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Niqab vs. Quebec: Negotiating Minority Rights within Quebec Identity

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Niqab vs. Quebec: Negotiating Minority Rights within Quebec Identity

Abstract

Quebec recently proposed legislation (Bill 94) that would require all individuals to reveal their face when seeking a government service. The proposed legislation particularly targets Muslim women who don the niqab. Underlying the present debate is an artificial dichotomy – a tension between a society’s interest in defining a common sense of citizenship and minority claims that seem inconsistent with the will of the majority. A Charter challenge – even if successful – would not fully address this underlying tension. In this paper, I argue that the heart of the present controversy relates to the need for a clear conception of Quebec identity. By considering the historical, social, ethnic, geographic and intrinsic significance of the French language, I argue that the French language, not secularism, is the key element of Quebec identity and facilitates a common sense of citizenship in Quebec. If a minority claim is capable of fitting within this conception of Quebec identity, then it poses no threat to Quebec citizenship, and thus, there should be no reason to exclude the claim – in this case the claim to wear the niqab when seeking a government service – from Quebec society.

Keywords

niqab, Quebec, citizenship, multiculturalism, Charter, constitutional law, French, identity

Cover Page Footnote

Nafay Choudhury (LLB/BCL '11) is a graduate of the McGill Faculty of Law. This paper was prepared under the supervision of Professor Hoi Kong, who provided valuable feedback through the drafting of the paper. Omar Edaibat provided helpful revision of an earlier draft. All mistakes and shortcomings are my own.

NIQAB VS. QUEBEC: NEGOTIATING MINORITY RIGHTS WITHIN QUEBEC IDENTITY

NAFAY CHOUDHURY*

INTRODUCTION

Few articles of clothing provoke as much imagery as the niqab. This small piece of cloth worn by some Muslim women—covering the majority of the face—has created a firestorm of controversy in a number of Western countries, many of which have been struggling to integrate an increasing number of immigrants and minority groups within their borders. Further, the tragic events of September 11, 2001, have exacerbated suspicion of Muslims. Muslim women have often become the focal point of tensions between clashing societal, religious, and gender values, largely due to their attire. The most conspicuous aspect of this attire is the niqab, or face-veil. In societies that strive to promote multiculturalism as a societal value, the niqab is often viewed as the unwelcome newcomer, raising questions of how far societies will go in tolerating individual practices.

Quebec recently trod into the charged discussion over the niqab with the introduction of Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*.¹ In the discussion that ensued, multiple discourses shared centre stage. Niqabi women claimed that their right to wear the niqab in a liberal democratic society is dangerously challenged by the proposed legislation, a position supported by some women's groups,² Muslim community organizations,³ civil liberties organizations,⁴ and public commentators.

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¹ Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st Sess, 39th Leg, Quebec, 2010 [Bill 94].

² *Déclaration de l'Institut Simone de Beauvoir à propos du projet de loi 94* online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>. Brief submitted to the general consultation on Bill 94 at the National Assembly of Quebec.

³ Muslim Canadian Federation, *Pour un Québec inclusif et rassembleur; Le projet de loi 94 est préjudiciable envers les Québécois (es) de confession musulmane*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>. Brief submitted to the general consultation on Bill 94 at the National Assembly of Quebec.

⁴ Canadian Civil Liberties Association, "CCLA Opposes National Assembly Bill 94 (the Niqab Bill)" (31 March 2010), online: Canadian Civil Liberties Association <<http://ccla.org>>; Canadian Council on American-Islamic Relations, *Brief Concerning Bill 94: An Act To Establish Guidelines Governing Accommodation Requests Within the Administration and Certain Institutions*, online: Assemblée

Other women's groups⁵ and community organizations⁶ feel that women's equality is a core Quebec value that is challenged by the very presence of the niqab. For these groups, Bill 94 is viewed as upholding gender equality, a principle highly valued in Quebec, Canada, and in liberal societies generally.

From another angle, the controversy over Bill 94 has brought to the foreground the ongoing debate over Quebec's identity. Quebec's unique status as a French-speaking province in a predominantly English-speaking nation and continent elicits a discussion of the meaning of identity for Quebecers who are concerned about the erosion of their culture and, in particular, their language. At the same time, Quebec receives a large number of immigrants each year, welcoming their skills as a valued addition to the economy and accepting their various ways of life. In addition, the present controversy highlights the tension between Quebec's notion of secularism, particularly following the Quiet Revolution (*révolution tranquille*), and the new wave of religious symbols entering into the public sphere, not the least of which is the niqab. A public consultation on Bill 94 commenced in May 2010, and, after a postponement of several months, was resumed on October 19, 2010.⁷

The general argument put forward by proponents of the Bill is that requiring an individual to show her face is simply a minimal requirement that ought to be expected of all Quebec citizens seeking an essential government service.⁸ Conversely, the discourse adopted by opponents alleges that the proposed legislation contains discriminatory, sexist, and Islamophobic undertones which may lead to the marginalization of a minority segment of the population. This dichotomous conversation thus pits the interest of the majority of Quebecers—that individuals reveal their faces—against the interest of a small group of women who cover their faces for religious purposes. More generally, the discussion contrasts the *universalizing* desire of a majority group to construct a thin layer of citizenship that should be adopted by all

nationale du Québec <<http://www.assnat.qc.ca>>. Brief submitted to the general consultation on Bill 94 at the National Assembly of Quebec [CCAIR].

⁵ Association féminine d'éducation et d'action sociale, *Pour préserver l'égalité entre les femmes et les hommes et la neutralité de l'État: baliser les accommodants*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>. Brief submitted to the general consultation on Bill 94 at the National Assembly of Quebec.

⁶ Les Intellectuels pour la laïcité, *La laïcité: Une valeur fondatrice essentielle de la société québécoise*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>> at 24–25 [Les Intellectuels]. Brief submitted to the general consultation on Bill 94 at the National Assembly of Quebec.

⁷ Kevin Dougherty, "Niqab debate resumes: Bill 94; Secularism a broader issue: Francoise David", *The [Montreal] Gazette* (20 October 2010), online: Postmedia Network Inc <<http://www.montrealgazette.com>>.

⁸ Shauna van Praagh, "Niqab bill is a statement of shared values", *The [Montreal] Gazette* (3 April 2010).

individuals with the *differencing* force introduced by minorities who make a claim to a particular identity perceived as distasteful by the dominant majority.⁹

It has been argued elsewhere that the present debate pursues an “artificially constructed dichotomy”¹⁰ which makes it difficult to perceive any reconciliation of values. Underlying this debate is a tension between a society’s interest in defining a common sense of citizenship and minority claims that seem inconsistent with the will of the majority. In this paper, I argue that the heart of the present controversy relates to the need for a clear conception of Quebec identity. This conception, I argue, must be based on the French language as the quintessential characteristic. In other words, the French language should be the gauge by which minority claims should be assessed. If a minority claim is capable of fitting within this conception of Quebec identity as a French-speaking nation, then it poses no threat to Quebec citizenship, leaving no reason to exclude the claim in question from Quebec society.

A cohesive notion of citizenship must be capable of reconciling the tensions that arise when multi-ethnic individuals bring their diverse norms into interaction with one another while maintaining an underlying thread that unites citizens. For Quebec, language is able to provide this common thread. Other values such as secularism, which may be perceived by the majority of Quebecers as important public values, must be understood to be of secondary importance, having relevance only insofar as they primarily support the French identity of Quebec.

After a clearer conception of Quebec identity is defined, Bill 94 can be better situated and analyzed. This will reveal that allowing women to wear the niqab without restriction under certain circumstances can be fully consistent with Quebec identity. The hope in pursuing such an approach is to break free from the “either/or” discourse which oversimplifies a complex debate, and to put forward “both/and” possibilities where interests of multiple parties can be genuinely and pragmatically reconciled.¹¹

In the first part of this paper, I will provide a brief summary of the present debate on the niqab in Quebec. In part two, I will argue that while a rights-based approach can provide potentially robust arguments in opposition to Bill 94 by relying on *Charter* values as upheld by the courts, such an approach risks overlooking larger societal questions on the erosion of citizenship caused by the increasing influx of minority rights. In part three I will carefully scrutinize Quebec identity and argue that its core characteristic is the French language. I will also argue that secularism is not a

⁹ Minority rights claims need not only be individual. Minority groups may also make claims to collective rights, such as their right to language. The present discussion focuses on an individual rights claim.

¹⁰ Ayelet Schachar, “Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law” (2008) 9 *Theor Inq L* 573 at 587. Schachar uses the phrase ‘artificially constructed dichotomy’ to describe the false dichotomy between religious tribunals and secular civil courts. However, the term can generally be employed to describe the false dichotomizing of minority claims and the status quo position of the majority on a given matter.

¹¹ Tariq Modood, *Multiculturalism* (Cambridge: Polity, 2007) at 130.

core component of Quebec identity. In part four I will attempt to resituate the current discussion concerning the niqab within this conception of identity, showing the possibility of tolerating the niqab without an erosion of Quebec identity. I conclude with a discussion of some potential shortcomings of the approach taken.

PART I: BACKGROUND FACTS

A. The Niqab

The niqab is a garment worn by some Muslim women which covers the larger part of the face. The term niqab, as used in Quebec and North American discourse, relates to a number of variations of the face-veil, including a veil that allows only the eyes to be seen as well as a full veil where the entire face, including the eyes, remains undisclosed.¹² Reasons for wearing the niqab may range from cultural practice,¹³ to personal conviction, to religious belief.¹⁴ To date, no extensive inquiry on the motivation for wearing the niqab seems to have been carried out.¹⁵ A new wave of opposition to the niqab has arisen just as Westerners have increasingly come to accept the hijab (a garment that covers the hair and neck and keeps the face visible) as a valid choice made by some Muslim women.¹⁶

For the purpose of this paper, it is not necessary to track the internal discourse within Islam or amongst Muslim women on the wearing of the hijab or the niqab.¹⁷ Reality provides a perennial reminder that individuals will often go to great lengths to be able to pursue their personal identities—such as wearing the hijab¹⁸ or the niqab.¹⁹ The internal discourse involving the evolution of the identity of a minority group is

¹² The various names of the different head coverings worn by various Muslim women can be found on the BBC website. See BBC News, “In Graphics: Muslim Veils”, online: BBC News <<http://news.bbc.co.uk>>.

¹³ In certain regions of the world, such as in Yemen and in Afghanistan, wearing the niqab is a cultural norm for women. It may, of course, be argued that culture is influenced by religion.

¹⁴ See Natasha Bakht, “Veiled Objections: Facing Public Opposition to the Niqab” in Lori Beaman, ed, *Defining Reasonable Accommodation* UBC Press [forthcoming in 2012] at 1 [Bakht].

¹⁵ My search on the topic yielded no results. Similarly Natasha Bakht notes in recently article on the niqab her inability to locate such a resources. See Bakht, *ibid* at 1.

¹⁶ *Ibid*.

¹⁷ The internal discourse on the niqab would include discussions within the Islamic tradition and amongst niqabi women on the historical, religious, societal and other reasons for wearing the niqab.

¹⁸ *R (on the application of X (by her father and litigation friend)) v Headteachers and Governors of Y School*, [2006] EWHC 298. In this case, a girl was prohibited from attending school as her hijab did not conform to the school’s dress code.

¹⁹ See *R v NS*, 2010 ONCA 670. In this case, a niqabi woman alleged sexual assault. At the preliminary inquiry, the accused sought an order requiring the woman to unveil. After questioning the woman, the judge asked that she unveil. She refused to do so, and the preliminary inquiry did not proceed. In remanding the case back to preliminary inquiry, the Court of Appeal opined that the preliminary inquiry judge should carefully consider whether the woman’s “sincerity of belief” amounted to religious freedom protected under s. 2(a) of the *Charter of Rights and Freedoms*, and if so, then to try to attempt to reconcile to the fullest extent possible her religious rights with the rights of the accused to make a full defence.

quite a separate matter from that minority group's interaction with the culture of the wider majority. The impact of Bill 94 on niqabi women is primarily a question of how the practice of a minority group can fit (or not fit) into the strictures of the majority of society—what can be regarded as an external discourse.²⁰ Several interest groups have argued that the proposed bill should succeed, given that the niqab is not a religious requirement. The very fact that certain groups hold such a position suggests that an internal discourse must necessarily be taking place since niqabi women will, at the very least, need to justify to themselves why they wear the niqab despite the criticisms levied against them. This internal reflection will in turn impact the manner in which niqabi women view their own practice of donning the niqab. Further, certain feminists may argue that niqabi women are victims of a “false consciousness,” choosing to wear the niqab based on cultural norms that are “forced up on them” to begin with.²¹ These arguments are geared at attacking the very logic that niqabi women employ when justifying their practices. However, by denying agency to niqabi women, these arguments remove from the discussion the very opinions of those most directly implicated.²² The importance of both the internal and external discourse, as well as the intersection of these discourses, has been carried forward by the feminism-multiculturalism discourse,²³ as well as the cultural rights-cosmopolitanism discourse.²⁴ This paper will specifically focus on external discourse—that between niqabi women and Quebec society.

B. The Controversy Surrounding Bill 94

The present controversy regarding the niqab commenced in March 2010 when Naima Ahmad, a 29-year-old immigrant from Egypt, filed a complaint with the Human Rights Commission against CEGEP de St. Laurent over their reaction to her refusal to remove her niqab.²⁵ Ahmad, who wore the niqab, had been attending a French-language course at the CEGEP. Her class of 20 students had three males, to whom Ahmad would

²⁰ Will Kymlicka, “The New Debate on Minority Rights (and Postscript)” in Anthony Laden & David Owens, eds, *Multiculturalism and Political Theory* (Cambridge: Cambridge University Press, 2007), 25 [Kymlicka, “New Debate”].

²¹ Ellen Wiles, “Headscarves, Human Rights and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality” (2007) 41:3 L & Society Rev 699 at 719, as cited in Bakht, *supra* note 14 at 3.

²² *Ibid* at 3–4.

²³ For a good overview of the feminism-multicultural discussion, see Leti Volpp, “Feminism and Multiculturalism” (2001) 101 Colum L Rev 1181.

²⁴ This debate is carried by Jeremy Waldron (on the point of cosmopolitanism) and Will Kymlicka (on the point of cultural rights). See Jeremy Waldron, “Cultural Identity and Civil Responsibility” in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (New York: Oxford University Press, 2000) 155; Will Kymlicka & Wayne Norman, “Citizenship in Culturally Diverse Societies: Issues, Contexts, Concepts” in Kymlicka & Norman, *ibid* 1 [Kymlicka, “Citizenship”].

²⁵ Les Perreux, “Asked to remove niqab, Quebec woman lodges human-rights complaint”, *The Globe and Mail* (2 March 2010), online: The Globe and Mail <<http://www.theglobeandmail.com>>.

not show her face. The precise extent of her class involvement is an issue of some dispute. According to one news source, Ahmad would only “give presentations from the rear of the class, which counted three men among 20 students.”²⁶ In a later interview, Ahmad denied this claim, stating instead that after being asked to remove her niqab when presenting, she “raised her niqab but turned away from the edge of the U-shaped classroom seating arrangement, where the two men sat.”²⁷

In either event, when a new session of classes began the following term, the gender balance of the class evened out, and the teacher and school found her request for accommodation excessive. Ahmad was then provided an ultimatum, supported by Quebec Immigration Minister Yolande James, requiring her to unveil if she wished to continue taking classes. After refusing to unveil, she was removed from the CEGEP and thereafter launched her complaint. Since then, a second student has been removed from a government sponsored French-language course by order of the Minister of Immigration for donning a niqab. In the second case, the student had not asked for any special accommodation. Moreover, the school coordinator commented that “[s]he was one of the best students, she wants to learn French, she participated in class and worked with men.”²⁸

Bill 94 was introduced to the Quebec National Assembly by Minister of Justice Katherine Wail as a response to allegedly unreasonable requests for special accommodation made by a niqabi woman seeking language services. The text of the legislation focuses on the acceptable level of accommodation that would be provided whenever a government service is sought by an individual or provided by government personnel.²⁹ The legislation would apply to institutions providing educational services, health and social services, and childcare services.³⁰ An accommodation is defined as “an adaptation of a norm or general practice, dictated by the right to equality, in order to grant different treatment to a person who would otherwise be adversely affected by the application of that norm or practice.”³¹ Most significant is clause 6, which sets the limit on reasonable accommodation. Clause 6 states:

The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the

²⁶ *Ibid.*

²⁷ Omar El Akkad, “Woman shocked by portrayal as hard-line Islamist: Niqab-wearing immigrant who launched human-rights complaint denies accusations she refused to work with men”, *The Globe and Mail* (25 March 2010), online: [The Globe and Mail](http://www.theglobeandmail.com) <<http://www.theglobeandmail.com>>.

²⁸ Katherine Wilton, “Second niqab-wearing woman forced out of Quebec class”, *Montreal Gazette* (13 April 2010), online: [Canada.com](http://www.canada.com) <<http://www.canada.com>> [Wilton].

²⁹ Bill 94, *supra* note 1, cl 1.

³⁰ *Ibid.*, cl 3.

³¹ *Ibid.*, cl 1.

Administration or the institution *show their face during the delivery of services is a general practice.*

*If an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied.*³²

While the proposed legislation nowhere mentions niqabi women, it is clear from the text that they are the prime target of the legislation. Article 6 is the particular cause of concern for niqabi women and their supporters. First, it would require niqabi women to unveil when receiving a government service. In its current wording, the legislation does not lead to a blanket ban on government services based on the wearing of the niqab, but rather provides government personnel a high level of discretion in denying a service if they feel that the individual's face must be viewed for security, communication, or identification purposes. The legislation's vagueness on what would "warrant" a denial of service suggests that government personnel are intentionally given a high level of discretion to apply the rule as they deem appropriate in the specific circumstances. Second, clause 6 creates a negative stigma—supported by government legislation—surrounding niqabi women, as their conduct would fall outside the accepted "general practice" of revealing one's face when receiving a government service.

It is impossible to know the full impact the legislation will have on niqabi women until it is enacted. However, the fervor displayed by both supporters and opponents already reveals the polarizing capacity of the legislation. Groups throughout Quebec, and indeed across Canada, have quickly made their allegiance known. The Quebec government made an open call for submissions on the draft legislation, and the provincial Committee on Institutions commenced public hearings on Bill 94 on May 18, 2010. Throughout the months of May, October, and November 2011, and January 2012, twelve government consultation meetings were held,³³ with 57 individuals and organizations making committee presentations.³⁴ In total, 66 consultation briefs were

³² *Ibid.*, cl 6 [emphasis added].

³³ Parliamentary Proceedings, "Bill n°94 : An Act to establish guidelines governing accommodation requests within the Administration and certain institutions — National Assembly of Québec", online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>> [Parliamentary Proceedings].

³⁴ Quebec, "A report from the Committee on Institutions, which, on 18, 19 and 20 May, 19, 20 and 21 October, 1, 2, 15, 25 and 26 November 2010 and on 18 January 2011, held public hearings within the framework of general consultations on Bill 94, An Act to establish guidelines governing accommodation requests within the Administration and certain institutions" (8 February 2011), online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>.

submitted to the committee by various organizations and individuals.³⁵ The diversity of views presented in the briefs helps provide a glimpse into the divided opinions which characterize the present debate: 19 briefs indicate support of the proposed bill; 24 oppose the bill; and 23 come down neither for nor against the bill, but rather contribute more nuanced positions and general thoughts. Most of the briefs touched on the point of secularism in Quebec, with proponents arguing that the bill is consistent with Quebec secular values, and opponents arguing that secularism should not infringe on the individual choices of niqabi women. Moreover, a number of groups noted the very term “secularism” is ill-defined and thus warrants a deeper discussion in Quebec.³⁶

In February 2011 the bill came before the National Assembly of Quebec for a vote on its passage in principles.³⁷ On February 15, 2011, the National Assembly voted in favour of the bill, with 56 members voting for, 49 against, and two abstaining.³⁸ The bill has now proceeded to committee stage, which has held committee meetings throughout the months of March, April, May, and September 2011.³⁹

PART II: ALTERNATIVE TO PURSUING A *CHARTER* CHALLENGE

A. The Nature of a *Charter* Analysis

In the current debate on Bill 94, a number of organizations⁴⁰ and law professors⁴¹ have voiced their concern about the potential unconstitutional nature of Bill

³⁵ For access to each of the briefs, see *Institutions — National Assembly of Quebec*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>.

³⁶ For example, see *Mémoire de la Fédération des travailleurs et des travailleuses du Québec*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>; Centrale des syndicats du Québec, *Pour définir le Québec laïque, un débat de société s'impose*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>. Briefs submitted to the general consultation on Bill 94 at the National Assembly of Quebec.

³⁷ A public bill, such as Bill 94, must go through several stages before it becomes law. First, the Bill has to be introduced into the National Assembly of Quebec by a member or Minister. Second, a public consultation may be held on the proposed bill. Third, the National Assembly debates on the spirit of the bill. Fourth, if the National Assembly votes in favour of adopting the bill, then the bill proceeds to the committee stage where a parliamentary committee studies the proposed bill in detail, including recommending amendment. Fifth, the committee prepares a report on the bill, and the National Assembly must vote in favour of the report for the process to proceed. Finally, once the bill is passed, it will be set to become law on a given date. See *Bills – National Assembly of Québec*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>.

³⁸ Before the voting on the bill, a minor amendment was made to clause 1; however, the amendment does not affect the pith and substance of the bill. See *Parliamentary Proceedings*, *supra* note 33.

³⁹ At the time of the publication of this paper, the committee stage was still in progress. Once this stage is completed, the committee report will be presented to the members of National Assembly of Quebec for another parliamentary debate on the bill in light of the report.

⁴⁰ CCAIR, *supra* note 4. Also see Association canadienne des libertés civiles, *Soumissions de l'Association canadienne des libertés civiles sur le projet de loi 94* (18 May 2010), online: Assemblée

94. If the Bill were to pass in its present form, it would come as no surprise were it to face a challenge under the Canadian *Charter*⁴² or the *Quebec Charter*⁴³ calling to question the legislation's possible undue interference with the rights of niqabi women. This section outlines some the avenues through which such a constitutional challenge could proceed.

One constitutional argument against the bill is that its passage would violate the right to freedom of religion under s 2(a) of the Canadian *Charter* or s 3 of the *Quebec Charter*. Under these provisions, individuals are afforded freedom to practice their religion as they wish.⁴⁴ The Supreme Court of Canada in *Syndicat Northcrest v Amselem* opined that an individual need only demonstrate "sincerity of belief" to gain protection under freedom of religion.⁴⁵ The sincerity of belief requirement could provide a repudiation of the argument put forward by some supporters of Bill 94 that wearing the niqab is not an obligatory practice within the Islamic faith:⁴⁶ a woman wearing the niqab need only do so out of personal religious conviction, regardless of official religious dogma surrounding the garment. Moreover, freedom of religion ensures that individuals are afforded protection from "direct and indirect coercion."⁴⁷ This could be argued by niqabi women because the bill would require them to unveil in order to receive particular services. Western governments like that of Quebec are generally restricted from actions that specifically preclude minority practices and must attempt to tailor public policies in a manner that is respectful of such practices.⁴⁸ The right to freedom of religion is regarded highly in Canada, and any infringement thereof must meet a very high threshold in order to be deemed justifiable.

nationale du Québec <<http://www.assnat.qc.ca>>. Brief submitted to the general consultation on Bill 94 at the National Assembly of Quebec.

⁴¹ Jacquie McNish & Sarah Boesveld, "Quebec's niqab ban sets up a legal showdown", *The Globe and Mail* (25 March 2010) online: The Globe and Mail <<http://www.theglobeandmail.com>>.

⁴² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁴³ *Charter of Human Rights and Freedoms*, RSQ, c C-12.

⁴⁴ Richard Moon, "Liberty, Neutrality, and Inclusion Religious Freedom Under the Canadian Charter" (2003) 41 *Brandeis Law Journal* 563 at 565 [Moon].

⁴⁵ *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 at para 46 [*Amselem*].

⁴⁶ The Muslim Canadian Congress put forward the argument that the niqab is not a religious requirement. See Noor Javed, "'People think you're oppressed' if you wear the niqab" *Toronto Star* (25 Oct 2009) online: <<http://www.thestar.com>>.

⁴⁷ Joan Small, "Multiculturalism, Equity, and Canadian Constitutionalism: Cohesion and Difference", in Stephen Tierney, ed, *Multiculturalism and the Canadian Constitution* (Toronto: UBC Press, 2007) at 200 [Small].

⁴⁸ Moon, *supra* note 44 at 572.

Beyond freedom of religion, several other approaches could be proposed in contesting Bill 94.⁴⁹ A claim may be brought forward under s 7 of the Canadian *Charter*, which provides all individuals the right to liberty in accordance with the principles of fundamental justice. In *Blencoe v British Columbia (Human Rights Commission)*, the Supreme Court of Canada stated that the liberty provided by s 7 ensures that “fundamental personal choices” must be free from state interference.⁵⁰ More specifically, the Court stated that an individual’s liberty includes the right “to make decisions concerning one’s body free from state interference.”⁵¹ Analogously, the choice to wear the niqab would appear first and foremost to be a choice of a woman concerning her own attire, providing a *prima facie* basis for a s 7 claim. That said, the claim would likely be controversial because the right to wear a religious garment is not normally understood as relating to principles of fundamental justice.⁵²

A claim may also be brought forward under s 15(1), which stipulates that individuals have the right to be free from various forms of discrimination, including discrimination based on religion. In *R v Kapp*, the Supreme Court of Canada explained that s 15 seeks to promote substantive equality with respect to the enumerated and analogous grounds mentioned therein.⁵³ Specifically, s 15(1) prevents the government from making distinctions that “have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping.”⁵⁴ To meet the requirements of s 15, a niqabi woman would need to demonstrate that she belongs to a cohort of individuals that faces prejudice and that Bill 94 creates a disadvantage based on this prejudice.⁵⁵ The widespread public discourse contesting the very presence of the niqab, along with polls indicating that 95 percent of Quebecers and three out of four people in the rest of Canada support the Bill,⁵⁶ provides some indication of possible prejudice, though more concrete evidence may be required to satisfy the threshold of s 15. Showing that the legislation is based on prejudicial views or promotes prejudice

⁴⁹ For a discussion on the various approaches available, see Beverly Baines, “Bill 94: Quebec’s Niqab Ban and Sex Equality” (12 May 2010), online: The Women’s Court of Canada <<http://womenscourt.ca>>.

⁵⁰ *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 54 [*Blencoe*].

⁵¹ *Ibid* at para 83.

⁵² The Supreme Court of Canada has generally dealt with religious apparel under s 2(a), for example *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256. The case involved a Sikh student who wished to wear a kirpan, a religious object resembling a dagger, on school premises. In denying the right to wear the kirpan, the Court made no reference to a deprivation of liberty under s 7; rather, the Court exclusively referred to an infringement of freedom of religion, under s 2(a).

⁵³ *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 37.

⁵⁴ *Ibid* at para 25.

⁵⁵ For example, in *Hutterian Brethren*, in applying the test for s 15, the Court did not find did not find that the colony suffered a pre-existing prejudice. See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 [*Hutterian Brethren*].

⁵⁶ Marian Scott, “Majority agree with Quebec’s veil law, poll finds” (28 April 2010), online: Vlad Tepes (blog) <<http://vladtepesblog.com>>.

may also succeed; however, those making the s 15 claim would need to refute the position of the Quebec government that the Bill does not specifically target niqabi women, but rather requires all individuals to reveal their faces when receiving a government service, owing to security, communication, and identification purposes.

Even if the bill is found to be a “clear” violation of the *Charter*, “freedom of religion, like everything else, is not totally absolute.”⁵⁷ Under the *Oakes* test (referencing s 1 of the *Charter*), the Quebec government would need to show that the bill addresses a “pressing and substantial” objective of a democratic society and that it is a rational, minimally impairing, proportionate means of meeting that objective.⁵⁸ The *Oakes* test provides the Quebec government some leeway in arguing that Bill 94 promotes integration and social cohesion and enhances safety by way of identification, both of which could constitute a “pressing and substantial” objective. In applying the *Oakes* test to Bill 94, a Court would, crucially, have to engage in a discussion on whether or not the niqab serves as “portable ghetto walls”⁵⁹ that stagnate social interaction and integration.

B. The *Charter* in a Multicultural Society

From the preceding discussion, it becomes evident that niqabi women could challenge the legality of Bill 94 through a number of avenues. If Bill 94 were to pass, a successful challenge under either the Canadian *Charter* or the *Quebec Charter* would help vindicate niqabi women by establishing that the niqab does have a place in Canadian, and Quebec, society. Further, a successful challenge would enable a niqabi woman to seek the essential services covered by the proposed legislation without needing to unveil, thereby safeguarding her religious beliefs.⁶⁰ However, a successful challenge does not necessarily reconcile the tensions that underlie the present controversy. Many Quebecers view Bill 94 as a reflection of Quebec values—in particular, secularism. With nearly 90 percent of Quebecers supporting the bill, a decision that voids or reads down Bill 94 may be perceived as an attack on Quebec values. A court decision that rules against Bill 94 therefore risks the possibility of exacerbating frictions between the majority of Quebecers and minority groups such as

⁵⁷ Mary Vallis, “Would veil law survive a Charter challenge?”, *National Post* (25 March 2010) [Vallis].

⁵⁸ *R v Oakes*, [1986] 1 SCR 103. The second part of the *Oakes* test involves a three-stage assessment: first, whether the legislation is rationally connected to the objective sought; second, whether the law impairs the right no more than is necessary to accomplish the objective; and third, whether the law has a disproportionately severe affect on the individual affected.

⁵⁹ Vallis, *supra* note 57.

⁶⁰ Instead of finding the entire piece of legislation unconstitutional, a court may find it to be over-inclusive, thus requiring that the legislation be amended in certain ways. Such amendments may or may not require niqabi women to unveil in certain instances.

niqabi women. Such a decision may be perceived as providing rights to niqabi women at the expense of the values adopted by the majority of Quebecers.

A court does have some ability to address—and attempt to reconcile—some of the tensions arising in the present controversy. The Supreme Court of Canada is regularly tasked with balancing the competing interests that exist in a multicultural society. In the context of a *Charter* challenge, the multiculturalism discourse often arises through either the s 1 *Oakes* test or s 27 (that the *Charter* shall be interpreted in the context of multiculturalism). In *Adler v Ontario*, the *Oakes* test was discussed in the separate dissenting opinions of McLachlin J (as she then was) and L’Heureux-Dubé J.⁶¹ The case involved a claim of discrimination under s 15 of the *Charter* because Jewish and independent Christian schools did not receive funding similar to public schools. After carefully considering the interests of the members of the religious groups and those of the greater society, both McLachlin and L’Heureux-Dubé JJ found that the concerned legislation, which supported only public schools, had a pressing and substantial goal. Publicly-funded schools promote diversity in the school system by exposing students to different cultures, which in turn leads to a more tolerant society.⁶²

In *Hutterian Brethren of Wilson Colony v Alberta*, the Alberta government introduced legislation that required driver’s licences to include a photo to protect against identity theft.⁶³ Members of a Hutterite religious colony found this requirement objectionable as they believed that the Biblical second commandment against making idols or likenesses forbade their pictures from being willfully taken. In upholding the legislation, the majority opinion weighed the benefit of the legislation against its negative impact on the community and found that the infringement of freedom of religion was proportionate. The separate dissenting opinions of Abella and LeBel JJ discussed at length the negative impact of the legislation on the colony. Though the decision only mentions the term multiculturalism in passing, the discussion is emblematic of a multicultural approach that weighs the competing interests of minority and majority groups and that attempts to mitigate harm caused by irreconcilable interests as much as possible. Both *Adler* and *Hutterian Brethren* demonstrate an attempt by the court to balance competing interests of, on the one hand, a minority group seeking a particular treatment, and, on the other hand, legislation geared towards the interests of the majority of the population.

⁶¹ *Adler v Ontario*, [1996] 3 SCR 609 [*Adler*].

⁶² *Ibid* at paras 101, 217. While McLachlin J opined that the legislation should be saved under the *Oakes* test as it had a pressing and substantial goal, L’Heureux-Dubé J found the concerned legislation invalid, as it did not meet the proportionality component of the *Oakes* test since partial funding of non-funded Jewish and independent Christian schools was also an available—and more desirable—option.

⁶³ *Hutterian Brethren*, *supra* note 55.

Though multiculturalism is often only mentioned in passing in cases heard before the Supreme Court of Canada, it is a principle fully contained in the *Charter*. Section 27 of the *Charter* specifically refers to multiculturalism. The section reads:

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

The Supreme Court tends to employ s 27 in two ways.⁶⁴ First, it allows the court to take a liberal approach in interpreting substantive rights, such as freedom of religion.⁶⁵ In *R v Big M Mart*, a store sold goods on a Sunday contrary to a statute that designated Sunday as a day of rest based on religious reasons.⁶⁶ Chief Justice Dickson opined that favouring a particular religion in a statute “is not consistent with the preservation and enhancement of the multicultural heritage of Canadians.”⁶⁷

Second, s 27 is sometimes employed when making an assessment under s 1.⁶⁸ In *Adler*, L’Heureux-Dubé J in dissent employed s 27 to support the position that “the preservation and continuation of the communities in question [. . .] do form interests fundamental to the purposes of the *Charter*.”⁶⁹ Her subsequent weighing of the interests of a minority against the impugned legislation vis-à-vis s 1 paid particular attention to the rights of “small, insular religious minority communities seeking to survive in a large secular society.”⁷⁰

One of the dangers in pursuing a *Charter* challenge to Bill 94 is that such an approach is not very effective in uncovering and reconciling the underlying tensions between minority groups and Quebec society. The Court’s application of multiculturalism vis-à-vis the *Oakes* test and s 27 is generally very problem-specific. Multiculturalism is employed to examine only the specific matter in question. However, without a thorough discussion of the values of a given society, it becomes very difficult to grasp the full scope of multiculturalism within that particular society. For example, even if a minority rights policy, studied in isolation, is supported by certain broad notions of multiculturalism, the overall trend towards increased recognition of minority rights has the potential to weaken individuals’ sense of citizenship, ultimately negatively affecting the general operation of the state.⁷¹ Enhancing the multicultural

⁶⁴ Small, *supra* note 47 at 200.

⁶⁵ *Ibid.*

⁶⁶ *R v Big M Mart*, [1985] 1 SCR 295 [*Big M Mart*].

⁶⁷ *Ibid* at para 99.

⁶⁸ Small, *supra* note 47 at 201.

⁶⁹ *Adler*, *supra* note 61 at para 85.

⁷⁰ *Ibid* at para 86.

⁷¹ Kymlicka discusses the relationship between minority rights and democratic citizenship. See Kymlicka, “Citizenship”, *supra* note 24 at 10.

heritage of Canadians must be weighed against the overall impact of multiculturalism over time on the particular state—a task well beyond the scope of any court. A successful challenge to Bill 94 may be particularly damaging to Quebec society’s sense of common citizenship because of its strongly perceived attachment to secular values.

I propose an alternative approach that pursues a serious discussion of multiculturalism and citizenship as a more relevant point of departure in the present controversy. Such an approach has the advantage of tackling the tension between Quebec identity and minority rights—like those being claimed by niqabi women—head-on. In the following analysis, I provide a conceptual framework that takes into account the historical and social contexts of Quebec society. Tackling the present controversy in this manner allows for a treatment of multiculturalism that is more in tune with greater notions of citizenship than if one were to pursue a *Charter* challenge. At the very least, this approach presents an alternative to a direct *Charter* challenge and provides the framework through which a potential *Charter* challenge can be analyzed and critiqued.

PART III: DEFINING *IDENTITY* IN QUEBEC

The debate concerning Quebec identity has been raging for several decades with no clear resolution in sight. Issues of identity are often very fluid, taking on new meanings based on the changing norms and conditions of each generation. My goal here is by no means to bring definitive closure to the lively discussion on Quebec identity. Rather, the ensuing analysis should be viewed as contributing to this discussion in a very modest manner by showing how a workable notion of Quebec identity should contain the French language as its core. Such a conception of Quebec identity does a decent job of balancing the tensions of a pluralistic society while maintaining a common underlying thread that provides all Quebecers a communal sense of identity. The niqab controversy can then be situated within this conception of Quebec identity, which will be the focus of Part IV of the paper.

A. From an “Ethnocultural” to a “Nation-Building” State

Before making the case for a francophone Quebec identity, it is necessary to clarify some of the liberal assumptions being made regarding the operation of the state. One of the shortcomings of liberal political theories of the state is the presumption of ethnocultural neutrality. Discourses on minority rights and multicultural citizenship have called into question this presumption of neutrality.⁷² Every society tries to promote what Professor Will Kymlicka calls a *societal culture*—certain cultural values that are minimalist and can be diffused widely amongst individuals, leading to a sense of

⁷² Kymlicka, “New Debate”, *supra* note 20 at 34.

collectivity. A common culture serves an important role since, in its absence, states would suffer a lack of social cohesion.⁷³ Thus, all liberal democracies promote the integration of immigrants and minorities into the societal culture.⁷⁴ This being the case, the very presence of a societal culture suggests some level of non-neutrality, as this culture will inevitably favour some individuals (i.e. those whose native culture is consistent with the societal culture) over others.

Kymlicka suggests that the “ethnocultural neutral” state be replaced with the notion of the “nation-building” state. Nation-building states are those in which one (or more) societal culture is promoted by the state authorities.⁷⁵ Kymlicka argues that at the core of these societal cultures lie a common language and common institutions. A common culture focused on language creates a thin sense of identity, even in societies with very diverse individuals. The rhetoric sometimes employed in the promotion of a societal culture can seem deeply ethnocentrically partisan—for example, the manner in which certain Quebecers promote usage of the French language in Quebec. However, the nation-building project should not be viewed as “purely a matter of cultural imperialism or ethnocultural prejudice.”⁷⁶ A societal culture can be a benefit to all individuals in the society, including immigrants, minorities, and others who may be the targets of integration into the culture.

Promoting a societal culture helps foster social mobility, social cohesion, and democratic participation.⁷⁷ First, when members of a minority-language community in a society do not learn the majority language, they risk becoming ghettoized and missing various social and economic opportunities. Training in a common language allows all individuals to access the workforce and, conversely, allows the workforce to quickly absorb such individuals and retrain them if necessary.⁷⁸ Second, a common language allows potentially diverse individuals to communicate with one another, exchange ideas, and pursue projects of mutual interest. Linguistic barriers can be a huge impediment to state planning on social welfare and in battling issues of discrimination and inequity. A common language provides a common bond, thus allowing diverse individuals to tackle issues of societal concern. Third, a common language allows linguistic minorities to more easily participate in the political sphere. Successful

⁷³ Alan Patten & Will Kymlicka, “Introduction: Language Rights and Political Theory: Context, Issues, and Approaches” in Alan Patten & Will Kymlicka, eds, *Language Rights and Political Theory* (New York: Oxford University Press, 2003) 10 at 39 [Patten, “Rights and Theory”].

⁷⁴ Kymlicka, “New Debate”, *supra* note 20 at 35.

⁷⁵ I mention the possibility of more than one societal culture to accommodate the example of Canada, which can be viewed as hosting the societal cultures of both English- and French-speaking portions of the country.

⁷⁶ Kymlicka, “New Debate”, *supra* note 20 at 36.

⁷⁷ Patten, “Rights and Theory”, *supra* note 73 at 39.

⁷⁸ *Ibid.*

democratic participation requires a common language so that individuals can have access to the relevant issues faced by different individuals. Governing a society becomes immensely difficult “[i]f citizens cannot understand each other.”⁷⁹

One important distinction to be made when speaking of the nation-building model is between *national minorities* and *immigrant and minority communities*. Nation-building can be the object of national minorities—those minority communities that have such a large population that they form their own society. Quebec society would be considered a national minority. It is a linguistic minority within Canada but is large enough to constitute a fully functioning society. National minorities are able to pursue societal cultures within their borders. In fact, the nation-building conception of the state leaves Canada in an odd (though not necessarily negative) position of *having* to promote two societal cultures within its territory—one English and one French. The imposition of an English societal culture on a national minority like Quebec, which is sufficiently large to host its own societal culture, is prone to be a failed endeavour. Such an English societal culture would no longer be viewed as a pragmatic means of achieving a “common good” for the population, but rather as a form of domination, likely inciting defensive responses.⁸⁰

Immigrant and minority communities are quite unlike national minorities in this regard, as they do not normally possess an analogous interest in nation-building. These communities, themselves covering a multitude of groupings, do not possess the requisite numbers to support separate societies with their own societal culture. Immigrants and minorities often seek integration into the greater society. For the above reasons, learning the common language is viewed as an important requirement of integration.

B. French Quebec Identity

The preceding discussion on the nation-building state introduces the possibility of the French language serving as a societal culture, providing a baseline of unity in Quebec society. Kymlicka makes the argument that a common language is necessary for a common societal culture to exist, for all the reasons argued above. However, to fully accept the argument that French is the key element of Quebec identity, language must be shown to be not only a necessary but also a sufficient condition. It must be demonstrated that the French language serves enough of a societal foundation to be considered the societal culture of Quebec.

In transitioning from the abstract concept of a nation-building state to the realities of Quebec society, attention must be given to the particular status of French within Quebec. For example, one would expect language to have a significantly

⁷⁹ *Ibid* at 40.

⁸⁰ *Ibid*.

different level of importance in French- and English-speaking Canada. To further the claim that language meets the sufficiency condition of constituting a societal culture specifically in Quebec, I will argue that the uniqueness of the French language is supported by both instrumental and intrinsic reasons. I will start by exploring four dimensions of the French language in Quebec that specifically support its unique, instrumental importance to the construction of the Quebec identity and society: the social, historical, ethnic, and geographic dimensions. Further, I will argue that, beyond instrumental reasons, the French language has an intrinsic value to Quebec society.

i. Social Dimension

A common language allows for community members of diverse backgrounds to interact with one another within the same forum. Quebec hosts almost 20 percent of the quarter of a million people who immigrate to Canada annually.⁸¹ This steady influx from every corner of the world has transformed Quebec society into a vibrant, cosmopolitan congregation of individuals of diverse identities and maternal-languages. The Quebec government in 1990 produced a report entitled *Au Québec pour bâtir ensemble: Énoncé de politique en matière d'immigration et d'intégration*, which was the first government report that defined Quebecers as all those who live in Quebec, thus including individuals of all ethnic backgrounds and overcoming the previous divide between Quebec's "cultural communities."⁸² The report speaks of a "moral contract" between the host society (Quebec) and immigrants, identifying the French language as one of the "social choices that characterizes modern Quebec."⁸³ For successful integration into Quebec society, immigrants would be expected to make the effort to learn the French language and eventually establish a feeling of commitment towards its development. The Quebec government would, in turn, be responsible for creating opportunities for linguistic integration, such as through language services, thereby fostering an overall environment of "harmonious inter-community relations."⁸⁴

The reasons that immigrants would adopt the French language can be both individual and integrative.⁸⁵ On the individual level, immigrants have an interest in acquiring "sufficient communicative ability to satisfy their own specific goals, usually economic targets."⁸⁶ Immigrants generally seek to learn French so that they can enter

⁸¹ Québec, Ministère de l'Immigration et des Communautés culturelles, *Tableaux sur l'immigration au Québec, 2005–2009* (2010) at 9. This figure is based on the five year period from 2005-2009 .

⁸² Québec, Ministère des Communautés culturelles et de l'Immigration, *Au Québec pour bâtir ensemble: Énoncé de politique en matière d'immigration et d'intégration* (1991) at 2 [Énoncé].

⁸³ *Ibid* at 16.

⁸⁴ *Ibid* at 17.

⁸⁵ Lea Oakes & Jane Warren, *Language, Citizenship and Identity in Quebec* (New York: Palgrave MacMillan, 2007) at 91 [Oakes].

⁸⁶ D E Ager, *Motivation in Language Planning and Language Policy* (Clevedon: Multilingual Matters, 2001) at 109.

the work force. The Quebec government further promotes the value of French to individuals by instituting legislation specifically making French the common language in public institutions and in the workplace. The Quebec government holds the view that on the integrative level, “learning French supports the development of [a] feeling of belonging to the Quebec community.”⁸⁷ In this way, French can become a *langue commune* and develop into a “civic heritage common to all [. . .] where an otherwise ethnically diverse population expresses its collective will to live together.”⁸⁸

ii. Historical Dimension

The French language provides a common identity inspired by a common past and maintains the history of Quebec’s development in an English-dominated continent. A group’s identity is often defined by differentiating the particular group from an “other”. Group differentiation is often the result of historical path-dependencies. Political theorists criticize treatments of language that take a presentist approach where language is examined in isolation, since doing so “entails ignoring, or at best underemphasizing, the specific socio-historical and socio-political processes by which particular national languages have come to be created and accepted as dominant and legitimate in the first place.”⁸⁹ In the case of Quebec, language carries with it a particular institutional memory that details the tense relations between French- and English-speaking Canada since before the time of Confederation.

Historically, language has been closely associated with conflict between the French- and English-speaking segments of Canada. With the British conquest of New France (as Quebec was called in the 1700s) and, subsequently, the enactment of the *Royal Proclamation of 1763*, the British sought to impose English law on the French-speaking population and to exclude the French from administrative power in the colony by requiring individuals running for public office to renounce their Roman Catholic faith.⁹⁰ The English authorities quickly realized the difficulty in controlling the French-speaking population in this manner. Political unrest in the British colonies and the threat of revolt in New France led to the passing of the *Quebec Act* in 1774, which reinstated French laws and public institutions, thereby affording the French language an informal status of recognition. Following the American War of Independence, New France saw an influx of British loyalists, which subsequently led to the *Constitution Act* of 1791, separating the English colony of Upper Canada and French-speaking colony of Lower

⁸⁷ *Énoncé*, *supra* note 82 at 17.

⁸⁸ Oakes, *supra* note 85 at 17.

⁸⁹ Stephen May, “Misconceiving Minority Language Rights: Implications for Liberal Political Theory” in Patten & Kymlicka, *supra* note 73, 123 at 126.

⁹⁰ The purpose of this regulation was to prevent French speakers, who were predominantly Roman Catholic, from being able to occupy an administrative post. See Pierre A Coulombe, “Citizenship and Official Bilingualism in Canada” in Kymlicka & Norman, *supra* note 24, 273 at 276.

Canada. Following a failed revolt for responsible government in both colonies, the British passed the *Union Act* of 1840 that amalgamated the two colonies, providing the French with under-representation in the elected assembly while declaring English the single official language. Subsequently, this single colony was divided into two parts for administrative purposes: French-populated Canada East and English-speaking Canada West.

The next major wave of revitalized interest in the French language arose in the 1950s with the rise of the “Montreal School” that helped redefine the identity of Quebec from a French-speaking minority in Canada to a French-speaking majority in the Quebec province.⁹¹ This movement also revitalized the meaning of being *Québécois*, as it came to be associated with “self-affirmation, self-determination, and national liberation.”⁹² Foreseeing the potential threat of secession, Canada subsequently passed the *Official Languages Act* in 1969, designating both English and French official Canadian languages.

From this brief historical survey, it becomes evident that the French language plays a significant role in Quebec history. Historically, language was often the fault-line that divided the various segments of Canadian society. The French language has historically faced much subjugation from the policies of Britain and, subsequently, English-speaking Canada. The French language thus carries with it an institutional history of resistance and resilience. Moreover, following the Quiet Revolution, “many French-speaking Quebecers feel that the only thing that separates them from Anglophone Canadians both inside and outside of Quebec is their language.”⁹³

iii. Ethnic Dimension

The ethnic dimension of the French language should be viewed as providing the initial direction for the development of the French language. Ethnicity can roughly be viewed as “a cultural collectivity, one that emphasizes the role of myths of descent and historical memory.”⁹⁴ The ethnic dimension of the French language closely ties into the historical dimension by providing history with a meaning in the present era. Ethnic groups often define themselves in opposition to other groups, particularly when a group perceives itself to be under the threat of external forces. The historical subjugation of the French language in Quebec (and before that, in New France) since the time of the British conquest in the 1700s has gradually shaped a sense of *Québécois* French ethnicity that views itself as the bearer of French Quebec’s history.

⁹¹ Oakes, *supra* note 85 at 27.

⁹² *Ibid.*

⁹³ *Ibid* at 12.

⁹⁴ A D Smith, *National Identity* (Hammondsworth: Penguin, 1991) at 20.

Ethnicity safeguards the French language in Quebec by providing a reason for its continued use in an English-speaking continent. The notion of ethnicity is important for Quebec because it “provides a necessary motivation for the maintenance of French, which reference to civic principles alone cannot inspire.”⁹⁵ French Quebec ethnicity is a driving force which safeguards the place of the French language in Canada and North America. French Quebec ethnicity can thus be distinguished from Quebec identity and “being a Quebecer”. As one Québécois writer notes, “speaking a language does not *a fortiori* make the speaker, if he or she comes from an ‘other’ culture, a fiduciary of the memory and representations of a particular group.”⁹⁶ An immigrant may find it difficult to immediately assimilate into being an ethnic French Quebecer, as this would entail adopting a particular historical narrative of one’s being (though such an assimilation may be possible over a longer period of time). However, immigrants can still adopt French as their quotidian language in Quebec, thus integrating into the society. Thereafter, other instrumental and intrinsic benefits allow for the language to become widely spoken and adopted as part of the identity of the individuals who speak it. Ethnicity must not be confused with ethnocentricity or ethnicism, as the latter two “drive individuals to discriminate against members of other ethnic groups, irrespective of how much the state promotes a common culture and language.”⁹⁷

iv. Geographic Dimension

The geographic location of Quebec is often used as a rallying point for those concerned with the preservation and continuance of the French language. Quebec’s geographic location played a significant role in the development of its French identity. Quebec is a French-speaking nation situated in a majority English-speaking country and continent. For this reason, many Quebecers fear the dilution and eventual erosion of their language over time. As noted above, the Montreal School of the 1950s played an important role in redefining Quebec society as a French-speaking majority in the province. The “territorialization” of Quebec French-speaking identity also set in motion the move away from pure ethnicism in Quebec identity.⁹⁸ Territorialization plays an increasingly important role in integrating immigrants into the greater society. It allows for immigrants to maintain diverse ethnic identities, while at the same time becoming participating members of Quebec society. Further, the move away from a purely ethnic conception of identity allows immigrants to eventually adopt the French language as a part of their own identity, thus facilitating its propagation among future generations.

⁹⁵ Oakes, *supra* note 85 at 104.

⁹⁶ J Létourneau, “Langue et identité au Québec aujourd’hui. Enjeux, défis, possibilité” (2002) 5:2 *Globe, Revue internationale* 79 at 80–81.

⁹⁷ Oakes, *supra* note 85 at 42. Some writers argue that the division between French-speaking Quebecers and ethnic French Quebecers is the cause of much discrimination against the former, as they are viewed as being “less” Québécois. See G Bouthilier, *L’obsession ethnique* (Montréal: Lanctôt éditeur, 1997).

⁹⁸ Oakes, *ibid* at 28.

v. Intrinsic Value of French to Québec Society

The French language is something that Quebecers can view as their own; it is intimately tied to the way people interact with one another, allowing for particular expressions of emotion, manners, norms, and ideas. The various dimensions of the French language in Quebec mentioned above are largely instrumental in nature. French provides a *means* of facilitating social interaction, creating economic opportunity, and maintaining an institutional history of Québec. However, focusing on the instrumental aspects of language shifts too much attention to the “other ends”, which language helps achieve. These other ends, while important, do not necessarily bring out the full significance of the particular language to its bearers. Language has significance to individuals beyond simply serving instrumental purposes. It has value in itself, as perceived by the people who use it and adopt it as part of their culture and their self-image. Denise Réaume, professor of law at the University of Toronto, provides a succinct summary of the value of language to a given people:

[Language] has intrinsic value as a cultural inheritance and part of an ongoing way of life. Participation in communal forms of human creativity such as language is an intrinsic part of the value of human life. The particular linguistic or cultural form it takes for a particular group of people has intrinsic value *for them because it is their creation*.⁹⁹ [emphasis added]

The intrinsic value of the French language provides the content for Québécois identity, which would otherwise simply be a vessel for the attainment of other ends. The French language can be valued and pursued independent of instrumental purposes. In this sense, language represents “a kind of cultural accomplishment itself.”¹⁰⁰ Furthermore, it is deeply intertwined with history, as it acts as a “repository of the traditions and cultural accomplishments of the community.”¹⁰¹ A newcomer who adopts the language signifies a desire to participate in this wider sense of community.

The intrinsic value of a language becomes more evident when two or more languages come into contact with one another, as in the case of French-speaking Quebec’s interactions with English-speaking Canada. Each linguistic group must then identify the characteristics that make its language of particular importance to society. Language is of particular importance to minority cultures. Quebec constantly faces the reality of being a French-speaking minority community in North America. For Quebec,

⁹⁹ Denise G Réaume, “The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?” (2001–2002) 47 McGill LJ 593 at 617 [Réaume].

¹⁰⁰ Denise G Réaume, “Official-Language Rights: Intrinsic Value and the Protection of Difference” in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 245 at 251.

¹⁰¹ *Ibid.*

French is something that the society can view as its own creation.¹⁰² It is intimately tied to the people and their interactions with one another, and thus possesses a special value that cannot be attained elsewhere. Accordingly, the intrinsic value of French is of particular importance in defining Québécois (or Quebec's) identity because it fosters a sense of community where diverse individuals can all feel that they possess something unique, independent of any other objective, making them uniquely Quebecer.

C. French as *the* Societal Culture of Quebec?

Two arguments can be put forward supporting the special, unique status of French as the core element of Quebec identity. First, certain characteristics that may be perceived as a societal culture are in fact too vague. A set of characteristics that may *prima facie* constitute a societal culture are broad principles and values that have widespread endorsement. These include principles of tolerance and acceptance, particular sentiments (such the value of the rule of law), or various widely held perceptions (like the value of multiculturalism). Such characteristics are vague to the extent that they fail to distinguish Quebec from other societies in any meaningful way or to create any sense of commonality. A societal culture may serve as a lowest common denominator; however, it retains a certain level of clarity. It does not float in abstraction, but rather applies concretely to the individuals of the relevant society. The French language plays a direct role in the way Quebec society runs and the way individuals interact with one another. Vague characteristics have low instrumental value, as the ends they attain are often equivalently vague. Moreover, they have very little intrinsic value, as they possess little content worthy of being considered a community's own creation.

Second, certain other characteristics that may be perceived as a societal culture are in actuality subordinate identities that fall short of being truly "societal"—the sufficiency condition of a societal culture. Looking at the case of French Quebec identity, the threshold for a particular societal element to amount to a societal culture is reasonably high.¹⁰³ In the case of the French language, social, historical, ethnic, geographic, and intrinsic factors support the vital role that the language serves in the formation of Quebec identity. While these factors do not necessarily amount to an exhaustive list, they do provide a sense of the level of pervasiveness that any given set of characteristics must have in a society in serving as a foundation for a societal culture. Certain characteristics of Quebec society may be quite pervasive, making them appear to be societal cultures. Most notably, secularism is sometimes mentioned in the context

¹⁰² Réaume, *supra* note 99.

¹⁰³ Kymlicka does not clearly provide a list of criteria on a societal culture; rather, he only specifies that a common culture and common institutions are at their core. See Kymlicka, "New Debate", *supra* note 20 at 36.

of Quebec identity.¹⁰⁴ The question of secularism possibly being a societal culture is particularly germane to the present controversy dealing with the niqab; therefore, the next section provides an elaboration of why secularism does not meet the qualification of a societal culture.

Secularism in Quebec

Secularism admittedly does facilitate a certain level of social interaction in society.¹⁰⁵ Immigrants to Quebec bring with them a variety of religious and spiritual beliefs. The principle of separation of church and state helps provide an understanding that the public sphere and the workplace are areligious arenas, where people of various (or no) faiths are expected to interact with one another. Secularism allows for successful democratic participation of sovereign individuals, where God is removed from the organization of a large society.¹⁰⁶ However, the role that secularism plays in the actual interaction of individuals is not particularly significant. Secularism may provide the “initial conditions” for interaction, but it does not provide any significant added value in the course of social interactions. To make the argument that secularism facilitates communication by pacifying religious adversaries, one must accept the questionable assumption that such individuals are predisposed to conflict. Furthermore, an individual’s affiliation with secular values will do little in terms of enhancing one’s skill set. Holding secular values is not equivalent to possessing an identifiable expertise or training that would help secure employment, thereby advancing one’s economic interests. In sum, secularism lacks a strong social dimension that would make it an integral part of the interactions between individuals within Quebec society.

Second, and perhaps most significantly, secularism by its very nature possesses little intrinsic value to individuals in society. Secularism is an approach that allows diversity in private religious affiliation, while promoting group interaction. It

¹⁰⁴ At the General Assembly consultation, a number of submissions mentioned secularism as a Quebec value. For example, see Les Intellectuels, *supra* note 6; and André Drouin, *Mémoire présenté à la Commission parlementaire portant sur le projet de loi 94*, online: Assemblée nationale du Québec <<http://www.assnat.qc.ca>>.

¹⁰⁵ Secularism in the North American context and *laïcité* in France exhibit a number of important differences. Whereas secularism in North America generally denotes the separation of church and state and the state’s non-preference for any religion, France’s *laïcité* denotes a form of neutrality towards religion where religious symbols are excluded from the public sphere to the greatest extent possible, being instead relegated to the private realm. The notion of secularism in Quebec falls somewhere between North American secularism and France’s *laïcité*. For a discussion on France’s *laïcité*, see David Saunders, “France on the Knife-Edge of Religion: Commemorating the Centenary of the Law of 9 December 1905 on the Separation of Church and State” in Geoffrey Brahm Levey & Tariq Modood, eds, *Secularism, Religion and Multicultural Citizenship* (New York: Cambridge University Press, 2009) 56. For a discussion on secularism generally, see S Sayyid, “Contemporary Politics of Secularism” in Geoffrey Brahm Levey & Tariq Modood, eds, *Secularism, Religion and Multicultural Citizenship* (New York: Cambridge University Press, 2009) 186 [Sayyid].

¹⁰⁶ For a discussion on the development of secularism, see Sayyid, *ibid*.

specifically fulfills an instrumental purpose of ideally allowing individuals to pursue their various religious beliefs without conflict or state favouritism. Language possesses an intrinsic value because it is something that people claim as their *own*.¹⁰⁷ Analogously, religion may be said to possess an intrinsic value, as it attaches closely to an individual's very being. However, it is difficult to make the same analogy with secularism. Secularism is not closely bound up with an individual's way of life to the extent that one would describe it as a core element of one's being. Secularism exists much more *in abstracto* as a general principle that allows individuals to pursue their own personal lives without undue interference.

Some may argue that the Quiet Revolution (or *révolution tranquille*)—a period in the 1960s marked by the rapid secularization of both government institutions in Quebec, as well as the overall Quebec psyche—was an important juncture in Quebec's history, and thus secularism carries this historical achievement.¹⁰⁸ Here, a careful distinction must be made between the intrinsic and the historical value of secularism. Admittedly, secularism could feasibly serve as a carrier of the memory of the Quiet Revolution, thus bearing historical value. However, secularism does not directly facilitate interactions through the expression of emotions, manners, norms and ideas. Secularism is not as much a cultural expression as it is an initial condition that allows for diverse cultures to express themselves within society. It is specifically these expressions that hold intrinsic value to their given bearers.

The deficiencies in the social and intrinsic value of secularism make it very difficult to fathom it as a societal culture. Without social and intrinsic dimensions present, secularism is unable to serve as a broadly constitutive characteristic that diverse individuals can share as a collective. Moreover, secularism does not possess a direct nation-building capacity, as it does not provide individuals with any particular added value, whether for communicating or seeking employment. Secularism, nonetheless, should not be viewed as entirely unimportant. While it may not be the core element of Quebec identity, it may still remain an important and widely held identity *within* Quebec.

PART IV: QUEBEC IDENTITY AND THE NIQAB

A. Reconciling Values

A crisper conception of Quebec identity aids in the analysis of how minority claims are able to fit within society. Using Quebec identity as a starting point provides a clear point of reference against which minority claims can be gauged. Such an approach

¹⁰⁷ Réaume, *supra* note 99.

¹⁰⁸ For a further discussion on the Quiet Revolution in Quebec, see Jocelyn Maclure, *Québec Identity: The Challenge of Pluralism*, translated by Peter Feldstein (Montreal: McGill-Queen's University Press, 2003).

helps protect Quebec society from the undue erosion of its sense of citizenship. If the French language is identified as the core characteristic of Quebec identity, which provides Quebec with an underlying sense of citizenship, minority claims should only be received to the extent that they promote the French language or are neutral towards it. Quebec society should be far more reluctant to accept a minority claim that is in conflict with the French language. Such claims infringe on Quebec identity and thus have the potential to weaken the overall functioning of the state, with negative consequences not only for the majority but also for the very individuals or minority group making the claim. This does not mean that any such minority claim should be completely precluded from succeeding. A case-by-case assessment must be made to unpack the idiosyncrasies of the particular claim being made. However, to succeed, such a claim would have to meet a high threshold by demonstrating its merit despite its potential erosion of common citizenship. With this in mind, we can now analyze the claim made by niqabi women to access essential government services without unveiling.

At first glance, Quebec identity, based upon the French language, does not seem to present any immediate clash with the right of a woman to wear the niqab in seeking a government service. The two sets of interests are largely exclusive of each other. Admittedly, the present controversy is the result of a niqabi woman asking for special accommodation as she was taking a French-language course. However, questions of accommodation only enter into the analysis if the primary question of whether the minority claim can be reconciled with societal culture is answered in the affirmative. Jumping immediately to the issue of accommodation wrongly shifts the focus away from the discussion of the core issue of whether the minority claim erodes the society's sense of citizenship.

All requests for special accommodations made by minority groups will have to be judged according to a standard of reasonableness. The courts provide meaningful instruction on how to go about this analysis, judging requests of reasonable accommodation against a standard of "undue hardship".¹⁰⁹ The standard of undue hardship allows service providers to deny services once an accommodation exceeds this standard.¹¹⁰ This would include the case of accommodating any otherwise acceptable minority claim that becomes too onerous. Further, special accommodation should not be viewed as a characteristic need of niqabi women, as this would serve to obfuscate the

¹⁰⁹ *Ontario Human Rights Commission v Simpsons-Sears*, [1985] 2 SCR 536 at para 23; Pierre Bosset, "Reflections on the Scope and Limits of the Duty of Reasonable Accommodation in the Field of Religion" *Commission des droits de la personne et des droits de la jeunesse* (February 2005), online: Commission des droits de la personne et des droits de la jeunesse <<http://www2.cdpdj.qc.ca>> at 8 [Bosset].

¹¹⁰ Locating the precise threshold of "undue hardship" is a point of much controversy. Factors that are considered include: the cost of the accommodation, concerns (safety or otherwise) that may arise from the accommodation, extent to which the accommodator is affected. See Bosset, *ibid.*

analysis. Just as one niqabi woman in Quebec asked for special accommodation, which was eventually denied, the second case arose soon thereafter where another niqabi was functioning well within her French class, without any need for special accommodation.¹¹¹ The question remains whether the niqab poses a threat to Quebec identity in the first place, thus making a *prima facie* case for its prohibition in light of its weakening of the societal culture.

The niqab covers the face, raising a *prima facie* concern that it may both inhibit communication in the French language and make it difficult for newcomers to receive French language instruction. The first concern could be addressed by various media of communication that do not require revealing one's face, such as the telephone and the computer.¹¹² In an increasingly electronic age, people are able to conduct a large portion of daily activities without ever needing to communicate in person. The second concern—that the niqab inhibits women from learning French—is a normative claim based on assumptions on how individuals *ordinarily* receive language instruction. As Professor Natasha Bakht indicates, “[F]or teachers who are accustomed to seeing the faces of students, it might be disorienting to reconfigure the way that one interacts with students”;¹¹³ however, the fact that niqabi women enroll in language courses, and moreover are capable of performing well in these courses, suggests that this reconfiguration should not be immediately dismissed.

Bill 94 would require niqabi women to unveil for reasons of security, identification, and communication. The first two reasons relating to safety are not only unnecessary, but also serve to reinforce a stereotype of niqabi women as being dangerous. Security and identification concerns sometimes necessitate that individuals provide information that they would not otherwise be asked to provide during daily activities. For example, security and identification reasons justify that some people may need to provide fingerprints or take a breathalyzer test in certain circumstances. Indeed, several groups supporting the rights of niqabi woman recognize that such women may still have to occasionally unveil to facilitate identification and security.¹¹⁴ This also raises questions of the bill's relevance. For example, when the RCMP released a statement declaring that niqabs would not be allowed in mug shots, they also commented that to their knowledge, the issue of niqabi women in mug shots had never previously come up.¹¹⁵ Niqabi women may seek a place within Quebec society while still being required to unveil occasionally for issues of safety. Rather than promoting safety, the bill would promote a stereotype of niqabi women being predisposed to

¹¹¹ Wilton, *supra* note 28.

¹¹² Bakht, *supra* note 14 at 21.

¹¹³ *Ibid.*

¹¹⁴ See e.g. CCAIR, *supra* note 4 at 7.

¹¹⁵ “Police won’t let women wear niqabs in mug shots”, *Canadian Press* (31 March 2010) online: CTV Calgary <<http://calgary.ctv.ca>>.

danger, since the legislation impliedly singles out women who wear a face covering as a security threat. The government on its part has not shown any demonstrable connection between wearing the niqab and threats to government institutions.

The requirement of unveiling to facilitate communication is similarly troublesome, because it serves as a barrier to niqabi women learning the French language, and it crystallizes a questionable concern about the niqab—namely, that it inhibits communication—into legislative fact. Bill 94 may prevent other niqabi women from attending French language schools in Quebec. If niqabi women are excluded from language schools for communication reasons, they will naturally have more difficulty acquiring French language skills. In turn, these women are less likely to adopt the French-speaking Quebec identity.¹¹⁶ Further, as mentioned earlier, it is certainly questionable whether viewing a person's face is necessary for communicating given the various modes of communication available that do not involve face-to-face interaction.

One of the dangers of pursuing Bill 94 in the name of secularism is that it may result in a policy that is at odds with French-speaking Quebec identity. If niqabi women are prevented from accessing language services pursuant to Bill 94, then they are less likely to develop French language skills. As a result, such women face a significant barrier to accessing Quebec's societal culture and thus are less likely to develop a sense of Quebec identity. Moreover, women who do not integrate linguistically will have more difficulty transferring linguistic skills to their children and families—particularly female children who may also choose to wear the niqab. Because integration is intergenerational, the long term consequence of pursuing legislation like Bill 94 may undermine aspects of French Quebec identity that promote the dissemination of French to as many segments of society as possible. In such a situation, where secularism promotes an end that is at odds with French Quebec identity, policies should be aligned with the latter, since choosing otherwise risks weakening a common sense of citizenship.

B. Possible Shortcomings in the Assessment of Minority Rights and Citizenship

While the approach of assessing minority rights against a common notion of citizenship addresses the fear of weakening citizenship with the onset of minority claims,¹¹⁷ certain questions remain unanswered. Two possible shortcomings are worth mentioning.

¹¹⁶ As noted earlier (see Part III (B)), minority individuals, such as niqabi women, may choose to learn the French language for several reasons, such as economic and social integration. Such individuals need not identify with nor even be aware of the reasons why French serves as the societal culture of Quebec; however, their very use of the language makes them carriers of French Quebec identity.

¹¹⁷ The term "multiculturalism fear" is sometimes employed to describe the fear of citizenship being weakened by the onset of minority claims. See Jacob T Levy, *The Multiculturalism of Fear* (Oxford: Oxford University Press, 2000).

First, a nation-building conception of the state suggests that, in order to be accepted, minority claims must be consistent with the societal culture to succeed. However, the nation-building model does not provide guidance if a minority claim is to be gauged against a widely-held identity which falls short of constituting a societal culture, namely secularism. Even though secularism, for example, may not satisfy the threshold of a societal culture, it may still be an important part of Quebec society. By the minimalist criteria of the nation-building model, a niqabi woman's claim for language training should be permitted no matter the offense to secularism, so long as the French identity is promoted. While this approach conveniently maintains the cohesiveness of the nation-building model, it seems somewhat overly simplistic. Some instances may arise where a widely-held value which is not a societal culture should trump a minority right. The nation-building model does not provide a conceptual basis for when such an occurrence may take place.

Second, it may be dangerous to consider French as a societal culture language in isolation from other aspects of society. The French language itself is intimately tied to other identities, and, indeed, different identities may overlap or be interconnected. Professors Leigh Oakes and Jane Warren comment that “[c]reating a sense of belonging through French among a greater number of new Quebecers” involves not only improving francisation services, but also “reflecting more deeply on the welcome extended to immigrants by members of the host society.”¹¹⁸ This would suggest that a more careful study of the French language as the societal culture of Quebec would entail understanding the degree to which it interacts with other identities held by majority and even minority groups. Only then would we get a more holistic sense of the role of the French language in Quebec society.

CONCLUDING REMARKS

This paper has endeavoured to provide a new manner of viewing the present debate on Bill 94 in Quebec by shifting the focus to the notion of common citizenship. By developing a clearer conception of Quebec identity, minority claims can be assessed in a manner that gauges whether they add to or detract from this identity. Replacing the notion of an ethnocultural state, where a state treats cultures or identities equally, with the concept of a nation-building state, where a state promotes a particular societal culture for the purpose of enhancing a common sense of citizenship, creates the opportunity to explore and validate the pervasive identities that characterize a particular community. In Quebec, the French language is at the core of this identity and is the defining feature of citizenship. The social, historical, ethnic, and geographic dimensions of the language, along with its intrinsic value in Quebec society, provide an explanation as to why French possesses a nation-building quality unlike any other value in society.

¹¹⁸ Oakes, *supra* note 85 at 197.

A woman's right to wear the niqab when seeking a government service—a right specifically limited by Bill 94—should be evaluated based on whether it is reconcilable with Quebec's notion of citizenship.

It is argued that the right to wear the niqab when seeking a government service is not inconsistent with the French Quebec identity. Consequently, allowing women to wear the niqab does not weaken Quebec citizenship. The argument that Bill 94 ensures security, identification and communication by requiring all individuals, including niqabi women, to unveil, is misplaced. Safety concerns do not directly touch on the discussion of the niqab and Quebec society since individuals are regularly required to give up claims to certain rights for safety reasons, whether unveiling or otherwise. More importantly, communication concerns are a reflection of a perceived deficiency on the part of niqabi women, rather than on a genuine concern, since such women are capable of learning and using the French language. These views of the niqab reflect a visceral reaction rather than a well-reasoned point of concern. The niqab may evoke strong feelings and discomfort from certain groups within Quebec society; however, it is difficult to argue that it serves to erode Quebec French identity as a whole.

Taking an approach that attempts to reconcile a minority right with a society's notion of citizenship does not imply that a *Charter* challenge must or should be discounted. A discussion that engages minority rights and citizenship can richly inform a *Charter* analysis as it provides an understanding of the potentially deep ramifications of multiculturalist policies in pluralist societies. A *Charter* analysis that overlooks or underemphasizes the tensions between minority rights and citizenship could risk an outcome that ultimately weakens a society's sense of citizenship. A multicultural analysis, as encouraged by s 27 of the *Charter*, would identify conflicting identities and reconcile them to the extent that reconciliation is possible.

Courts are regularly tasked with questions of competing societal values. However, such questions often require the active engagement of academics, intellectuals, and the public, who are better equipped to analyze trends in particular policies over time. A thorough discussion of multiculturalism may best be suited to the political sphere, where multicultural policies are developed.

The arguments in this paper should not be viewed as oversimplifying questions of multiculturalism, a topic of great complexity and nuance. However, a discussion of identity and citizenship may provide a meaningful starting point: by situating our values within the large scheme of society, we can better ensure that heated discussions on competing rights are analyzed in a cogent manner, thereby avoiding visceral reactions that often fail to account for their long-term societal consequences.