culture does matter, even to ethnic immigrants. But if it does, it is unclear how he can stop at polyethnic rights, and not proceed to self-government.

In order to make his distinction workable, Kymlicka has two options. He could conceivably argue that the interest of ethnic immigrants in cultural membership is somehow different from that of national minorities. But this is

¹⁵See generally Jeremy Waldron, "Minority cultures and the cosmopolitan alternative," *University of Michigan Journal of Law Reform*, 25 (1992), 751–93.

¹⁶Joseph Carens has made a similar point. Joseph Carens, "Liberalism and culture," *Constellations*, 4 (1997), 35–47 at p.44.

tantamount to saying that one's own culture matters less for ethnic immigrants than for national minorities. Kymlicka rightly does not take this position, because it is conceptually impossible. Fundamental interests—theories of the good—are by hypothesis interests which everybody has. To begin to draw distinctions between persons with respect to fundamental interests violates a cardinal premise of modern political philosophy—namely, as Kymlicka has written elsewhere, “that the interests of each member of the community matter, and matter equally.”¹⁷ Kymlicka therefore argues not that ethnic immigrants possess a lesser interest in cultural membership, but rather that they have waived the right to live in accordance with their own cultures through the decision to immigrate to a society in which they knew they would constitute a minority. As he says in a crucial passage:

nor is it unjust that the American government (and other Western democracies) have decided not to give immigrants the legal status and resources needed to become national minorities. After all, most immigrants (as distinct from refugees) have chosen to leave their own culture. They have uprooted themselves, and they know when they have come that their success, and that of their children, depends on integrating into the institutions of English-speaking society.¹⁸

In short, immigrants have consented to a less extensive scheme of cultural rights.

Although superficially attractive—and reflective of political discourse of liberal democracies—this argument does not withstand scrutiny. Consider first the normative significance of the decision to immigrate. Kymlicka argues that immigration amounts to a form of consent—a choice for which ethnic immigrants can be held responsible. But in the liberal tradition, persons are only held responsible for states of affairs that arise from choices that are made freely. What is the liberal conception of freedom? At the very least, freedom entails freedom from physical coercion. For this reason, Kymlicka puts former slaves and refugees to one side because their immigration was involuntary, either because they were physically abducted or fled in the face of physical harm. These are genuinely hard cases for any liberal theory of minority rights. However, for liberal egalitarians, like Rawls and Dworkin, choices made against the background of material inequality also lack moral force because they are not freely taken. This creates two problems for Kymlicka. First, Kymlicka has elsewhere confirmed his commitment to the egalitarian version of liberalism. We can assume that he wishes his theory of minority rights to cohere with his views on distributive justice. Second, most immigrants, or at least a very significant proportion, migrate in search of economic opportunity. Although immigration is often prompted by other reasons—family reunification, personal relationships—economic motivations predominate. The key point here is that economic opportunities are unevenly distributed on a global scale, owing to factors that

¹⁷Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 1990) at p. 4.

¹⁸Kymlicka, *Multicultural Citizenship*, pp. 95–6.

egalitarians would regard as morally arbitrary.¹⁹ This means that in the majority of cases the decision to immigrate is not free, such that voluntary immigration cannot validate distinctions drawn between different categories of ethnocultural groups.

Kymlicka is obviously bothered by this problem. As he acknowledges, “the line between involuntary refugees and voluntary immigrants is difficult to draw, especially in a world with massive injustice in the international distribution of resources.”²⁰ His response, though, is not to re-examine his scheme of minority rights, but to argue that the correct solution is to remedy the unjust international distribution of resources. But it is inconsistent for Kymlicka to not address this problem, because he refuses to apply the consent argument with equal vigour to national minorities who joined the larger political community against a background of material inequality.

For the consent argument to do the work Kymlicka demands of it, it should explain not only why ethnic immigrants do not have rights to self-government, but also why national minorities do have those rights. National minorities who have been incorporated involuntarily clearly can invoke this right because they have not consented to join the larger political community. But what about national minorities who have joined voluntarily? As Kymlicka suggests, the terms of federation or cession, either contained in constitutions or treaties, are of central importance in these sorts of cases. However, Kymlicka is quick to note the difficulties with this argument.²¹ The decisive problem is that these treaties or the terms of federation vary enormously in their specificity and content, ranging from extensive rights of self-government to almost none at all. As a consequence, for Kymlicka, they produce arbitrary distinctions among national minorities, a result that he does not accept. But how can Kymlicka make this argument? His only option is to acknowledge the source of these differences: the varying degree of relative inequality of bargaining power between minority and majority groups. Inequality in bargaining power, in turn, is a function in part of material inequality (historically, this was particularly true for indigenous peoples in North America). But if Kymlicka is willing to accept that choices made against a background of material inequality do not carry moral force here, then how can he insist that they should count in the case of ethnic immigrants?

The argument from consent is also problematic because it does not produce a justification for polyethnic rights. As Kymlicka frames it, an argument from consent does not in itself specify the terms that are consented to. The relevant terms are those that the parties agree to, either through a process of negotiation, or more likely, a process of unilateral offer and acceptance. Those

¹⁹See the essays in *Global Justice*, ed. I. Shapiro and L. Brilmayer (New York: New York University Press, 1999).

²⁰Kymlicka, *Multicultural Citizenship*, p. 99.

²¹In this respect, he follows the work of Patrick Macklem in “Distributing sovereignty: Indian nations and equality of peoples,” *Stanford Law Review*, 45 (1993), 1311–67.

understandings may be explicit or implicit. Only if polyethnic rights are part of those understandings can ethnic immigrants then assert them. Kymlicka, though, does not justify polyethnic rights on this basis, with good reason. Historically, immigration policies have been assimilationist, demanding that immigrants accept not only principles of political justice, but also the lifestyle preferences of the majority society. By definition, this approach rules out polyethnic rights. What other arguments are available to him? Kymlicka argues that those rights further the project of integrating ethnic immigrants into the dominant society. Alternatively, he also grounds those rights in some notion of fairness. But note that these justifications have little to do with consent. Rather, they appeal to some other value.

If the consent argument fails, then what are we left with? We are pushed back to the claim that the interests of ethnic immigrants and national minorities in their own cultures are somehow different. But Kymlicka cannot make that argument because it offends the basic notion of moral equality that lies at the foundation of any theory of justice. In the end, then, Kymlicka has not offered a good justification for the hierarchical distinction between ethnic immigrants and national minorities drawn by most liberal democracies. Although I cannot develop the point here, Kymlicka's difficulty in justifying that distinction suggests that culture cannot do all of the work he wants it to do in a liberal theory of justice.

B. The Argument from Political Sociology

The argument from consent does not justify the distinction between the treatment accorded to ethnic immigrants and national minorities. Faced with this difficulty, Kymlicka at times retreats into what I call the argument from political sociology. Perhaps the most interesting methodological feature of *Multicultural Citizenship* is the normative work done by political sociology. In this section, I argue that Kymlicka's use of political sociology in normative argument is conceptually flawed. But what does political sociology mean? I take that term to encompass at least three different types of empirical or descriptive claims. First, there are the *aspirations* or *expectations* of members of ethnocultural groups. The demand of national minorities for institutional separateness is an illustrative example. Second, there are questions of *viability* or *possibility*. For my purposes, the relevant issue is the capacity of ethnocultural groups to embody their cultural practices institutionally. Finally, there are *current political practices*. Into this category I place the institutional arrangements that currently exist in liberal democracies to accommodate ethnocultural difference.

There are four different ways in which these varieties of political sociological facts can figure into normative political theory, three of which are correct, but one of which represents a serious mistake.

First, the expectations or aspirations of ethnocultural groups can figure into an analysis of political discourse. The idea is to articulate the claims of justice implicit in the political claims of social groups. The value of this exercise is empirical, because it reveals what kinds of normative arguments members of these groups make. In this respect, Kymlicka is not alone. Applied to problems of cultural difference, this approach was pioneered by Iris Marion Young, and has been used with great effectiveness most recently by Melissa Williams.²² But there are two cautions to keep in mind when analyzing political discourse in search of normative arguments. The first is that these arguments merely represent claims of justice. Even after these claims have been carefully described, from a normative perspective, the important question remains unanswered—that is, whether those claims of justice should count. Used in this way, political sociology sets the stage for normative analysis, but is not a substitute for it (as both Young and Williams acknowledge). The second caution is that political discourse must not be taken as an exclusive source of normative arguments, because this would unduly narrow the scope of normative inquiry. There may be good arguments that have not been advanced in political discourse. As well, the claims of social groups are often shaped by the very institutions and practices that those claims are used to scrutinize. The preferences of members of social groups often adapt to existing social arrangements, so that their expectations and aspirations approximate or rationalize the *status quo*. If this is true, then it is question-begging to use those preferences as a benchmark against which to measure the justice of institutions, because they are the products of those very institutions themselves. Indeed, it may be perverse, if those institutions are designed to generate certain sorts of political preferences. Stephen Macedo argues, for example, that one of the central aims of a liberal constitutional order is to transform religious views that are incompatible with the principles of liberal democracy.²³

Second, political sociology, in the form of current political practices, can play an important role in the process of reflective equilibrium.²⁴ Current political practices may represent our considered judgments or the fixed points in our search for abstract principles of justice. The goal of reflective equilibrium is to ensure that those principles accord with and explain our considered judgments. We arrive at this equilibrium through the following kind of process. We begin by proposing a set of abstract principles of justice, which we adopt provisionally, and compare them against our considered judgments. If there is a disjunction between political practices that seem right and those principles that we have provisionally adopted, then we have a choice. Either we reconsider and reframe

²²Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); Melissa S. Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton, N.J.: Princeton University Press, 1998).

²³Stephen Macedo, "Transformative constitutionalism and the case of religion: defending the moderate hegemony of liberalism," *Political Theory*, 26 (1998), 56–80.

²⁴John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), pp. 19–20 and 47–50.

the principles of justice, and again measure them against those fixed points, or we revise our considered judgments to accord with fundamental principle. The important point to note is that the process of revision extends both ways, so that we must be willing to revise political practices that we initially take as givens.

Third, empirical claims about viability or possibility can serve as the empirical premises of normative arguments that have the following structure. Imagine some social goal or principle, whose importance has been established independently through moral reasoning. Our objective is to secure that goal here and now, through whatever concrete measures are appropriate. An argument for those measures is a normative argument of what is to be done. But that argument will also have an important empirical component, relevant to the question of means. For example, we must consider what is practical and feasible given our understanding of human behavior, such as how people respond to certain incentives. As well, questions of political culture and comparative institutional advantage are important. These sorts of arguments, combining normative goals with empirical insights with respect to means, figure prominently in the design of just institutions. The discussions in the *Federalist Papers* of the obstacles that factions pose to the effective functioning of democracies is a famous example. Into this category also fall arguments relating to the implementation of moral norms through positive law. The caution here is that we must be skeptical of empirical premises that appear to be fixed givens. This is especially so when claims of viability or possibility are in fact a function of the very institutions that we want to reform. This is another manifestation of the problem of recursiveness that presented itself with respect to aspirations or expectations. Here, existing institutions unduly limit our sense of the possible.

Finally, political sociology could figure into normative political theory in a crude and direct manner. The argument would be that facts of political sociology of all sorts carry normative force simply because they exist. Call this the claim of *per se* normativity. It typically applies to current political institutions and expectations or aspirations. Whatever the particular fact, this claim comes in a weak and a strong version. The weak claim is that the mere existence of a fact counts, but that it is not the only consideration that matters. Other factors may outweigh it. The strong claim is that a sociological fact is so weighty that it is right merely because it exists. The effect of the strong claim on normative reasoning can be understood as the replacement of fixed points with immovable ones in the process of reflective equilibrium. If this is the case, then the claim of *per se* normativity transforms the process of reflective equilibrium, such that the principles of justice merely rationalize existing facts, instead of striving to justify them. The fundamental problem of the claim of *per se* normativity, in either its weak or its strong form, is that it does not provide an argument for why sociological facts should themselves carry normative force. It derives an ought from an is. As Jeremy Waldron has reminded us, the liberal tradition has been characterized from the outset by a refusal to accept tradition and established

social practice as the basis of political order; rather, liberalism is synonymous with a demand for justification of the social world.²⁵ For this reason, claims of per se normativity typically rely on some other value, which then replaces those facts as the primary source of the normative claim.

Kymlicka fares quite poorly with respect to the manner in which he incorporates political sociology into his normative argument. Consider first his treatment of the expectations or aspirations of members of ethnocultural groups. One of the striking features of Kymlicka's analysis is his focus on what ethnic immigrants and national minorities demand of liberal states. His principal error is to regard these demands as largely exhaustive of the arguments worth considering. Thus, when presented with arguments that vary from the ones he claims are made in actual political discourse, he downplays them. This arises particularly with respect to the question of institutional separateness for ethnic immigrants. He does not take this claim seriously because, in his view, it is unrepresentative of political discourse. The following passage is characteristic:

there is little evidence that immigrants are seeking national rights, rather than polyethnic rights. Some commentators interpreted the 'ethnic revival' in the United States in the 1970s as a repudiation of integration into the mainstream society. But as I noted [earlier] . . . this is dubious. . . . The ethnic revival, in other words, involved a revision in the terms of integration, not a rejection of integration.²⁶

I do not deny that there is value to articulating the claims of justice implicit in the demands of social groups. Indeed, as Kymlicka rightly notes, there is a special need to characterize those arguments fairly and accurately, because they are so often misunderstood or misrepresented in debates over cultural difference. But the fact that ethnic immigrants do not make certain arguments does not mean that they should not be making them, or that more ambitious claims are not justified.

Narrowing the scope of normative analysis to existing claims is also question-begging, because those aspirations or expectations are to a considerable extent the function of background institutional conditions. This is the lesson of Benedict Anderson's famous treatment of nationalism, which detailed the deliberate way in which a national consciousness was created in many modern nation-states with no historical antecedents.²⁷ Kymlicka himself acknowledges this fact when he states that "differences in the mode of incorporation affect the nature of minority groups, and the sort of relationship they desire with the larger society."²⁸ But if expectations or aspirations are a function of the very

²⁵Jeremy Waldron, "Theoretical foundations of liberalism," *Philosophical Quarterly*, 37 (1987) 127–50.

²⁶Kymlicka, *Multicultural Citizenship*, pp. 97–8; also see p. 67, para. 2.

²⁷Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991).

²⁸Kymlicka, *Multicultural Citizenship*, p. 10; also see p. 11, para. 2.

institutions we wish to scrutinize, then relying on them is problematic because they provide no external standard for evaluation. Even worse, relying on expectations creates perverse incentives for states to mold preferences so as to insulate institutions from political criticism.

Indeed, Kymlicka goes even further at certain points, and ascribes normative significance to the demands of ethnocultural groups simply because those demands exist. This is clearest in a later essay in which Kymlicka examines the implications of his theory for Hispanics in the United States.²⁹ The sociological status of Hispanics is ambiguous, because this group encompasses both national minorities (such as Puerto Ricans) and ethnic immigrants (such as Central Americans), each with the aspirations that one would expect—the former demanding institutional separateness, the latter demanding integration on fair terms. What is striking is the normative implication that Kymlicka draws from these facts of political sociology. He argues that the “aspirations of Hispanic groups are simply too divergent to create a single form of multiculturalism *appropriate* for all Hispanic groups.”³⁰ This is an argument that multiculturalism should be tailored to suit the aspirations and expectations of ethnocultural groups. But this is no more than the derivation of an ought from an is.

Related problems occur in Kymlicka’s treatment of institutional completeness. Kymlicka differentiates the legitimate claims of ethnic immigrants and national minorities on the basis of their capacities to sustain societal cultures. Thus, national minorities have a right to self-government (rights to institutional separateness) because they possess the requisite institutional capacity, whereas ethnic immigrants only possess polyethnic rights (rights to institutional integration) because they lack this capacity. This is an account of the design of just institutions of the style that I described earlier. Kymlicka’s mistake is to take the institutional capacities of ethnocultural groups as factual givens, and to base his account of just institutions around them. In reality, these institutional facts are highly contingent. They are a function of existing distributions of resources and political power. Moreover, there is a recursive relationship between institutional capacities and the rights that groups currently possess, making it unfair to regard them as decisive considerations in arguments for why or why not those current arrangements should be altered. Institutions are a function of rights, not the other way around. Additionally, as with expectations or aspirations, incorporating institutional capacities incorrectly into normative argument creates perverse incentives for states.³¹ Carens argues in this vein that a

²⁹Will Kymlicka, “Ethnic associations and democratic citizenship,” *Freedom of Association*, ed. A. Guttman (Princeton, N.J.: Princeton University Press, 1998) pp. 177–213 at pp. 208–10.

³⁰*Ibid.* at p. 210 (emphasis mine).

³¹Ironically, Kymlicka employs this argument himself, in rejecting the lack of the capacity to create societal cultures as a reason not to grant rights to self-government of national minorities. He draws a distinction between the “potentiality of societal cultures” (100) and current or present capacity. But if Kymlicka is willing to relax his empirical assumptions for national minorities, why does he refuse to do so for ethnic immigrants?

danger of a “contextual approach” to political philosophy “is that it will fail to recognize injustices that are pervasive and deeply embedded in practice.”³²

Kymlicka’s tendency to take the institutional capacities of ethnocultural groups as fixed givens is worth reflecting on because it is premised on a mistaken view of the relationship between sovereignty and territory. His assumption throughout is that sovereignty requires a defined territory over which it may be exercised. Kymlicka is in distinguished company here; this assumption underlies traditional conceptions of sovereignty and political community. It follows that only ethnocultural groups that are territorially concentrated can realistically exercise rights to self-government and, in Kymlicka’s view, that only those groups possess those rights. Accordingly, national minorities, which by definition are territorially concentrated, possess rights to self-government, whereas ethnic immigrants, who are territorially dispersed, do not.

Kymlicka’s mistake is to give short shrift to institutional arrangements that would allow communities to govern themselves without a defined territory, and hence challenge the claim that sovereignty is inextricably linked to territory.³³ Here, the facts of political sociology, particularly those drawn from comparative experience, far from supporting Kymlicka’s arguments, can instead serve as a useful fund of examples that both expose and destabilize his institutional assumptions.³⁴ I have already alluded to immigrant communities whose institutions serve important quasi-public functions, without the need for a defined geographic base of the kind that public governments (nations, provinces, municipalities) possess. Moreover, other institutional arrangements that explicitly detach the capacity for self-government from territory are possible. For example, in Canada, it has been suggested that aboriginal peoples who live in urban areas, and who are interspersed with the general population and hence lack the territorial basis for traditional forms of self-government, could nevertheless govern themselves with respect to social services, child welfare, housing, and primary and secondary education through a “community of interest” model.³⁵ Under this model, a local aboriginal council would be vested with legal powers over these matters and the power to tax; jurisdiction over aboriginal peoples would be voluntary.

³²Carens, *Culture, Citizenship, and Community*, p. 4.

³³To be fair, Kymlicka does discuss the Millet system of the Ottoman empire (at pp. 156–8), although in connection with the distinction between external protections and internal restrictions. As well, in his most recent work, Kymlicka seems to have recognized the variety of institutional mechanisms available to accommodate ethnocultural difference within liberal democracies (W. Kymlicka and W. Norman, “Citizenship in culturally diverse societies: issues, contexts, concepts,” *Citizenship in Diverse Societies*, ed. W. Kymlicka & W. Norman (Oxford: Oxford University Press, 2000) pp. 1–41 at pp. 24–30.

³⁴Carens, *Culture, Citizenship, and Community*, pp. 4–5. Elsewhere, I have argued that comparative case-law can serve the same function in constitutional adjudication, in “Globalization in search of justification: toward a theory of comparative constitutional interpretation,” *Indiana Law Journal*, 74 (1999), 819–92.

³⁵Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply and Services Canada, 1996), vol. 2, pp. 274–8.

More radical are proposals for non-territorial forms of federalism, whereby a community (for example, a religious minority, or an indigenous people) would possess institutions with the power to promulgate laws that bind its members throughout a nation-state. This approach to federalism imagines political communities in non-territorial terms, and, depending on how membership is determined, could in principle operate independently of the consent of those governed by a community's laws. The kind of legal pluralism contemplated by non-territorial federalism was and continues to be in operation, both prior and subsequent to independence, in the former colonies of British Africa.³⁶ Some contemporary proposals suggest that the jurisdiction of non-territorial political communities should be equivalent to the jurisdiction of territorially based federal sub-units;³⁷ others suggest that the jurisdiction of non-territorial political communities should be rather limited. A leading example of the latter is the system of Muslim personal law in India, which is limited in scope to the regulation of marriage, divorce, child custody, and inheritance.³⁸

I hasten to add that by listing these institutional options, I do not endorse them. Indeed, as Ayelet Shachar has demonstrated, systems of religious personal law have systemically worked to the disadvantage of women, and for that reason should be accommodated within the family law regimes of liberal democracies only with extreme caution.³⁹ But these examples do refute the institutional assumptions underlying Kymlicka's claims of viability or possibility, which are key empirical premises in his argument for why ethnic immigrants lack rights to self-government. The availability of institutional options that divorce sovereignty from territory demands that Kymlicka squarely face the normative justifications for the distinction between ethnic immigrants and national minorities. It also illustrates the contingency of the predominant institutional options in liberal democracies.

What unites Kymlicka's mistakes is a tendency at times to give normative significance to contingent facts of political sociology.⁴⁰ What is driving Kymlicka's analysis? His concern, I think, is less with justice than with the political stability of liberal democracies that are ethnically diverse. This becomes clear in the latter part of his book, where Kymlicka explicitly addresses the question of whether polyethnic rights and self-government rights undermine or support social unity. His conclusion is rather revealing. On the one hand, polyethnic rights support social

³⁶T. W. Bennett, "Conflict of laws—the application of customary law and the common law in Zimbabwe," *International and Comparative Law Quarterly*, 30 (1981), 59–103.

³⁷For a proposal that a non-territorial "Aboriginal Peoples Province" be created in Canada, see David J. Elkins, *Beyond Sovereignty: Territorial and Political Economy in the Twenty-First Century* (Toronto: University of Toronto Press, 1995) ch. 5.

³⁸David Pearl and Werner Menski, *Muslim Family Law*, 3rd edn (London: Sweet & Maxwell, 1998), ch. 2.

³⁹Ayelet Shachar, "Group identity and women's rights in family law: the perils of multicultural accommodation," *Journal of Political Philosophy*, 5 (1998), 285–305, and "On citizenship and multicultural vulnerability," *Political Theory*, 38 (2000), 64–89.

⁴⁰Yael Tamir has made a similar point, in "Theoretical difficulties in the study of nationalism," *Canadian Journal of Philosophy*, 22 Supp. (1996), 65–92 at p. 79.

unity because they facilitate the participation of ethnic immigrants in societal cultures. Self-government rights, however, have exactly the opposite effect because they acknowledge the existence of multiple political communities within a nation-state, thereby raising the question of which community is the object of citizens' primary allegiance. In this light, limiting the range of groups that can legitimately claim rights to institutional separateness is of pressing practical concern. Fortunately, the existing practice of liberal states offers a sharp categorical distinction between ethnic immigrants and national minorities.⁴¹ Kymlicka's goal is to justify that practice. One would have expected Kymlicka to approach this task by confining himself to the argument from consent. Instead, he slips into the argument from political sociology, which is methodologically suspect.

In this context, Kymlicka's emphasis on the normative claims implicit in political discourse is extremely understandable. His goal is to address the concern that immigrant multiculturalism is inherently separatist, and is the first step down the road toward minority nationalism. Kymlicka's response is to examine the actual implications of public policies associated with immigrant multiculturalism, as well as the demands of ethnocultural groups. Neither these policies nor the demands of ethnic immigrants seek to transform ethnic immigrants into national minorities, with their attendant demands for institutional separateness and rights of self-governance. Accordingly, Kymlicka dismisses this fear as "a red herring without any basis in reality."⁴² Kymlicka here is a participant in a political debate over the logic and consequences of existing multiculturalism policies. His emphasis on the concrete facts of political sociology is valuable, because debates on the accommodation of cultural difference in liberal democracies are often characterized by more heat than light over what multiculturalism currently means in practice. However, Kymlicka's sociological groundedness is purchased at a normative price, because it limits his access to a critical stance from which to scrutinize existing political practices.

IV. THE ACCURACY OF KYMLICKA'S POLITICAL SOCIOLOGY

But even if Kymlicka is correct to use political sociology in the manner that he does, his descriptive sociology leaves a great deal to be desired and creates

⁴¹In this connection, the following admission is remarkably candid: "there is a more realpolitik reason for emphasizing the sharp distinction between immigrants and national minorities, rather than viewing them as simply two poles on a fluid and amorphous continuum. One of the most common and influential objections to minority rights for any group is that it would lead us down a 'slippery slope' in which more and more groups would demand more and more rights, leading to the eventual disintegration of society. . . . I believe that progress on the rights of minorities will only come about if we effectively tackle this 'slippery slope' view. And to do so, we need to show that ethnocultural groups do not form a fluid continuum, in which each group has infinitely flexible needs and aspirations, but rather that there are deep and relatively stable differences between various kinds of ethnocultural groups." Will Kymlicka, "Do we need a liberal theory of minority rights? Reply to Carens, Young, Parekh and Forst," *Constellations*, 4 (1997), 72-87 at p. 80.

⁴²Kymlicka, "Ethnic associations and democratic citizenship," p. 199.

significant problems for him. Consider first the issue of viability. Kymlicka’s argument is as follows:

- P₁ Individuals have a fundamental interest in cultural membership, because cultures provide the context of choice that is a necessary condition for the exercise of individual autonomy.
- P₂ Only a societal culture can serve as a suitable context of choice.
-
- C₁ Individuals have a fundamental interest in membership in societal cultures.
- P₃ Ethnocultural groups differ in their capacities to build and sustain societal cultures in states in which they do not constitute the majority. In general, national minorities possess this capacity, whereas ethnic immigrants do not.
-
- C₂ National minorities can meet their fundamental need for cultural membership by maintaining their own societal cultures, while ethnic immigrants cannot.

There are a number of difficulties with this argument. Let us assume P₁ to be true, and focus on P₂ and P₃. What is Kymlicka’s argument for P₂? Kymlicka never fully explains why only *societal* cultures can provide a meaningful context of choice. To discover what his argument might be, one place to turn to is the distinction he draws between societal cultures and the other species of culture that are somehow deficient or lacking. Most relevant here are the various subcultures prevalent in liberal societies characterized by the fact of reasonable pluralism. In discussing subcultures, Kymlicka refers to “the distinct customs, perspectives, or ethos of a group or association, as when we talk about a ‘gay culture’.”⁴³ Into this category, he places “the various lifestyle enclaves, social movements, and voluntary associations which can be found in any modern society.”⁴⁴ Kymlicka appears to emphasize two significant differences between societal cultures and subcultures. The first is one of scope—societal cultures provide meaningful options across a broad range of social, political and economic life, encompassing both the public and private spheres. Subcultures, by contrast, speak to a much narrower range of activities. The second difference is one of institutional embodiment. Again, the distinctive feature of societal cultures, for Kymlicka, is that practices occur in institutions. Presumably, subcultures lack institutional specification. Thus, when referring to ethnic immigrants, Kymlicka claims that “they have left behind the set of *institutionalized* practices, conducted in their mother tongue, which actually provided culturally significant ways of life to people in their original homeland.”⁴⁵

⁴³Kymlicka, *Multicultural Citizenship*, p. 18.

⁴⁴Ibid.

⁴⁵Ibid. at p. 77 (emphasis mine).

It is readily apparent that the second of these distinctions is empirically false. In liberal societies, the cultural practices of many social groups, including ethnic immigrants, are institutionally embodied. Note here that Kymlicka appears to have a rather expansive definition of institutions, broad enough to encompass “schools, media, economy, [and] government.”⁴⁶ The defining feature of institutions would appear to be that they regularize or concretize social interactions. Assuming this to be Kymlicka’s definition of institutions, then many social groups possess them, including ethnic immigrants. These institutions range from small social clubs to nationwide cultural and religious organizations. Nevertheless, despite disparities in size, there are institutions which facilitate practices which are culturally meaningful, albeit only to subcultures.

Kymlicka might then respond that the institutions of subcultures are somehow less significant in comparison to the institutions of societal cultures. But this claim is false as well. Consider the institutions of ethnic immigrants.⁴⁷ In North America, there is a long tradition of immigrant communities building institutions that serve important functions. Many ethnic immigrant communities operate educational institutions of varying sophistication, ranging from after-class or weekend schools to secondary schools where instruction is received both in English and the language of their country of origin. Immigrant communities have built hospitals and nursing homes. They operate social service agencies that address a wide range of social problems, from spousal and elder abuse to alcoholism to difficulties with cultural integration. They possess media outlets, offering mother tongue news coverage in print, radio and television. Kymlicka’s frequent references to the “home and voluntary . . . associations,”⁴⁸ and to the tendency of immigrants to “maintain some of their old customs regarding food, dress, [and] religion”⁴⁹ misdescribes the complex and rich patterns of social life mediated through the institutions of ethnic immigrant communities. Indeed, as my examples illustrate, many of these institutions serve quasi-public functions, or operate in the public sphere. Granted, these institutions are not governmental, in that they lack sovereignty and jurisdiction, including the powers to tax and coerce. But even here, the reality is more complicated. In some ethnocultural communities, for example, membership fees imposed by religious institutions (for example, synagogues), coupled with the high costs of exit flowing from the control exerted by those institutions over access to important goods (for example, burial services, religious marriages, or even social acceptance) combine to create incentives to contribute financially to those institutions as strong as the legal obligation to

⁴⁶Ibid. at p. 76.

⁴⁷For a similar argument, see Chandran Kukathas, “Multiculturalism as fairness: Will Kymlicka’s *Multicultural Citizenship*”, *Journal of Political Philosophy*, 5 (1997), 406–27 at p. 415.

⁴⁸Kymlicka, *Multicultural Citizenship*, p. 78.

⁴⁹Ibid. at p. 14.

pay taxes in political communities.⁵⁰ In others, the doctrines of private law (for example, trust, contract) have been successfully used to enforce coercively the norms of conventional morality, through the threat of expulsion and/or the denial of a share of communal property.⁵¹ To be sure, in the wake of the rise of the welfare state, these institutions have receded in importance. But they have always been present, and as the state retreats their importance will likely return.⁵²

Kymlicka's point may be that these institutions, although significant, are not as expansive in scope as the institutions of societal cultures. That is certainly true, especially since the institutions of ethnic immigrants rarely extend into the economic and political spheres.⁵³ However, this does not mean that subcultures, including the cultures of ethnic immigrants, lack institutional embodiment. Rather, it only means that those cultures are institutionally incomplete. What this means is that considerations of scope, both of institutions and of the norms of tradition and convention themselves, appear to be the central feature that distinguishes societal cultures and subcultures. But why does this difference matter? Presumably, Kymlicka wants to argue that the narrow scope of subcultures somehow renders them incapable of serving as contexts of choice. On purely functional grounds, this is clearly false. Recall what Kymlicka says about the value of cultural membership:

Freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us. People make choices about the social practices around them, based on their beliefs about the value of these practices . . . And to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture.⁵⁴

Again, assume P_1 to be correct. Why then are subcultures any less capable of serving as the context of choice than societal cultures? It cannot be that subcultures are deficient either because they do not present options or because

⁵⁰Chandran Kukathas is thus mistaken when he ignores the high costs of exit from ethnocultural minorities in his theory of cultural rights, in "Are there any cultural rights?" *Political Theory*, 20 (1992), 105–39.

⁵¹Denise G. Réaume, "Common law constructions of group autonomy: a case study," *Ethnicity and Group Rights*, ed. I. Shapiro and W. Kymlicka (New York: New York University Press, 1997) pp. 257–89, and "The legal enforcement of social norms: techniques and principles," *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives*, ed. A. Cairns, J. Courtney, D. Smith, P. MacKinnon, and H. Michelman (Montreal: McGill-Queen's University Press, 1999) pp. 177–201.

⁵²It is also worth noting that these institutions developed in the absence of policies encouraging ethnic immigrants to view themselves as colonists with the goal of establishing institutionally complete societies in the mirror image of the mother country. In urban areas, communities of ethnic immigrants are sufficiently large and geographically concentrated to enable a similar process to occur.

⁵³Even here, the reality is more complex. Suzanne Model has described the role of networks among ethnic immigrants that serve as sources of employment opportunities in "The ethnic niche and the structure of opportunity: immigrants and minorities in New York City," *The "Underclass" Debate: Views from History*, ed. M. Katz (Princeton, NH.: Princeton University Press) pp. 161–93.

⁵⁴Kymlicka, *Multicultural Citizenship*, p. 83.

they do not assign them value. Subcultures certainly do both. Indeed, this is the definition of a culture. Perhaps the problem, then, is that subcultures do not present the right kinds of options, or more precisely, do not present relevant options. Maybe subcultures speak to such a narrow range of our existence that they cannot assist in our attempts to frame, question and revise a conception of the good. This is definitely true for some of the subcultures that Kymlicka refers to. For example, it hard to imagine an intelligible conception of the good emerging from “a ‘bureaucratic culture’.”⁵⁵ But, as David Miller has noted, the subcultures of ethnic immigrants are qualitatively different.⁵⁶ Recall that, on Kymlicka’s own account, they consist of a shared vocabulary of tradition and convention that were formerly part of societal cultures in immigrants’ countries of origin. The alleged obstacle posed by the fact of immigration is that those cultures cannot be actualized because of a lack of institutions. But this characterization assumes that the cultures of ethnic immigrants speak to important aspects of their lives as much as the societal culture of the dominant society; the only problem is one of institutionalization.

Kymlicka might respond that the fact of immigration does more than sever the traditions and conventions of ethnic immigrants from their institutional means of support. It also narrows the range of activities the cultures of ethnic immigrants contemplate; it converts them from societal cultures into subcultures. Instead of speaking to both the public and private realms, ethnic immigrant subcultures merely speak to our intimate and associational lives. However, even if this claim were true, it is not clear why this transformation would render the cultures of ethnic immigrants less able to serve as contexts of choice. In liberal societies, our conceptions of the good are often most closely tied to the private sphere. Personal choices regarding family life, friendship and religious faith often lie at the core of our most important projects. By contrast, our involvement in the political and economic sphere is rarely of this character. Indeed, in liberal democracies, our economic and political commitments are often viewed instrumentally, in terms of their ability to enable us to pursue our most cherished projects. Inasmuch as the cultures of ethnic immigrants are limited in scope because of their failure to speak to economic and political life, this does not undermine their relevance to individual autonomy.

The institutional viability and relevance of ethnic immigrant subcultures that are partial in scope demonstrates that P_2 is false. As a consequence, P_3 loses its force, since it is not necessary for ethnic immigrants to possess their own societal cultures to secure their fundamental interest in cultural membership. In addition, this reality also suggests that the political claims of ethnic immigrants for recognition of their particularity in public institutions is more complex than Kymlicka suggests. Instead of uniformly demanding integration on fair terms into

⁵⁵Ibid. at p. 18.

⁵⁶David Miller, *On Nationality* (Oxford: Oxford University Press, 1995) at pp. 121–2.

common institutions, at least some ethnic immigrants aspire to a mix of inclusion and institutional separateness. The liberal distinction between public and private helps to illuminate the topography of these claims. In matters economic and political, the demand of ethnic immigrants *is* for inclusion in common institutions on fair terms. The concern is that institutional separateness will lead to unfair distributions of important social goods, and to economic and political marginalization. In matters familial and associational, though, at least some ethnic immigrants are sympathetic to the idea of institutional separateness. Integration is perceived as a threat to the maintenance of cultural distinctiveness. The diverse set of institutions of civil society organized on the basis of ethnocultural difference in multicultural states testifies to the strength of this desire.

The distinction between public and private, however, only takes us so far. As I mentioned earlier, many institutions of ethnic immigrants serve quasi-public functions. That is, they serve functions that are or could plausibly be provided by governments. What is striking is that, in Canada, many ethnic immigrant groups now receive and demand government support for those institutions. This tendency is most marked with respect to social services, particularly in large urban areas with substantial immigrant populations. The best way to serve the needs of these populations is through services that accommodate cultural difference. Public institutions are capable of rising to this challenge, but what has evolved instead in many cases is a combination of public support and provision by organizations tied to particular ethnocultural groups.

What implications does this have for Kymlicka's argument? Inasmuch as the argument from political sociology turns on the aspirations and institutional capacities of ethnocultural groups, the sharp dichotomy that Kymlicka draws between ethnic immigrants and national minorities cannot withstand an encounter with reality. At best, these groups lie on a sociological continuum that Kymlicka attempts to shoehorn into his rigid categories. Thus, the argument from political sociology cannot compensate for the failure of the argument from consent. Even worse, the argument from political sociology fails on its own terms.

V. CONCLUSION

Kymlicka might respond to many of my criticisms by branding them utopian, a term that is open to at least two interpretations. A utopian political philosophy may be one that does not speak to urgent problems in the here and now, and which for that reason is somehow deficient. Utopian political philosophy fails in its mission because it does not *aim* to alter or elucidate the terms of reference for political debates in which we are now engaged. Conversely, a political philosophy may be utopian not because of its aim, but because of an ignorance of or indifference toward the empirical realities surrounding its implementation—the

question of *means*. This charge has been leveled recently against the work of egalitarian liberals.⁵⁷ The danger here is not only irrelevance, but also that such a philosophy could be seized upon by political radicals set on realizing it no matter what the cost. Indeed, some of the most disastrous social experiments of the last century were founded on an unyielding and rigid adherence to political philosophical ideals. To avoid this danger, political philosophy must pay heed to existing expectations, political practices and institutional capacities, in the manner that Kymlicka does.

How could one respond to these charges? To be sure, some of the best political philosophy is written against the background of contemporaneous political events or debates. Indeed, context may provide both the spark and the materials for reflection on the most difficult problems of justice. Without a doubt, the most admirable feature of *Multicultural Citizenship* is that it speaks to pressing political questions confronting liberal democracies today. And Kymlicka's impressive attempt to provide workable and practical policies that grow out of, and build upon, current political practices, expectations and institutional capacities clearly represents a heartfelt desire that political philosophers contribute to political discourse in a way that is both useful and responsible, by steering clear of the dangers of irrelevance and intellectual imperialism.

My quarrel with Kymlicka is not with the idea that context and facts should count in political philosophy. Indeed, my own criticisms of Kymlicka—with respect to both the argument from consent, and the link he draws between territory and sovereignty—rely on political sociology in order to defeat his normative claims. Rather, my concern is that, in the argument from political sociology, he does not count context and facts in the right way. As we strive for relevance, we must avoid the temptation to bend our theories around political realities, for if we do, political philosophy surrenders its critical stance. Without our ideals, we lack the ability to appreciate what is lost when public policies fall short of principle.

⁵⁷Elizabeth Anderson, "What is the point of equality?" *Ethics*, 109 (1999), 287–307.