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**Determining Membership:
Providing Greater Access to Citizenship
For International Immigrants**

by

Zeina Bou-Zeid, B.A.

A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of

Master of Arts

**Department of Law
Carleton University
Ottawa, Ontario
August 20, 2001**

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Thesis Supervisors

Chair, Department of Law

**Carleton University
September 2001**

Abstract

This thesis investigates the role of citizenship in contemporary liberal democratic societies and how it should be reconceived to promote greater social inclusion for immigrants. My exploration of Michael Walzer's theory of membership and Jürgen Habermas' theory of "constitutional patriotism" seeks to ascertain what are the justifiable requirements that a liberal democratic state can apply to the admission of potential immigrants. Furthermore, supplementary agonal theory and its emphasis on contestatory relationships will be used to offer a critical examination of Walzer's and Habermas' contributions to the citizenship debate. Against this background, a comparison of Walzer's and Habermas' theories to what I suggest is Joseph Carens' agonistic position and his contextual approach to justice, will be conducted.

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Introduction

The reality of a “borderless world” seems possible with the emergence of international markets driven by multinational corporations, the free movement of capital and goods across regional economies, the development of universal legal norms governing the international community, and the rapid growth of communication technology surrounding the globe.¹ Nevertheless, while it appears that globalization is reshaping the world we inhabit, it has also produced growing economic and social inequalities between industrialized nations and those nations that cannot achieve sustained economic growth. In many underdeveloped countries, health standards and educational opportunities are decreasing, exaggerating huge discrepancies between the poor and the rich.

One of the most pressing political issues affecting the global community is the migration of individuals crossing borders from the South to the North.² Although international migration is not a new phenomenon, current migration patterns suggest that the recent large-scale migrations are problematic. First, there is growing concern over the size of the international migration taking place. The staggering numbers of immigrants moving around the world has challenged many

¹ Kenichi Ohmae. The Borderless World. New York: HarperCollins, 1991. The term “borderless world” is a reference to the title of Ohmae’s examination of the global economy. My reference to the term “borderless world” is to the decreasing international restrictions governing trade, political and legal relations.

² I use the term “North” to refer to most highly developed countries, and “South” to refer to less developed regions. However, I realize that such generalizations are problematic because they create an image of poor immigrants from the South converging upon the economically stable North even though there are many forms of immigration that occur that do not involve poor immigrants.

existing citizenship laws that govern integration.³ Second, the ethno-cultural characteristics of a large number of these immigrants tests the ability of receiving nations to integrate differing cultural and religious practices. Therefore, certain states are increasingly guarded of their physical borders and borders of membership, evidenced by increasingly stringent state control over international immigration.⁴ Receiving states are under little obligation to admit immigrants. Rather, the principle of national sovereignty governs the international state system.⁵ Juridical citizenship (possessing the formal rights and responsibilities of citizenship) has been one means by which states can control their borders and membership. But under the pressures of immigration and globalization, there is increasing disagreement over whether states are morally obligated to open their borders, at least to a portion of the millions of immigrants, refugees, and asylum seekers fleeing poverty, persecution, and violence. This thesis will examine the role of

³ There are many forms of immigration taking place including temporary (guestworkers and tourists) and permanent landed immigrants (acquiring citizenship in another nation). I am referring to the immigration of those individuals that choose to remain in the host state for a significant period of time.

⁴ Stephen Castles and Alastair Davidson. Citizenship and Migration: Globalization and the politics of belonging. (Routledge: New York, 2000.)pp.8-9.

⁵ David Held. "The Decline of the Nation-State." Ed. Stuart Hall and Martin Jacques. New Times: The Changing Face of Politics in the 1990's (New York: Verso, 1989)p. 191. I define national or state sovereignty as the state's possession of autonomy to govern and control its own territory. Membership in the international state system rests on recognition by other states of a government's sovereignty within its territory. With respect to transnational immigration, national sovereignty provides states with the authority, through an elaborate system of documentation, to restrict the movements of outsiders attempting to gain entry. For a discussion of paper documentation used by the state to control entry and exit of members and outsiders see, John Torpey. "Coming and Going: On the State Monopolization of the Legitimate Means of Movement" 16 Sociological Theory (1998)pp. 227-259.

citizenship in contemporary liberal democratic societies and how it can be reconceptualized to encourage greater social inclusion for immigrants in liberal democratic states.⁶

At the centre of the present discussion is a critical examination of the contributions made by Michael Walzer and Jürgen Habermas to debates surrounding citizenship and competing models of inclusion in a nation-state. This is not an empirical exploration of the actual immigration policy of contemporary liberal democratic states, but rather a consideration of what principles *ought* to guide a nation's theory of membership. My investigation of Walzer's and Habermas' views on admission and exclusion seeks to ascertain what requirements a liberal democratic nation can justifiably impose on potential new immigrants.⁷ Those requirements generally fall into one of two broad categories: assimilation and integration. Assimilation implies that immigrants must *become* like the other citizens by, for example, adopting the linguistic, cultural and religious practices of the majority. Integration, by contrast, implies that immigrants are integrated into the political culture understood as incorporating and providing access for individuals to the political process and institutions, yet allowed to retain their traditions and

⁶ By liberal democratic states, I refer to nations that are tolerant towards the claims of minority and immigrant groups as long as they are compatible with fundamental liberal freedoms such as freedom of speech and choice. Liberal democracies have a basic ideological commitment to the freedom and equality of all citizens, and an obligation to ensure basic civil and political rights for all individuals.

⁷ I define immigrants throughout the thesis to include individuals who voluntarily leave their homes and those who are forced to leave (either fleeing from wars, persecution or those that leave to start a better life). I include refugees, asylum seekers, guest workers, and undocumented workers or illegal migrants in my thesis as those that are marginalized by the state and often regarded as second-class citizens. In particular, illegal or undocumented workers are the class of individuals who are exposed to the greatest human rights violations (see conclusion), their illegal status makes it easier for the state to claim little responsibility for them.

language. Integration requires that immigrants respect the institutional practices of the nation, yet it also imposes certain obligations on the receiving state to encourage cultural diversity.⁸ In particular, the state should be required to actively ensure that immigrants are allowed to maintain and express their culture. In order to determine how citizenship should be reconceived to promote greater social inclusion for immigrants, a brief history of citizenship is required.

A Brief Exploration of Citizenship

Historically, two contrary interpretations of citizenship have developed. The first understanding of citizenship is the communitarian model that emerged out of the republican tradition. In this case, citizenship is fashioned after self-determining ethnic or cultural communities. Citizens are integrated into the political community like parts of a whole in such a way that they can develop their personal and social identity within the context of a community's shared traditions and recognized political institutions. Thus, the body of citizens is similar to an extended family or a group of individuals with common origins.⁹ This first articulation of "citizen" was based in the ancient Athenian "political project" and was classically formulated by Aristotle. Those that were entitled to Athenian citizenship during this period (adult male property owners) were entitled to influence political matters which affected the community.

⁸ Castles, Supra 4 at 60. See Kymlicka (1995) pages 176-178 and Parekh (1995) for more on the dangers of assimilation.

⁹ For a more detailed exploration of the history of the Athenian model of citizenship, see Michael Walzer. "Citizenship" Eds. T. Ball, J. Farr, & R. L. Hanson. Political Innovation and Conceptual Change. (Cambridge: Cambridge University Press, 1989)pp. 211-219. and Castles, Supra note 4 at 28-31.

Citizenship implied both an active and passive status. Active citizenship suggested that citizens could contribute to the community by participating in the political processes and the administration of the city (holding political office). It also required that individuals were obligated to obey the laws of the city. The citizen also possessed a passive status in which he was required to place a greater emphasis on the public good over the private interest.¹⁰ Citizens worked to regulate the collective and common interests of the community, and not to pursue their personal concerns. Thus, in ancient Athens citizenship was indicative of an active status where the participation of citizens was encouraged. Yet, the civic form of citizenship, with its emphasis on the citizens' commitment to one another, established the dominance of a small majority (women, slaves, children, and aliens were excluded from the status of citizen). The subsequent understanding of citizenship protected the rights and responsibilities of all citizens through the law.¹¹

The second interpretation of citizenship was established in ancient Rome. The Roman Empire expanded by granting citizenship to conquered and incorporated people of diverse cultural origins. According to the Roman tradition, citizenship began to reflect a legal status which granted rights and duties to all citizens. Given the diverse traditions and cultures that were integrated under Roman influence, citizenship was no longer based on common origins, but rather integration into the legal community.¹² The advent of liberalism centuries later would

¹⁰ Michael Ignatieff. "The Myth of Citizenship" Ed. Ronald Beiner Theorizing Citizenship. (Albany: State University of New York Press, 1995)pp. 55-57.

¹¹ Walzer, Supra note 9 at 216.

¹² Castles, Supra note 4 at 31-33.

expand upon this Roman concept of citizenship, giving the citizen an individualistic and instrumentalist character. The political community was only a framework for incorporating individuals into the collective. According to Habermas, the liberal version of citizenship ensured that government performance took into account the preferences of the citizens. The citizen is a passive recipient of organizational services and benefits from the state, and in exchange citizens make specific (although mostly passive) contributions to the state, such as voting and paying taxes.¹³

Today, citizenship reflects the tension between these two historical understandings. Walzer may be considered a representative of the republican model of citizenship which assumes that each person can adopt the perspective of the many.¹⁴ Habermas has attempted to unite the universalist aspirations of liberalism and its emphasis on voluntary membership, with the republican idea of a political community. This thesis offers a critical examination of Walzer's and Habermas' interpretations of citizenship and an assessment of their formulations' relative capacity to offer a model which would grant immigrants greater social inclusion.

¹³ Jürgen Habermas. "Citizenship and National Identity" Appendix 2 Between Facts and Norms. (Cambridge, Mass: MIT Press, 1996)p. 498

¹⁴ Michael Walzer. "In Response: Support for Modesty and the Nation-State." 11 The Responsive Community. (2001)p.8. Walzer has denied that he is a "civic republican" claiming that he defends the ideal of plurality in modern democratic states. However many political theorists have characterized him as such since his theory of justice indicates that a nation-state can determine its underlying social commonality.

Two-Part Admission Process

In liberal democratic nations, citizenship is the basic foundation which unites a community. Ideally, access to citizenship should be open to all individuals that reside within a nation's territory, yet, as I will discuss, citizenship has exclusionary consequences for immigrants. Achieving formal legal status as a citizen (or juridical citizenship) is integral for immigrants, as it implies that they have become members of the community and have gained all the rights and responsibilities which accompany all legal members. Yet, gaining access to citizenship is a difficult process governed by certain requirements specific to each nation-state. Despite these empirical differences, on a conceptual level all nations basically share a two-part admission process controlling access to legal citizenship for immigrants. Through an examination of this process a clearer understanding of the limitations of Walzer's and Habermas' theories of citizenship will be achieved.

While states are not necessarily required to admit immigrants, most liberal democratic states do. Yet in order to ensure that the "right" kind of individual is granted access to citizenship these states have constructed a complex two-part admission process. This process provides the nations protection from "undesirable" immigrants. While the category of "undesirable" immigrants might extend to such criteria as the possession of a criminal history, I am concerned here with the more questionable practice of attaching the label "undesirable" to immigrants who cannot be sufficiently assimilated into the community or nation. It is this two-part admission process, I will argue, that has problematic consequences for the social inclusion of immigrants.

Thus, a theory of citizenship should improve the two-part admission process which immigrants must traverse in order to create greater social equality for new members.¹⁵

The first part of the process, and therefore, the first difficulty that immigrants face when attempting to migrate to a nation, is the possibility that a nation's borders may not be open to them. This thesis is not an argument for open borders in the sense that nations should have a moral obligation to take in as many immigrants as they can, but rather that receiving states should not deny admission to immigrants of differing cultural, religious, and ethnic backgrounds from the majority culture of the nation. A majority culture or "societal culture," to use Will Kymlicka's term, represents the dominant cultural traditions of a nation embodied in its values, language, and common institutions. The conception of open borders advocated here calls for the modification of admission standards with the view to a more ready acceptance of differing cultures and traditions in liberal democratic states. From my perspective, there is a need to ensure that a nation does not require that immigrants assimilate to its prevailing identity at the expense of their cultures and traditions.¹⁶ Therefore, open borders in this thesis implies that those immigrants seeking admission to liberal democratic states will not be selected based on the characteristics that they share with the majority culture.

The second part of the admission process comes into effect after the immigrant has arrived and settled in the new nation and is awaiting the acquisition of formal legal status as a

¹⁵ My reference throughout the introduction to new or potential members refers to those immigrants that must pass through the two-part admission process in order to become juridical citizens.

¹⁶ Will Kymlicka. Multicultural Citizenship: A liberal Theory of Minority Rights. (Oxford University Press, 1995)pp. 76-77.

citizen. Acquiring the status of “citizen” is a process governed by naturalization procedures. While all countries entertain some set of procedures aimed at naturalization of aliens, they can differ considerably from case to case. This discretionary act performed by the state on behalf of the political community usually entails a period of legal residence that is required before an individual can acquire full citizenship. Most importantly, each nation has a set of criteria which immigrants must meet before they can become naturalized, criteria whose fulfilment are taken to demonstrate their capacity to be either assimilated or integrated into the community. Although some of the requirements are more subjective than others, most states require proficiency in the national language, that individuals be of good character, be financially stable, and in some cases, renounce their former nationality.¹⁷

Although the naturalization process differs in each nation, I will suggest that while awaiting acquisition of citizenship immigrants are unable to join the conversation of the nation about what are acceptable limits on cultural and religious expression. I would argue that potential new members are concerned that some of their traditional practices might not be accommodated or heard in public debates. Without some form of political influence, immigrants are not in a position to ensure the continuation of their culture. At the very least they should be provided with the opportunity to be heard.

This two-part admission process is part of the state’s protective barrier against claims for inclusion from “undesirable” immigrants. It is the method through which a nation can assure itself that the *right* kind of immigrant is granted juridical citizenship. Thus, my argument that the two-part admission process must be more inclusive demands two requirements from the state.

¹⁷ Castles, Supra note 4 at 86.

First, open borders or admission requires the protection of the immigrant culture from complete assimilation to the majority culture. Second, the acquisition of citizenship requires some form or measures for immigrants to be able, at the very least, to contest the state's view of their traditional practices. My exploration of Walzer's and Habermas's theories seeks to determine whether their formulations establish conditions which would see immigrants granted the full rights associated with citizenship, or whether either or both endorse accepting the "right kind of immigrant" either explicitly or implicitly. Since my working assumption is that immigrants should be allowed to preserve their cultures in their new home, a few words of justification are necessary.

Rights of Immigrants

As I have suggested, the two-part admission process is the means through which nation-states secure their borders and restrict the entry of immigrants that are deemed incompatible with the community. It is my contention that encouraging tighter restrictions on border control can be justified under certain circumstances (e.g. keeping out dangerous criminals), however, utilizing the closing of borders to ensure that only immigrants who can assimilate to the majority will be allowed juridical citizenship is essentially unjust. As Bhikhu Parekh contends, "immigrants leave their country, not their culture."¹⁸ Thus, it is unjust to expect immigrants to assimilate to the majority culture and to deny them the ability to practice their traditions in their new home. From Will Kymlicka's perspective, multiculturalism or cultural pluralism have become a mainstay in

¹⁸ Bhikhu Parekh. "Cultural Pluralism and the Limits of Diversity" 20 Alternatives (1995) p. 432.

liberal democratic nation-states.¹⁹ Political theorists have recently begun to recognize that assimilation, understood as encouraging or requiring immigrants to become indiscernible from other citizens by following the majority cultural practices, is a harm and a form of injustice to immigrants. As Charles Taylor also notes, ensuring cultural recognition in the public sphere is necessary in order for individuals to secure and reproduce their identity.²⁰

Furthermore, as Parekh indicates, nations have often created a distinction between immigrants and citizens. However, as he notes, this imposed dichotomy is false because it overlooks the reality that immigrants are often future citizens. Although they may have just arrived, their goal is typically to settle in the nation as productive citizens. As Parekh argues, immigrants should be conceived as “probationary citizens” with many of the same rights as full fledged legal members. Thus immigrants would be allowed to make many of the same claims as other citizens. As he argues, it is precisely because immigrants are future citizens (in most cases) that they are entitled to demand many of the same rights as other citizens.²¹ According to Parekh:

They [immigrants] can hardly be said to be treated as equal citizens if the public life and symbols of the state take no account of their presence; if the dominant definition of the national identity finds no place for them; if the educational system makes no provision for their languages and cultures; if the legal system makes no allowances for their cultural differences; or if they are required to abandon their way of life as a price of full citizenship.²²

¹⁹ Kymlicka, Supra note 16 at 10-11.

²⁰ Charles Taylor. “The Politics Of Recognition.” Ed. A. Gutmann Multiculturalism and the Politics of Recognition. (Princeton: Princeton University Press 1994). See Taylor for an examination of the reasons for cultural recognition.

²¹ Parekh, Supra note 18 at 433-434.

²² Ibid. at 435.

As Parekh also notes, states have tended to treat immigrants in terms of what can they do for the host nation and have overlooked the obligations they have to immigrants. Most importantly, states have an obligation to ensure that their policies do not put pressure on the immigrant to assimilate to the majority culture thereby encouraging them to abandon their way of life.²³ Therefore, in order for the first part of the admission process (open borders) to become more inclusive for immigrants, it must protect their culture from assimilation. Those immigrants migrating to liberal democratic nations should be guaranteed that their traditions and cultures will not have to be assimilated to the majority.

If greater inclusiveness and a greater commitment to multicultural plurality are to be realized, then the second part of the admission process (acquisition of citizenship) should demand that immigrants be able, on some level, to contest the community interpretation of their cultures and traditions. New immigrants should be guaranteed a “public voice” or influence in their new homes, even before they become juridical citizens. In some cases, while immigrants are awaiting naturalization they are assenting to the prevailing hegemonic view of the nation without the freedom that juridical citizens possess to contest the practices of that nation. Not only are these immigrants often unable to be heard in the national community, but more importantly this is in direct contrast to the principles of democracy where every individual who is subject to political authority should be afforded the opportunity to participate in the community. Attempting to include these potential new members without their free agreement to the principles of the nation is unjust.

²³ Ibid. at 434-435.

This is not an argument for immigrants to be granted precisely the same rights as citizens, rather that immigrants should be (at least) given some opportunity to contest the standards of the community. Equality cannot come from enhancing the distinction between citizen and outsider, rather there should be an attempt to remove or limit this divide in order to enable the participation of most immigrants living within the physical territory of the community.

In many cases the immigrant's way of life differs from that of the majority of individuals in liberal democratic states, and in some cases it offends the standards of the community. One such example is the practice of the female genital mutilation. However, even if the practice meets with disapproval from the community, the immigrant's practice at least warrants an attempt to be defended. As Parekh states "the society has a duty to engage in a dialogue with the minority about its disputed practices."²⁴ In many cases, the demand of the immigrant group is, as Kymlicka states, a request " . . . for exemptions from laws and regulations that disadvantage them. . . For example, in Canada, in order for Sikh men to wear the turban, they have sought exemption from motorcycle helmet laws and from the official dress-code of police forces."²⁵ Furthermore, the onus should not be solely on the immigrant to convince the community that the practice can be justified; there is also a burden on the community to demonstrate why that practice violates the community's values. The argument that immigrants awaiting acquisition of citizenship should have some form of political influence or public voice amounts to ensuring that they have a means to contest possible restrictions on their traditional practices. It ensures that their cultural differences are recognized and that they have the opportunity to engage in a

²⁴ Ibid at 438.

²⁵ Kymlicka, Supra note 16 at 31.

dialogue with the majority. A nation's obligation to equal treatment within its territory does not stop simply because individuals are not (yet) legal members of the community.

Outline of Thesis

The first chapter of the thesis critically examines the theories of citizenship developed by Michael Walzer and Jürgen Habermas which have implications for our membership in the political community. I maintain that Walzer's contention that a community that has the right to preserve its particular way of life, limits the demands that may be made by potential new members. In particular, Walzer's interpretation of the community and determining shared understandings encourages opening borders to certain immigrants that meet his qualifications. Ultimately, I judge Walzer's interpretation of the political community as assimilationist and too restrictive to potential immigrants who might want to enter yet preserve their distinct way of life. Conversely, I suggest that Habermas' theory encourages greater social inclusion for all individuals residing in a nation. Habermas's theory of "constitutional patriotism" reduces admission requirements, thereby requiring that immigrants need only integrate (not assimilate) into the community. Nevertheless, his suggestion that immigrants should "assent" to the principles of the constitution raises the question as to whether immigrants awaiting to acquire citizenship (the second part of the admission process), can have influence in the public sphere. Based on the problems that I discuss in the work of Walzer and Habermas, the next chapter is an examination of agonal theory as a necessary corrective.

Chapter Two offers a critical exploration of Walzer's and Habermas' contributions to these debates cast against the backdrop of agonal theory. Rather than a fictional version of the

political community that is based on a stable identity historically understood, agonism requires that in order to encourage a plurality of traditions and cultures, relationships among individuals and the rules governing the political community must always be open to question, negotiation, and contestation. Using the work of agonal theorists William Connolly and Bonnie Honig, I contend that Walzer's theory and its reliance on the common identity of the community, thus reinforcing the distinction between citizen and outsider, must be rejected. Although Habermas seeks to ensure the recognition of all traditions (compatible with democracy) in the political community, his reliance on historically embedded constitutional principles is problematic for potential new members. I will utilize the work of James Tully to demonstrate the valuable contribution to these debates that might be had through the supplementation of Habermas' approach with insights drawn from agonal theory.

In the third chapter, I explore the work of one of Canada's leading political theorists, Joseph Carens. I contend that Carens' body of work can be divided into two separate arguments. His early article *Aliens and Citizens: The Case For Open Borders* (1987), which argues that borders should generally be open, is consistent with a supplementary agonal approach advocated in Chapter Two. However, I argue that his more recent approach initiates a shift from the argument for freedom of movement to significant restrictions on immigration. Thus, Carens' "justice as evenhandedness" approach, while sensitive to the historical context of the nation, like Walzer's theory of membership, places too great an emphasis on preserving the national identity of the community. Finally, I revisit Habermas' theory of constitutional patriotism and Tully's agonal approach, and suggest that a theory of citizenship should follow Habermas' project supplemented with Tully's agonal approach.

To some extent, all liberal democratic nation-states limit the rights and the political voice of immigrants. Therefore, this thesis is an exploration of the restrictions that a state can legitimately place on new members. As potential citizens, immigrants are treated unfairly when they are excluded from the political process. To limit the conditions for entry and then to allow individuals to reside, but not *join*, is unjust.

Chapter One

Theoretical Debates: Determining Membership

1. Introduction

The increasing international mobility of people raises significant challenges for the absorption of international immigrants in liberal democratic nation-states. The large-scale immigration that is currently taking place has prompted a renewed dialogue on the definition of citizenship, and has given rise to deep divisions between supporters of extending citizenship to all inhabitants of a territory, and those that seek to limit access to citizenship.²⁶ This chapter will examine the contributions Michael Walzer and Jürgen Habermas have made to contemporary debates on these issues. The communitarian understanding of citizenship advanced by Walzer denotes a “radically particularist” understanding of the community. That is, Walzer determines that a world of common meanings can be found within the borders of a territorial state. Conversely, Habermas’ project of uniting universal liberalism with the republican model of the political community, determines that many distinct traditions can be incorporated into one common political culture.

In his widely read book *Spheres Of Justice* (1983), Walzer develops a theory of justice which advocates the supremacy of the political community described as a world of common meanings where language, culture, history, and national character can be derived from the shared

²⁶ I use the terms citizenship and membership interchangeably to refer to the status of legal or juridical members or citizens. These members or citizens possess all the rights and responsibilities embodied in citizenship.

understandings of members.²⁷ Walzer envisions a world of divided and relatively insulated political communities that are autonomous and represent the sovereign will of the citizens of a territory. Accordingly, each political community expresses the shared understandings of its respective members, and can place limits on the moral demands made by outsiders.²⁸ Walzer's theory of the political community may be viewed as representative of a liberal and pluralist version of communitarianism.²⁹

I will suggest that Walzer's emphasis on the ability of legal members or juridical citizens of the community to determine membership, and his consistent support of the concept of state sovereignty, places immigrants and potential new members at a great disadvantage.³⁰ As I mentioned in the introduction, the two-part admission process that immigrants must pass through is the determining factor for social inclusion. In this chapter, I will explore whether Walzer's theory of membership creates social equality for immigrants.

²⁷ Michael Walzer. Spheres of Justice. (New York, Basic Books: 1983.)p.5.

²⁸ Marc Gibney Strangers or Friends: Principles for a New Alien Admission Policy (New York: Greenwood press, 1986) p. 5. By outsiders, I mean immigrants that are not legal members of the community.

²⁹ For communitarians the community is unified by shared experience, history, and identity and it is rooted in the experience of *mutuality* (which arises from the complex interaction that individuals in the community create). Emiliios Christodoulidis, Communitarianism and Citizenship (Vermont: Ashgate, 1998)p.19. Communitarianism can be generally divided into three categories. First, the liberal communitarian perspective found in Walzer's work emphasizes the community as a social entity. Second, conservative communitarians such as Alasdair MacIntyre contend that the community is defined by traditions and moral virtues. Finally, neo-republicans such as Hannah Arendt emphasize the political dimensions of the community. p. 38.

³⁰ Walzer, Supra note 27 at 60-61. According to Walzer all immigrants are "potential or future" new citizens because he argues that once an immigrant has been admitted, a democratic nation is under the obligation to grant them the right to apply for citizenship.

I will argue that the openness of liberal democratic borders to immigrants that do not share the same cultural beliefs as the majority of the community is at risk in Walzer's formulation. His emphasis on the distinct identity of the community implies that potential immigrants who do not share the majority culture (the dominant understandings of the community) will not be selected by the community for admittance. According to Walzer, the community composed of juridical citizens has the right to control the openness of the nation's borders. Potential immigrants are selected by the community based on characteristics that are already significantly represented in the majority culture. Furthermore, in order to locate the community's shared understandings, Walzer utilizes a subjective interpretive methodology. Thus, my objection to the first step of the admission process (open borders) in Walzer's theory of membership is twofold.

First, while it is clear that Walzer acknowledges a variety of problems attending the selection of immigrants by the political community, and also concedes certain limitations on the ability of the community to determine membership, his consistent advocacy of the right of *only full* members (legal citizens) to determine "who gets in" encourages choosing immigrants that are similar to the existing members of the community. Second, Walzer's attempts at determining "shared understandings" is based on an interpretive methodology which cannot account for various conflicting and contradictory understandings located in the community. Although I do agree with Walzer that a temporary agreement must be reached on the political institutions that represent the community and the language of public communication in order for society to function, I contend that his formulation of the self-determining community has the capacity to become a theory of citizenship that encourages assimilation rather than integration.

The second protective barrier of the admission process is the acquisition of legal/full citizenship (naturalization). For Walzer, once immigrants are granted admittance to the nation in most cases they should be given the right to apply for citizenship. Thus, all immigrants that have passed the first part of the admission test (open borders) are considered potential or future citizens and should be granted a public voice. Therefore, for Walzer, the state should govern admission more restrictively than naturalization. It is my contention that Walzer's approach exhibits the positive aspects of encouraging immigrants to have a public voice in the community once they have been granted entry, yet it places significant control over the selection of the characteristics of immigrants seeking admission.

Unlike Walzer's protection of the distinctive community, Habermas' theory of "constitutional patriotism" advocates equality for all citizens of the community by integrating them into a political culture which values multiculturalism.³¹ By political culture, Habermas refers to the collective self-understanding of the relationships that a community of citizens shares with one another. The political culture is reflected in political institutions and daily practices. For Habermas, immigrants need only be integrated into the political culture, they need not abandon their diverse traditions. Walzer's theory of membership is based on a communitarian model that requires that the characteristics of potential new citizens be compatible with those of the majority.

³¹ Jürgen Habermas. The Inclusion of the Other: Studies in Political Theory, Eds. Ciaran Cronin and Pablo De Greiff. (Cambridge: MIT Press, 1998.) p. 146.

Habermas, by contrast, argues that all that is required of potential new immigrants is integration into the political culture.³²

In Habermas's theory of constitutional patriotism, the first requirement of the admission process (open borders) is more inclusive for immigrants with diverse traditions and cultures. Rather than ensure that all immigrants admitted share the same values and understandings as they are encouraged to in Walzer's theory, in Habermas' theory citizens and immigrants do not have to abandon their traditions and cultures. While Walzer presents a theory which advocates the supremacy of legal members sharing a unified cultural or national identity, Habermas encourages open borders by advocating that it should be easier for immigrants to meet the requirements of entry to a community by not encouraging assimilation of their distinct traditions. Habermas argues that all ethnic, religious, and cultural traditions that are compatible with democratic principles must be allowed to thrive in their new home.

However, it is in the second part of the admission process (naturalization) where Habermas' theory of constitutional patriotism might compromise social equality for immigrants. Constitutional patriotism attempts to reattach individual loyalty to a nation-state based not on ethnic or cultural ties, but rather on a common political culture. Individuals must be united by the principles that regulate their political culture. The shared political culture is expressed within the principles of the constitution. Habermas recognizes that constitutions which embody a nation's identity and political culture are historical projects which have evolved over centuries. However,

³² For Habermas, potential or new members refers to immigrants after they have been admitted but before they have become naturalized. Constitutional patriotism does not guarantee immigrants a public voice until they have been naturalized. While Walzer does not guarantee that immigrants should have a voice in the community once they have been admitted, he does argue that as future citizens they should have some sphere of influence.

it is these historically embedded constitutional principles that I suggest may present significant difficulties for immigrants. Since, according to Habermas, immigrants are not juridical citizens and must *assent* to the principles of the constitution, I argue that their opportunity to influence the scope of interpretation of constitutional principles is threatened. If immigrants cannot challenge and grant their consent to these principles until they become juridical citizens then they are residing in and contributing to a community with which they have insufficient ability to engage in a dialogue.

2. Walzer's Admission Policy: Open Borders

As I mentioned, the first part of the admission test (openness of borders) is problematic in Walzer's formulation because of the limits it places on the range of acceptable characteristics immigrants must display. Both Walzer's identification of the political community as selecting the criteria for immigration, and his methodology of locating shared understandings, promote the domination of one culture at the expense of minorities and potential immigrants. Before I address these two concerns, I will describe how citizens have come to determine the distribution of membership in Walzer's theory.

The central contention of Walzer's theory of justice is that a given community is essentially a distributive community. While there is a multiplicity of goods and various methods and agencies that parcel out these goods, the members of a political community determine how these goods are to be shared. How these goods are justly dispensed depends on the community's understanding and interpretation of the social good. Thus, for Walzer "there are standards

(roughly knowable even when they are controversial) for every social good.”³³ The task of the philosopher is to determine the shared value that governs a social good’s distribution as it is understood by the political community. Recently, Walzer has updated his earlier position by arguing that an understanding of how social meanings are constituted and how they come to be recognized by members of the community is also of importance. Thus, for Walzer, social meanings are not necessarily obvious and fixed. Social meanings change over time as a result of the changing needs of the community and they are continually open to dispute.³⁴ However, Walzer also contends that while individuals may disagree on the interpretation of a social meaning, they still “are arguing within a world they share, where the range of social meanings is fairly narrow.”³⁵

According to Walzer’s theory of justice, the distribution of social goods must take place within the political community where members determine the assignment of such goods. For Walzer, the primary social good is membership in the community since it is the basis on which all other distributive choices are allocated. As citizens of a country, Walzer contends that:

we who are already members do the choosing, in accordance with our own understanding of what membership means in our community and what sort of community we want to have. Membership as a social good is constituted by our understanding; its value is fixed by our work and conversation.³⁶

³³ Walzer, Supra note 27 at 7. The social goods which Walzer discusses are not merely consumer goods with a monetary value, but are also the “objects of cultural assessment” for the community to distribute.

³⁴ Michael Walzer. Thick and Thin: Moral Argument At Home And Abroad. (London: University of Notre Dame Press, 1994.)p. 28.

³⁵ Ibid at 28.

³⁶ Walzer, Supra note 27 at 32.

For Walzer, members of a community have involuntarily entered into a social contract with other members by virtue of being citizens within a particular nation-state. Walzer has described the social contract as:

an agreement to redistribute the resources of the members in accordance with some shared understanding of their needs, subject to ongoing political determination in detail. The contract is a moral bond . . . creating a union that transcends all differences of interest, drawing its strength from history, culture, religion, language . . . arguments about communal provision are, at the deepest level, interpretations of that union.³⁷

All citizens of a community are morally bound to each other within a particular territory and therefore are required to distribute social goods in accordance with the members' shared understandings.

In Walzer's theory of membership, the political community should not evade all its responsibility in accepting displaced and impoverished immigrants and refugees, however, it may, according to Walzer's admission policy, place conditions on the character of potential new members based on the principle of state sovereignty. A government of a state is just where it derives its political sovereignty from its members' desire to protect its "communal life." Thus, a particular community is created thereby reinforcing the need for protection from foreign interference (of which the migration of foreigners is one form).³⁸ Walzer's admission policy states that:

admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be communities of

³⁷ Ibid at 82-83.

³⁸ Gerald Doppelt. "Walzer's Theory of Morality in International Relations" 8 Philosophy and Public Affairs (1978) p.9.

character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of common life.³⁹

Walzer advocates the value of “distinctiveness” for a political community, thus implying that the relative closure of borders may be a political decision made by the community in order to preserve its valuable culture. Accordingly, the sovereign state has the authority, and may be required, to “restrain the flow of immigrants.”⁴⁰ For Walzer, inhibiting entry of immigrants or potential new members is compatible with preserving the values of democracy that unite a community of individuals. According to him, “the state is constituted by the union of people and government, and it is the state that claims against all other states the twin rights of territorial integrity and political sovereignty.”⁴¹ For Walzer, in order for a state to maintain its communal life it must derive its sovereignty from the consent of its members who collectively make a common life through shared experiences. Thus an “independent community” is created with the right to be free from foreign interference.⁴² Essentially, Walzer’s theory of the community gains its legitimacy from the “nationality principle” which guarantees the right of national self-determination to every sovereign state.⁴³

In Walzer’s theory of membership the political community is responsible to ensure that its distinct culture is preserved. In order to protect its understanding of itself, it must have exclusive

³⁹ Walzer, Supra note 27 at 61-62. [emphasis added].

⁴⁰ Ibid at 39

⁴¹ Michael Walzer. “The Moral Standing of States,” 9 Philosophy and Public Affairs (1980)p. 212.

⁴² Michael Walzer. On Toleration. (Yale University Press, 1997) p. 9.

⁴³ Walzer, Supra note 27 at 42-43.

control over admission and exclusion to ensure that potential immigrants will not significantly alter the national identity. Nevertheless, it would be unfair to characterise Walzer's position as endorsing a completely closed community.

2.1 Choosing Characteristics

For Walzer, immigration is, first, subject to the collective will of the community. As Walzer has clearly stated, the just distribution of social goods can only be determined by legal members of the community and the opinions of non-members are not required. For Walzer, the state is comparable to a club with sovereign power over its selection process and it establishes general qualifications for admission and exclusion.⁴⁴ The most important factor affecting how the community determines its admission policy is the character of the political community.⁴⁵ As Walzer states, members of a community have a certain affinity with or responsibility to strangers or non-members. Thus Walzer's theory is not completely closed, however, *it does prioritize who gets in*.

Walzer describes three forms of affinity which citizens may share with non-members and which are acceptable standards for justifying who may be granted entry. First, affinity between family members or permitting family reunification. This is otherwise known as the "kinship principle" and functions by granting priority of immigration to family members of juridical citizens. Second, ethnic affinity entails an identification between a national of one country based

⁴⁴ Walzer, Supra note 27 at 40.

⁴⁵ Ibid at 35. Other factors which govern admission policy include economic and political conditions, however for Walzer, they are not as important as the character of the community.

on ethnic similarity with nationals of the same country even though they do not reside within the same territory. Finally, although individuals may not reside within the same nation-state they may still possess a certain ideological affinity toward each other.⁴⁶

Thus, it appears that in Walzer's theory of membership there are criteria for selecting the characteristics of the immigrants that may be granted entry. For Walzer, nations that appear to be historically culturally unified have the right to close their borders to other cultures that might transform the character of the community. Thus the state is *justified in choosing its characteristics* (family, ethnic, and ideological affinity) for admittance. Walzer argues:

. . . the Danes, say, or the French, or citizens of any other long-established, territorially – based majority nation, to allow themselves to become a minority in their own country. . . In nation-states like Denmark, the cultural nation and the political nation are closely connected, and it seems to me that the first of these has a right to (try to) sustain the connection when and if it is actually threatened. It is this kind of limiting case that establishes the right of closure.⁴⁷

For Walzer, nations such as Denmark and France are countries which appear to be culturally unified, thus selecting immigrants based on family, ethnic, and ideological affinity is justified in order to protect and preserve the unified identity of the nation.

However, I contend that these characteristics are fairly narrow and, more importantly, permit entry of those immigrants that most closely resemble the character of the juridical citizens of the community. For a liberal democratic state to select immigrants based on their compatibility with the community, thereby excluding differing cultures and traditions is unjust. Most liberal democratic states which admit immigrants acknowledge that family reunification is a just practice

⁴⁶ Ibid at 35-42.

⁴⁷ Walzer, Supra note 14 at 10. [emphasis added].

and thus permitting family members to reside within the same territory is widely regarded as an acceptable choice for selecting immigrants. Nevertheless, the argument made by Walzer that potential immigrants may be selected on the basis of their ethnic and ideological affinity with members of the political community, suggests that only those immigrants who can be easily assimilated to the majority culture will be admitted.

Thus, while Walzer does not advocate a closed community, it is an extremely *selective* community. For liberal democratic nations to be picking the qualifications for admission may be a just practice, yet choosing members based on how well they can relate to the ethnic identity and ideological beliefs of a nation itself, is unjust. Essentially, by justifying selection on the basis of ethnic identity Walzer's theory is a return to the view of citizenship based on a group of individuals united through common origins.⁴⁸ The practice of allowing immigrants admission to a nation because they share a similarity with the nation is not itself exclusionary, but rather it is the consequences of the exclusion of other immigrants with differing ethnic origins and ideological beliefs that is unjust. Myron Weiner offers a useful example: preferential policies such as encouraging Jews to return to Israel are not objectionable immigration policies. Yet they have exclusionary consequences for individuals of differing ethnicities, since they give preference to the admission of one ethnic group over another. Although an argument can be made that ensuring Jews return to their homeland is necessary in order to ensure the survival of the Israeli state, it does not justify the state promoting the interests of one ethnic group over another in a multi-

⁴⁸ Walzer, Supra note 9 at 214.

ethnic state.⁴⁹ Therefore, the practice of selecting immigrants based on the characteristics they share with juridical citizens is not itself unjust, but rather it has exclusionary consequences for immigrants of differing ethnic backgrounds and ideological beliefs. Walzer's theory of membership is exclusionary to those immigrants that do not share the cultural identity of the community.

Although, the right of the community to determine its membership is guaranteed, it is not absolute. Walzer alludes to the *possibility* of an external principle that might limit the ability of the self-determining community to govern admission and exclusion. He states "the principle of mutual aid can *only modify* and not transform admissions policies rooted in a particular community's understanding of itself."⁵⁰ For Walzer, the right of the community to determine its membership is integral, nonetheless a liberal democratic state may be required to recognize the principle of mutual aid. As members of the global community, individuals have moral obligations to non-members based on the principle of mutual aid. Walzer argues that the principle of mutual aid requires hospitality, assistance, and good will to non-members regardless of their political, cultural, and religious persuasion.⁵¹ Hence, while there are (possible) limitations on the influence of the political community, these cannot alter the community's understanding of itself. Walzer indicates that the principle of mutual aid is vague and its force on the ability of the

⁴⁹ Myron Weiner, "Ethics, National Sovereignty and the Control of Immigration" 30 International Migration Review. (1996) p. 178.

⁵⁰ Walzer, Supra note 27 at 51.

⁵¹ By non-members and strangers, I mean those that are outside of the physical territory of the community.

community to determine its membership is uncertain.⁵² For Walzer, given that the community has a particular understanding of itself, the principle of mutual aid can only “modify” certain admission decisions.⁵³ Thus, the ability of the political community to have the authority to determine who it will allow to enter its borders, prevails.

2.2 Uncovering Shared Understandings

Despite Walzer’s recognition of the limitations on an absolute right of the state to exert power over its borders, significant obstacles remain for the integration of immigrants into his selective community. Another central problem in Walzer’s theory of justice is his reliance on the notion of the political community which determines its membership criteria based on the shared understandings of the distribution of a social good. However, I will argue that determining the shared understandings of a community is an unrealistic practice.

For Walzer, principles of justice are based on a community’s shared understandings and therefore are unique to every community. However, as Georgia Warnke argues, Walzer’s interpretative or hermeneutic approach to justice raises the problem of how a shared social meaning can be determined.⁵⁴ Walzer’s interpretive approach does not seek to locate an impartial procedure that can judge between accounts of justice, rather he rejects any form of the procedural

⁵² Walzer, Supra note 27 at 33-34 and 62.

⁵³ From my perspective, to grant Walzer’s principle of mutual aid any significant weight over the ability of the community to determine its admission policy I would suggest is a mistake. The principle of mutual aid can merely *influence* the admission policy, thus its actual potential to alter a nation’s admission policy is limited.

⁵⁴ Georgia Warnke, “Walzer and Social Interpretation” Justice and Interpretation. (Cambridge, Ma.: MIT Press, 1993)pp.13-37.

project. Instead, he argues that through a democratic dialogue a particular community's account of justice can be discovered. Thus the task of the political theorist is to articulate and interpret the shared understandings that can be located in a community.⁵⁵ In order to determine what the shared understanding is, Walzer's method of interpretation examines both historical and social accounts. As Susan Moller Okin argues, in order to determine a shared understanding, Walzer must arrive at an answer to the query, "what would individuals like us choose, who are situated as we are, who share a culture and are determined to go on sharing it."⁵⁶ In other words, Walzer interprets the historical and social accounts and attempts to determine the underlying shared understanding that are representative of all members of the community. Yet, without an impartial procedure to decide between two divergent accounts, the political theorist must determine which account better articulates the community understanding.

As Warnke indicates, Walzer's approach of investigating history and social descriptions does not adequately deal with the problem of conflicting and contrasting accounts.⁵⁷ She claims:

The goal [of the interpretative approach] is that of ironing smooth all the wrinkles or glitches in our interpretation so that we attain a self-consistent understanding in which our interpretation of the meaning of each practice, norm and arrangement of the society conforms our understanding of the whole and in which our understanding of the whole substantiates our understanding of each part.⁵⁸

⁵⁵ Shane O'Neill. Impartiality in Context: Grounding Justice in a Pluralist World. (Albany, State University Press, 1997)p. 7.

⁵⁶ Susan Moller Okin. Justice, Gender, And The Family. (New York: Basic Books, 1989)p. 63.

⁵⁷ Warnke, Supra note 54 at 24.

⁵⁸ Ibid at 22.

According to Warnke, this method of creating uniformity or homogeneity of understanding is a flawed process because it reflects the subjective understanding of the interpreter. The goal of determining shared understandings is to attain uniformity and a consistent understanding.

Furthermore, if there is not a set of principles or an impartial procedure to select one particular interpretation over another, then there is no just method to decide between two interpretations.⁵⁹

Warnke states:

Two different interpretations of either textual or social meaning might be equally deep and inclusive; they might offer equally well-integrated accounts of the relation of part to whole; they might each offer internally consistent interpretation of the text of our social life that each show how that text of life composes a unified meaning. Still, these different interpretations will be also equally partisan; they will offer interpretations that are necessarily selective, that emphasize different practices, norms of action and institutions and that place these within different historical contexts and social frames of reference.⁶⁰

For Warnke there is always an alternative interpretation that is equally as persuasive. Thus determining which is the shared understanding is based on *subjective interpretation*.

However, as Okin argues, even with these criticisms of the interpretive approach, Walzer still contends that a community has shared understandings but they are “latent and need to be brought fully to consciousness.”⁶¹ According to Walzer, a shared understanding can only be located and interpreted by a political theorist based on the history of the community. Yet, while Walzer often acknowledges that communities are divided, he assumes a community can determine its underlying social commonality. As Okin suggests, Walzer is aware that national ideologies will always be confronted by plural and multiple formulations, he even acknowledges

⁵⁹ Ibid at 24-29.

⁶⁰ Ibid at 30.

⁶¹ Okin, Supra note 56 at 42.

that there must never be a final victory or a dominant ideology. Yet as long as social views on the distribution of membership *appear to be representative* of the community, then Walzer believes that a social understanding can be derived.⁶² This interpretative methodology in Walzer's analysis is problematic because it assumes that homogeneous shared understandings can be determined.

As I indicated, for Walzer, the political community determines admission and exclusion by allowing entrance to those that share a certain affinity (family, ethnic, and ideological) with the community. In order to preserve a community's distinct identity, Walzer's interpretive approach implies that the national identity of most nations is largely homogenous. As Veit Bader argues, "Walzer, of course, knows that states are not necessarily, or even commonly, ethnic or cultural homogenous entities. Nevertheless, he does speak of states as "nations" or "communities" all the time, even when this is obviously false."⁶³ Many political theorists have concluded that state formation has often proceeded at the expense of minority groups and that in many cases political boundaries have been drawn through violent confrontation. Thus any attempt at locating a shared understanding of a community will be disputed by alternative historical interpretations. Bader contends:

historical states are not such warm . . . or free and democratic associations, based on consent, but rather cold vertical institutions, based not on free entry but on enforced membership and physical violence. Internally, *the modern nation-state acted as a radical cultural unifier*, creating "the nation". . . externally, modern nation-states have acted, as a byproduct of their direct economic and political colonization and conquest of the world, and usually as its main ideological myth, as large-scale cultural imperialists.⁶⁴

⁶² *Ibid* at 64.

⁶³ Veit Bader. "Citizenship And Exclusion: Radical Democracy, Community, and Justice. Or, What Is Wrong with Communitarianism?" 23 *Political Theory* (1995) p. 217.

⁶⁴ *Ibid.* at 219. [emphasis added].

As Bader explains, state formation often proceeds with the use of violence aimed at suppressing competing interests. If a nation-state has defined its territory at the expense of some of its members, a theory of membership cannot claim to embody a unified shared understanding. As Bader has just indicated, there is no nation that has a historically homogenous past. Thus, Walzer's argument that within a state there is a homogenous community understanding, might be disputed by alternative interpretations.

Walzer acknowledges that a homogenous population located within a nation-state is an improbability. He claims if that appears to be the case, then this is because a dominant group has succeeded in assuming control and creating a "common life" in a way that reflects its history and culture.⁶⁵ Walzer acknowledges that a national identity that is fixed and permanent is a myth. However, he feels that a community understanding can be articulated because the sharing of institutions and common beliefs unifies a group of individuals. Nonetheless, arguing that the shared understandings of a community can be found if one "interprets history in a certain way" privileges one version of history above others. Walzer's view that shared understandings can be located, essentially is a false statement based on his interpretative methodology. As the title of Okin's published criticism of Walzer questions, "Whose Traditions? Which Understandings?" a significant challenge arises as to whether these shared understandings are indeed common to all members of a community.⁶⁶

To close the discussion of Walzer's treatment of open borders, what should be evident is, that his theory of justice promotes defending historically embedded cultures and thus advocates

⁶⁵ Walzer, Supra note 42 at 25.

⁶⁶ Okin, Supra note 56 at 41.

selective criteria for admission of immigrants. Walzer's admission policy supports a community with distinct traditions, thus juridical citizens may select potential immigrants that share the same characteristics as the community. With respect to how open the community's borders are to new immigrants, Walzer seems to suggest that immigrants are more likely to be granted admittance if they possess the qualities of the majority culture. Furthermore, his interpretative methodology of locating shared understandings assumes agreement where there is constant dispute. Walzer's theory does not submit that potential immigrants assimilate into the community and become like the citizens of the community once they arrive, instead they may be chosen for entry based on the characteristics they share with the juridical citizens. However, it remains an assimilationist model by privileging the majority culture over cultural pluralism.

3. Walzer's Admission Policy: Naturalization

Since Walzer believes that all immigrants that have been admitted into a nation should be able to apply for naturalization, he is more guarded about the first form of admission (who gets in).⁶⁷ Ensuring that the right kind of immigrant is granted access to the physical territory and citizenship of a nation-state is integral, since these immigrants will most likely be legal citizens in the future. For Walzer, the citizens who determine the make-up of the political community, must "... be prepared to accept, as their equals in a world of shared obligations, the men and women they admit; the immigrants must be prepared to share the obligations."⁶⁸

⁶⁷ Walzer, Supra note 27 at 52 and 56-61. For a discussion of Walzer's moral reasons that states have an obligation to naturalize all individuals that reside and are employed within a territory.

⁶⁸ Ibid at 52.

In order to demonstrate the injustice of allowing immigrants residence in a nation without affording them the opportunity of full rights of juridical citizenship, Walzer's discussion centers around guest-workers, (immigrants, usually working class or poverty stricken, that immigrate to a nation in order to occupy certain jobs that the domestic population finds degrading and/or dangerous).⁶⁹ In many cases since guest-workers are not juridical citizens, they are denied many of the civil and political rights which accompany legal citizens. Nevertheless, Walzer acknowledges that in the interests of political justice, since these immigrants are living and working in and therefore contributing to the community, they should be thought of as future juridical citizens of that community.⁷⁰ Thus, they should be granted the same civil and political rights as citizens, including the right to vote and participate in politics.⁷¹ For Walzer, the second part of the admission process (naturalization) is a mere formality. Accordingly, all immigrants that are admitted should be given the opportunity to become juridical citizens. Thus, since acquisition of citizenship is generally granted to immigrants without great consequence, the political community must make sure that those it admits in the first part of the admission process are the right kind of immigrants.

⁶⁹ Ibid at 56.

⁷⁰ Ibid at 60. For Walzer political justice means "... the processes of self-determination through which a democratic state shapes its internal life, must be open, and equally open, to all those men and women who live within its territory. ..."

⁷¹ Ibid at 60-61. There are certain qualifications that Walzer places on the right of naturalization for those immigrants already within the territory. These include "time and qualification." He does not explain these, although I think he means how long the guest-workers have been in the nation (the longer the residence the more obligation on the state to grant them citizenship) and that they must first meet the qualifications of the first part of the admission process (open borders).

4. Habermas and Constitutional Patriotism: Reducing Admission Requirements

The dilemma of what encompasses the identity of a political community and therefore what obligations result from the shared identity of the community, have been outlined in Habermas' theory of "constitutional patriotism." Habermas' theory of constitutional patriotism greatly reduces the admission requirements for immigrants in the first section of the admission process which covers entrance (open borders), when compared to Walzer's theory of membership. Habermas' theory encourages *integration* of immigrants into the political community, rather than selecting on the basis of the characteristics of potential immigrants and their ability to be assimilated.

Habermas' theory of constitutional patriotism embodies a conceptual shift from the historical understanding of the concept of the "nation" which characterized the community as a homogeneous group based on common descent, culture, or history, to a political community where individuals are united through the political process and institutions. In order to avoid the homogenizing effect of the shared interpretation of ethnicity, history, religion, and language and its exclusionary consequences for differing cultures, Habermas' alternative view of the nation reattaches patriotism or loyalty of individuals to the *political culture*.

According to Habermas, within a multicultural society, *political* integration of prospective citizens is required in order to ensure loyalty to the state's common political culture. The political integration required of citizens forms around the recognition of a shared political life, and not around an ethical-cultural form of life. The ethical-cultural common life that Habermas wants to avoid imposing, requires that citizens and immigrants adopt the way of life and local culture of the majority. For Habermas this is a form of assimilation "... that penetrates to the level of

ethical-cultural integration and thereby has a deeper impact on the collective identity of the immigrants' culture of origin"⁷² For Habermas, democratic citizenship does not have to be rooted in the national identity of a people, but rather citizens may be linked through a shared political process.

This political culture which citizens are to become socialized into reflects the "formal consensus" expressed in the constitution of that nation. For Habermas, "the political culture of a country crystallizes around its constitution."⁷³ The political culture through which constitutional principles have become embedded, does not require that all citizens share the same language and ethnic or cultural origins or, (in Walzer's terms) "shared understandings" of the community. For Habermas, "a liberal political culture is the only common denominator for a *constitutional* patriotism. . . that heightens an awareness of both diversity and the integrity of the different forms of life coexisting in a multicultural society."⁷⁴ Hence, the basic constitutional principles must be capable of being interpreted from the perspectives of different traditions and histories.⁷⁵ One's own viewpoint must be "relativized" by the perspectives of other traditions. Therefore, for Habermas, socialization into the common political culture requires that the prospective

⁷² Jürgen Habermas. "Struggles For Recognition in the Democratic Constitutional State" in A. Gutmann Ed. Multiculturalism and the Politics of Recognition. (Princeton: Princeton University Press, 1994)p.138.

⁷³ Habermas, Supra note 31 at 118.

⁷⁴ Habermas, Supra note 13 at 500.

⁷⁵ Ibid at 514.

immigrant must be willing to be a member of the particular historical community, its past and future, and the forms of life and institutions through which its members think and act.⁷⁶

Unlike Walzer, who argues that shared understandings can be determined – and as I argued this can lead to the assertion of a privileged form of life – in Habermas’ theory there is more room for a plurality of perspectives. Habermas’ concept of constitutional patriotism indicates that the abandonment of one’s way of life or culture is not a necessary element of acquiring citizenship. As Habermas indicates, the basic right of self-determination includes first, the right to preserve one’s own political culture, and second, does not amount to the right to assert a privileged form of life. Within a democracy, Habermas suggests that diverse forms of life can and should, coexist equally. Yet, these diverse forms of life will eventually overlap in a common political culture that remains open to new forms of life.⁷⁷ Therefore, those with diverse cultural traditions need not surrender them to the will of the majority. Within a nation-state, superiority of a culture cannot justly be asserted anymore. All minorities and new immigrants reside within a nation that is open to their distinct traditions. This implies an atmosphere of tolerance for diverse cultural practices. Habermas’ promotion of diverse cultures flourishing in a community is in contrast to Walzer’s theory in which the juridical members are justified in preserving their privileged form of life.

With regard to immigrants who seek entry into liberal democracies, constitutional patriotism reinforces the ideal that their diverse traditions can thrive in their new homeland.

⁷⁶ *Ibid* at 513. As I will discuss, this presents certain problems for the second part of the admission process (acquisition of citizenship), mainly whether potential immigrants are actually unreflexively *assenting* to the principles of the constitution.

⁷⁷ *Ibid* at 513-514.

Immigrant groups are able to preserve their identity and the political community is able to conserve its political culture. Therefore, according to Habermas, “all that needs to be expected of immigrants is the willingness to enter into the political culture of their new homeland, without having to give up the cultural form of life of their origins by doing so.”⁷⁸ The identity of the political community will be altered in the future as a result of waves of immigration (since immigrants cannot be compelled to relinquish their traditions). Unlike Walzer’s theory of membership which, as I have argued, justifies placing significant limitations on the character of potential new immigrants, Habermas’ theory of constitutional patriotism reduces the kinds of qualities that a nation can require of possible new members. There is no requirement that immigrants share characteristics with the legal citizens of a community. As Habermas argues, there is an obligation on the part of liberal democratic nations to foster a liberal immigration policy. Furthermore, he contends that any quotas on immigration must be “acceptable from the perspective of all parties involved.”⁷⁹ Thus, for Habermas, any immigration policy must reflect liberal principles and represent the interests of all.

One significant qualification that Habermas places on the quality of character of immigrants, however, is the right of a democratic nation through self-determination to protect itself from the admission of new immigrants that threaten the political culture of the nation. Habermas argues, “in multicultural societies the national constitution can tolerate only forms of life articulated within the medium of such non-fundamentalist traditions.”⁸⁰ These fundamentalist

⁷⁸ Habermas, Supra, note 72 at 139.

⁷⁹ Ibid at 142.

⁸⁰ Ibid. at 133.

traditions which Habermas claims are incompatible with liberal democracies are described as certain nationalist movements and religious groups that claim that their own truth is absolute and who attempt to secure their perspectives through violent means. For Habermas, these individuals and groups violate the democratic principle of toleration.⁸¹ Furthermore, they seek to establish one way of life as legitimate and all others as false. As Will Kymlicka suggests “liberal justice” cannot permit one group to oppress or exploit other groups.⁸² Ensuring that those immigrants permitted into the receiving nation do not seek to violate an essential liberal value is a limitation that can be justified.

Therefore, according to Habermas, immigrants are now only required to be politically integrated into the community. He maintains that their traditions and cultures do not have to be assimilated into the majority culture. However, as well as the qualification that a nation can refuse to admit immigrants that seek to destroy the liberal democratic form of life, there is another significant limitation in Habermas’ theory on the ability of immigrants to be integrated into the political community.

5. Commitment To The Principles Of The Constitution: Can Immigrants Be Guaranteed A Public Voice?

For Habermas, regardless of the diversity of different cultural forms of life that may inhabit a given state, constitutional patriotism does require that every citizen be socialized into a

⁸¹ Jürgen Habermas. “Remarks on Legitimation through Human Rights” LXXV The Modern Schoolman (1998) p. 98-100.

⁸² Kymlicka, Supra note 16 at 152.

common political culture. While Habermas' theory of constitutional patriotism is open to the voices of new members and does not require that they assimilate into the culture of the majority, his theory is ambiguous in the sense that his reliance on constitutional principles seems to leave little room for challenge from new members. In order for the political culture to survive it must remain, as a liberal political culture, open to new perspectives and promote democratic ideals. Yet, as Habermas acknowledges, given that a community cannot be entirely divorced from its historical formation, a problem arises as to the permeability of the political culture to new perspectives. Thus, it is the second section of the two-part admission process – the acquisition of citizenship – that provides a challenge to Habermas' theory.

As I indicated, that which provides individual attachment to the national identity are the principles embodied in the constitution. As Habermas states, "a constitution can be thought of as an historical project that each generation of citizens continues to pursue."⁸³ Political integration of citizens occurs by ensuring loyalty to a common political culture established through an interpretation of the nation's constitutional principles. Yet, this is based on the nation's historical experience. And as Habermas indicates "that interpretation cannot be ethically neutral."⁸⁴ Thus integration requires "assent to the principles of the constitution within the scope of interpretation determined by the ethical-political self-understanding of the citizens and the political culture of the country."⁸⁵ As we can see, a nation's ethical-political understanding of itself cannot be divorced from the political community.

⁸³ Habermas, Supra note 72 at 107.

⁸⁴ Ibid at 134.

⁸⁵ Ibid at 138.

With respect to immigrants that have passed the first part of the admission test (open borders) and await the second (naturalization), constitutional patriotism becomes problematic. Since these potential immigrants are not yet juridical citizens, according to Habermas' theory, their ability to challenge the principles of the constitution may be limited. For example, Habermas acknowledges that constitutional principles will be interpreted by the political culture. In particular he suggests that:

Immigrants should be obliged to assent to the principles of the constitution as interpreted within the scope of the political culture: that is, the ethical-political self-understanding of the citizenry of the receiving country. *Once they become citizens themselves, they in turn get a voice in public debates, which may then shift the established interpretation of constitutional principles.*⁸⁶

Furthermore, a democratic constitutional state must be allowed to "... preserve the identity of the political community, *which nothing, including immigration, can be permitted to encroach upon*, since that identity is founded on the constitutional principles anchored in the political culture"⁸⁷ Thus, for immigrants, even if they have been admitted into a nation (passed the first part of the admission process) they are not considered juridical citizens and have limited influence in the public sphere. Habermas' statements on the rights of immigrants prior to naturalization suggest that the dialogue between immigrants and citizens is relatively closed (until that time when immigrants are granted legal citizenship). However, from my perspective there must be a method for immigrants to open a dialogue with citizens that questions the interpretation of constitutional principles, otherwise immigrants are assenting to principles of the constitution without the ability to voice any concerns that they have.

⁸⁶ Jürgen Habermas. "Multiculturalism and the Liberal State." 47 Stanford Law Review (1995)p.138. [emphasis added].

⁸⁷ Habermas, Supra note 72 at 139. [emphasis added].

As James Booth argues, regardless of the constitutional principles' abstractness, they are deeply embedded within a community of memories. A nation's identity is fixed in the moral claims of remembrance and responsibility and in sameness across time that is handed down to members of a political society. Furthermore, he contends that we cannot pick and choose from our past memories even though we can influence the shape of the future. These memories are part of the collective identity of a nation, whether they are worth remembering or not. The past is present in a nation's traditions either intentionally (monuments dedicated to remembrance) or unintentionally (modes of thought). ⁸⁸

Habermas acknowledges that the past is a burden giving us pride or shame and always making us accountable, thus we inherit liability for the past. ⁸⁹ The burden of history that a community has to its past and the duty to remember, according to Booth, weighs heavily against the openness of the community. He states "if the enduring identity of a community is woven out of the past, and memory of it, a past that in a strong sense is 'ours', then both exit and entrance seem much more difficult than the liberal universalist might imagine." ⁹⁰ Therefore, the liberal constitutional patriotism that Habermas seeks might not be the object of freely willed choices in the open democratic forum, since the interpretation of constitutional principles is based on the community's values. The political commonality that constitutional patriotism seems to advocate is a "partnership in political institutions and practices and in a sharing in a certain perception of

⁸⁸ James Booth. "Communities of Memory: On Identity, Memory, and Debt" 93 American Political Science Review (1999) p. 254.

⁸⁹ Ibid at 225.

⁹⁰ Ibid at 258.

justice. In short, what is common, politically speaking, is something akin to a constitution . . . the identity of a regime is the continuity of its constitutional form.”⁹¹ Constitutions are the foundation holding political communities to account for their past and also to lay out a path for the continuation of the established way of life for the future. As Habermas suggests, a community’s memories are bound to a specific territory, and members have an obligation to acknowledge their heritage. Thus individuals are liable for the past and those deeds that have shaped a community’s life together.⁹²

While Habermas acknowledges that the past is part of a nation’s political culture and must not be forgotten, he is also aware that constitutional patriotism requires the influx of new perspectives. Yet, if Habermas concedes that the past is part of the constitutional principles and political culture of the nation-state, then the nation is more prone to accepting and acknowledging already established traditions. Hence, a significant question arises as to whether or not the democratic state can indeed be sufficiently permeable to the differing views of immigrants. A tension exists, within constitutional patriotism, between an obligation to the past and recognition of the future. Relying too much on the past results in a closed political culture that cannot be open to the needs of immigrants, and looking too far ahead results in forgetting that nation’s roots.

In support of Booth’s view, Patchen Markell contends that Habermas has referred to the shared political culture needed for constitutional patriotism, “as the supplement of particularity

⁹¹ Ibid at 250.

⁹² Ibid at 255.

that abstract principles require if they are to become objects of attachment and affect.”⁹³ Thus, constitutional patriotism reflects the historical understandings of the political community. As Markell indicates, Habermas’s project is based on contextually interpreted understandings of the constitution. Yet as Markell states:

the content of the constitution and the particular interpretations that constitution has been given over a long history of adjudication; the political history of the country; the symbols, songs, events, dates, and people who capture our political imagination; the patterns and structures of civil society; the vocabularies of political analysis and polemic; the ‘national fantasizes’ that ‘circulate through personal/collective consciousness’ all these and more reflect a cultural inheritance that the *demos* did not choose.⁹⁴

Habermas recognizes that universal principles will be based in the historical account of the community. Although Habermas has disentangled attachment from ethnic nationalisms to abstract universal principles, these universal principles are still influenced by historical conditions.

What Booth and Markell both illustrate is the potential exclusionary consequences of constitutional patriotism. Habermas is aware that uniting a community based on abstract universal principles is not easily accomplished, rather constitutional principles are based on the historical evolution of the community. Habermas’s goal of uniting citizens’ loyalty to a common liberal political culture is limited, since it has to attach an individual’s allegiance to the nation-state. Therefore, as Booth, Markell, and even Habermas indicate, legal principles might be interpreted from the perspective of the national culture embodied in constitutional principles since the identity of the nation cannot be divorced from the national community and its past. In

⁹³ Patchen Markell. “Making Affect Safe For Democracy? On ‘Constitutional Patriotism’” 28 Political Theory, (2000) p. 51.

⁹⁴ Ibid at 52.

contrast to Walzer's project of selecting immigrants that share the characteristics of the community, thereby ensuring admittance of only immigrants who can easily adopt the perspectives of the majority, Habermas asserts that democratic citizenship need not be rooted in the national identity of a people or the nation's ethical culture. While this opens the door to the immigration of those with cultures and traditions that differ from the majority culture, constitutional patriotism requires that every citizen be socialized into a common political culture. As I have argued, because this common political culture is based on the historical interpretation of the nation's constitutional principles, the permeability of the political culture to immigrants is questionable. If the goal for constitutional patriotism is the political integration of prospective immigrants, then the danger is that a privileged form of life will already be asserted since citizens are required to be a part of the historical community.⁹⁵ As Booth, Markell, and Habermas indicate, the identity of the community cannot be separated from the past memories of the nation-state. This implies that new citizens must be willing to be members of the community and respect its basic political identity and ideals.

This presents certain problems for immigrants awaiting naturalization. If the condition of adhering to a liberal political culture amounts to respecting the fundamental freedoms of each individual and their choice of how to lead their lives, then what about those individuals who disagree with the state and contend that certain freedoms in the constitution have been interpreted in a manner unfavorable towards their perspectives? If immigrants are to be expected to adhere to the political culture of the nation, how open to revision is the political culture of the nation to

⁹⁵ This might be the result, even though Habermas argues against a privileged form of life being asserted.

new perspectives that do not reflect the accepted concept of the community. The result seems to be a community that is not the product of freely willed choices in a substantially open democracy. For example, the Muslim practice of polygamy is banned in many Western liberal democratic nations, yet many Muslim immigrants contend that it is part of their religious beliefs and is important to their way of life. Although it can be argued that this practice conflicts with the liberal belief in equality of the sexes, I suggest that it might be hasty to ban a religious practice that affects immigrants without giving them the ability to voice their concerns. In this situation it appears that immigrants are being required to assent to the dominant interpretation of the nation which negatively affects their cultural practice. It is unjust to not offer a public voice or sphere of influence to immigrants to express their concern over the regulation of their culture. If new immigrants are expected to live in a new nation as members they must have the opportunity to contest the basic principles of the nation. While constitutional patriotism states that this can be accomplished, this is a right granted only to juridical members.

Habermas' theory does encourage liberal democracies to open their borders to immigrants of differing backgrounds, and unlike Walzer's theory it rejects the selection of certain immigrants determined by assimilable qualities. Furthermore, as Habermas has stated, new members are entitled to add their voices to the community and the community is required to be open to their perspectives. Thus, constitutional patriotism has reduced the qualifications that immigrants must meet for the first step of admission (open borders). However, it is in granting naturalization to immigrants that have been admitted that constitutional patriotism might become exclusionary. Immigrants must be granted the opportunity to voice their views in the public sphere as long as constitutional principles reflect the historical interpretation of the community.

6. Conclusion

In liberal democratic theory, citizenship is the framework which provides political cohesion. As we have seen, Walzer and Habermas express two quite different theories of citizenship. While it appears that the status of *citizenship* is inclusive and guarantees equal protection for all citizens, its exclusionary consequences characteristics for immigrants have become apparent. As I argued in the introduction to the thesis, borders must be sufficiently open in order for immigrants to be admitted and, second, the practice of naturalization which grants the formal legal status of citizen should be offered to most immigrants that are granted admission. In order to guarantee immigrants the right to reproduce their culture in their new home, and to grant them a voice in the public forum over policies that might negatively affect them, I argued that the two part admission process in Walzer's and Habermas' theories of citizenship must be rethought to enhance greater social inclusion. In the case of Walzer's theory, his description of the ability of the political community to select the characteristics that immigrants must possess before they are granted admission, results in the exclusion of cultures that are not represented in the majority culture. With respect to Habermas' theory of constitutional patriotism, immigrants are greatly disadvantaged by not having the right to contest the governing constitutional principles.

Given the increasing international mobility of people and the pressure on liberal democratic states to accept many of them, theories of citizenship must be reconcieved in a fashion that promotes greater social inclusion of immigrants. In an effort to prompt this necessary re-conceptualization the following chapter is an examination of agonal theory and its potential implications for the theories of Walzer and Habermas.

Chapter Two

The Challenge of Agonal Theory: A New Direction?

1. Introduction

As I argued in chapter one, both Michael Walzer and Jürgen Habermas construct theories of membership based on full inclusion of juridical citizens in a political community. Yet, they both must contend with the phenomenon of international immigration and the challenge that it presents to the physical boundaries of the nation-state and the identity of the community. In order to become citizens of a nation, immigrants must traverse the two part admission process. First, they must be granted access by the nation to enter the territory (open borders), and second they must acquire citizenship (naturalization). Applying this admission process to the theories of Walzer and Habermas, I concluded that Walzer's theory was exclusionary towards those immigrants that do not share the traditions and cultures of the receiving nation. I suggested that in Walzer's work borders are constrained because of the selective criteria that the political community may utilize to distinguish desirable from undesirable immigrants.⁹⁶ In the case of Walzer, future citizens may be chosen to *fit* the image of the political community. With respect to Habermas' theory of constitutional patriotism, immigrants are no longer required to assimilate to the characteristics of juridical citizens, thus the theory is less selective of the criteria for

⁹⁶ As I argued in chapter one, those immigrants selected for admission in Walzer's theory are considered potential citizens. Once immigrants pass the open borders qualification, Walzer argues that they should be granted the opportunity of naturalization.

admittance of immigrants.⁹⁷ However, immigrants are required to integrate into the common political culture of the nation. Habermas requires that immigrants *assent* to the principles of the constitution, which I suggested contains the historical interpretation of the nation's identity. This condition, I argued, causes difficulties for immigrants awaiting naturalization since it limits the ability of these immigrants to have a sphere of political influence on issues that might affect them. In this chapter I will argue that Walzer's theory needs to be exposed for the unjust assumptions that it makes with respect to the right of self-determination as properly protecting the cultural identity of the political community, and Habermas' theory of constitutional patriotism should be reexamined for its interpretation of modern constitutions.

The approach to be developed here has been dubbed "agonism", understood as the process whereby individuals deliberate and constantly renegotiate the rules of democratic activity and the institutions that contain these democratic practices. As Dana Villa contends, one of the central concerns of contemporary agonistic theorists is that democratic politics turns its citizens into passive members, rather than encouraging discussion and argumentation. He states:

... modern democracies are hardly democratic at all; that the bureaucratic edifice of the state has usurped the space of the political, *rendering citizens the passive recipients of policy decisions*; and that liberal theory has contributed to this state of affairs by promoting a conception of politics which is essentially juridical/administrative, one which seeks ways of diminishing, if not *eradicating, the contest and debate that is the life blood of a robust democratic politics*.⁹⁸

Thus, in order for democracies to become *contestatory* and to encourage free debate, agonistic politics must question the procedures of democracies.

⁹⁷ In Habermas' theory immigrants are not granted any rights to naturalize once they have been admitted. They do not share the same rights as juridical members until they are naturalized.

⁹⁸ Dana Richard Villa, Politics, Philosophy, Terror: Essays on the thought of Hannah Arendt. (Princeton: New Jersey. Princeton University Press 1999.) p. 107 [emphasis added].

Critics of the agonai approach suggest that the conflict-ridden nature of agonism encourages ideological divisions in society since individuals are more expressive and demand that their views be heard and acknowledged. They contend that this type of political action could result in further fragmentation of the ties that hold a community together.⁹⁹ While this is a fair assessment of the implications of encouraging greater conflict, it overlooks the necessity of this critical perspective which can stimulate greater reflection on the practices and policies that determine our community and how these can negatively affect others. Although there is a perception that agonai politics might promote divisions within “the community,” this cannot be a reason to overlook the positive change that might result from its application such as contesting notions of essential and unified communities. Hence, it is my contention that these criticisms have some relevance, and it is for this reason that I suggest agonai theory should be used as a supplementary approach to political theory. That is, agonism should not attempt to re-write political theory, but rather it should infuse current thinking.

This chapter will first explore the concept of agonism, its criticisms, and the reason that agonism should be utilized as a supplementary approach to political theory. Agonism promotes a contestatory orientation by re-examining the rules and institutions that are prominent in democracies. Furthermore, it encourages debate and negotiation over what those rules and institutions should resemble in order to ensure that the voices of all members (if they choose to have a voice), are recognized and not marginalized by dominant groups and procedures. Thus, an agonistic orientation attempts to restore democracies to their intention of promoting citizen participation. Agonal theory cultivates a critical rethinking and further inquiry by political

⁹⁹ Ibid at 109.

theorists of their conception of the rules and institutions of democratic politics. Accordingly, it enables theorists to examine and resist the determinacy of these concepts that frame democratic politics.

Using the work of contemporary political agonists, William Connolly and Bonnie Honig, I will attempt to demonstrate that Walzer's efforts to construct a political community that privileges one culture at the expense of others is a profoundly problematic contribution to citizenship debates. Connolly's and Honig's discussion of the need for agonal thinking demonstrates the flaws in Walzer's formulation of the community and his assumption that a community's shared understandings can be located. Although, I have argued that agonal theory should supplement political theory, in the case of Walzer's theory of membership, I contend that we must reject his formulation of the distinct community. The strategy of supplementing political theory with the agonal perspective is not possible under the conditions of Walzer's theory. His notion of the distinct and relatively closed community is fundamentally at odds with the agonai spirit of openness and contestation. Thus, Walzer's theory is irretrievable through a supplementary agonal approach.

However, in the case of Habermas, I suggest that his theory of constitutional patriotism might benefit from a supplementary agonal approach, in order to reevaluate the historical formation of modern constitutions and their exclusionary consequences for citizens and immigrants. Using the work of James Tully, I argue that a reexamination of the concept of constitutionalism is required in order to secure cultural recognition. I will contend that Tully provides insight into the inherent limitation in Habermas' discussion of modern constitutionalism.

2. Struggles For Recognition: Agonal Theory

As Dana Villa explains, agonistic politics developed as a reaction to “proceduralist liberalism.” That is not to say that liberal values such as the commitment to individuals as free and equal persons, or the commitment to toleration based on the recognition of individual diversity are problematic, but rather that the procedure constructed to embody these liberal values encourages consensus, rather than exploring difficult moral problems or questions of power. Villa argues that liberals of this sort, “are so anxious to avoid conflict that they construct a set of public institutions, and a code of public argument and justification, which leave precious little space for initiatory or expressive modes of political action.”¹⁰⁰ For agonistic theorists, the central problem with liberalism is that it seeks to promote a consensus in the public sphere in order for society to function. Yet, agonists argue that the liberal tradition of searching for an “overlapping consensus” is a fiction, rather, the very nature of democracy embodies conflict and contestation.¹⁰¹

In David Owen’s exploration of agonism based on the perspective of Friedrich Nietzsche, he further clarifies the difference between liberal politics and agonism. He argues that, from the liberal perspective, political freedom takes place if individuals are provided with the *opportunity* to search for, and revise, their conception of the good. An agonistic politics reflects not just the opportunity to enter the debate, but the “rational exercise” of this capacity.¹⁰² In this sense, the tension between liberal politics and agonism reflects the distinction between the passive and

¹⁰⁰ Ibid at 108.

¹⁰¹ Ibid at 108.

¹⁰² David Owen. Nietzsche, Politics and Modernity: A Critique of Liberal Reason. (Scarborough, Great Britain: Sage Publications Ltd., 1995.)p.165.

active status of citizenship. As agonal theorists argue, liberalism has cultivated a non-agonic passive status where citizens are given the opportunity to engage in public debate, yet are not required to do so, while agonism fosters a re-infusion of the active role of the citizen in which individuals have a civic duty to participate. In order to explain the need for a supplementary agonism, I will further explore the definition of agonism offered by contemporary theorists.¹⁰³

Both Villa and Bonnie Honig have suggested that Arendt's account of agonism or performative politics was a reaction to her rejection of the institutions of politics. From Honig's perspective, "identity is the performative production not the expressive condition or essence of action."¹⁰⁴ On Honig's interpretation of Arendt, it is not the fact that all individuals are permitted into the political arena (given the opportunity to be heard), it is the performance in the political arena that is important. As Villa explains, what makes Arendt's writings on agonism attractive to radical democrats is the central place she affords to *action* which occurs only in a public sphere where all individuals are equal.¹⁰⁵ This is what she termed the *joy of action* in democratic

¹⁰³ I have used the work of contemporary political theorists Dana Villa, David Owen, Bonnie Honig and James Tully, to define agonistic politics. Although their understanding of agonism is based on the work of Michel Foucault, Friedrich Nietzsche and Hannah Arendt (those who originated the agonal ideal), the work of these contemporary theorists better articulates the need and implications of the agonal approach for modern democracies. For a history of the agonal ideal see Villa (1999).

¹⁰⁴ Honig, Bonnie. "Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity" Ed. Bonnie Honig Feminist Interpretations of Hannah Arendt. (University Park, Pa., Pennsylvania State University Press, 1995.)p. 136.

¹⁰⁵ Villa, Dana Richard. "Postmodernism And The Public Sphere." 86 American Political Science Review. (1992)p. 713. Villa defines Arendt's version of the public sphere as the space of "tangible freedom." It is the space of political action where there is the artificial creation of equality among all participants.

political life. According to Villa, for Arendt, all public issues should be debated in this public sphere.¹⁰⁶

Similarly influenced by Arendt's agonism, Honig argues that the individual or the self needs to act, otherwise it succumbs to "commonality." Individuals must act in order to free themselves from this "normalizing impulse of the social."¹⁰⁷ If the individual is unable to act then she has no identity of her own. The multiple-self is "the site of struggle that is quieted, temporarily, each time the self acts and achieves an identity that is performative in production."¹⁰⁸ Furthermore, as Honig explains, politics must be agonistic since it is the method through which multiple identities can be secured. Thus, Honig argues, "a political community that constitutes itself on the basis of a prior, shared, and stable identity threatens to close the spaces of politics, to homogenize or repress the plurality and multiplicity that political action postulates."¹⁰⁹ In order to avoid domination of weaker groups (such as new immigrants) and ensure plurality, resistance to homogeneity of the political community including the past and its collective memories is required.¹¹⁰ As Villa indicates, the difference between Arendt's agonistic political space and current democracies, is that she advocates a political arena that is the "site of perpetual debate

¹⁰⁶ Villa, Supra note 98 at 117-118.

¹⁰⁷ Honig, Supra note 104 at 139. As Honig explains, the social in Arendt's view is defined as "the usurpation of the political space by behaviourism, mass society, and the administration of housekeeping. . . ."

¹⁰⁸ Ibid at 141.

¹⁰⁹ Ibid at 149.

¹¹⁰ Ibid at 150.

and contestation.”¹¹¹ Additionally he contends, “what matters for her is less *where* political action takes place and *what* it concerns than the spirit in which it is undertaken.”¹¹²

James Tully’s article, *The Agonic Freedom of Citizens*, contributes to the debate on agonism, by drawing upon the work of Michel Foucault and modifying Arendt’s statements on agonal theory. In particular, Tully cites Foucault as extending the scope of agonistic activity from beyond the political arena and face-to-face contests for recognition (that was initially articulated by Arendt) to, “any form of activity or language game in which the co-ordination of action is potentially open to dispute.”¹¹³ As Villa explains, Foucault’s contribution to agonism was the realization that “power permeated everyday life. . . [and that] the very process of producing docile subjects created resistances and multiple sites of struggle. . . .”¹¹⁴ From Tully’s perspective, Foucault envisioned agonism as a relationship which involves “reciprocal incitation and struggle”, there can be no consensus, rather practices must “. . . always be open to question. . . response, and negotiation.”¹¹⁵ As Tully argues, Foucault’s contribution to agonistic thought was the examination of any human activity governed by rules that have been held in place by

¹¹¹ Villa, Supra note 98 at 116.

¹¹² Ibid at 118.

¹¹³ James Tully. “The Agonic Freedom of Citizens” 28 Economy and Society. (1999) p. 168. Tully contends that Arendt’s theory of agonism involved agonic contests for recognition. For Arendt individuals would challenge others for recognition in an agonic contest. Foucault’s contribution was to argue that an agonic activity should be extended to changing the rules in order to encourage free political action.

¹¹⁴ Villa, Supra note 98 at 114.

¹¹⁵ Tully, Supra note 113 at 167-168.

techniques of governance or relations of power. Thus, political theory should attempt to uncover agonistic action.¹¹⁶

For Tully, the participation of citizens in a political community should be located in the democratic process. It is in this democratic process that Tully argues agonistic activity should thrive. According to Tully, the rules binding the political community must always be open to dispute. It is integral to determine how the democratic forum has appropriated the public identity of individuals and created consensus. Tully states:

*Participation in dialogues and negotiations over how and by whom power is exercised over us constitutes our identities as 'citizens' and generates bonds of solidarity and a sense of belonging to the political association (the people) that comes into being and is sustained by this (game-like) activity. . . . Citizen identity is not generated by the possession of rights and duties, or by agreement on substantive or comprehensive common goods, fundamental principles of justice, constitutional essentials, shared values, understandings or national, multicultural or cosmopolitan identities, or, finally, by consensus on a set of universal procedures of validation Identity politics and struggles for recognition are agonistic games in which the contestants seek to modify and often reverse the rules of recognition of the game, not once and for all, but as their identities and diverse ways of being themselves change over time and generations, often as a result of participation in dialogues with diverse others.*¹¹⁷

As this argument suggests, the only way to ensure equality among all members of the political community (including immigrants) is through constant negotiation. For Tully, the only activity that citizens truly share is having a voice in the dialogues over who has and exercises power. Agreement should always be non-consensual since participation in the arena where individuals struggle for recognition should be based on agonistic activity.¹¹⁸ If agonistic activity is “unavailable or

¹¹⁶ *Ibid* at 167.

¹¹⁷ *Ibid* at 170 and 175. [emphasis added]

¹¹⁸ *Ibid* at 170

arbitrarily restricted, the members of a political association remain ‘subjects’ rather than ‘citizens’ because power is exercised over them without their say, non-democratically.”¹¹⁹

For my purposes, one significant conclusion can be drawn about the relevance of the agonal approach to contemporary political theory. The importance of agonal theory rests in its ability to reexamine democratic theory’s method for ensuring recognition of all individuals. The strength of agonism lies in its ability to question whether the institutions and rules of democracy restrict the voice of any individuals and possible new members. It questions all political institutions and rules that govern democratic politics. There can be no closure of democratic politics; it must always be open to contestation by different voices, and its institutions and rules should reflect an agonistic spirit. The agonal approach promotes a critical reorientation towards democratic politics. It encourages political theorists to examine and resist the unification of concepts that compromise democratic politics in liberal democracies.

While I have emphasized the benefits of agonism one must be cautious about the possible implications of such an approach. As Villa contends:

... the trouble with recent formulations of an agonistic politics is that they [political theorists] have tended to celebrate conflict, and individual and group political expression, a bit too unselectively. One can agree with their diagnosis of some of the ills of liberal theory and practice (the tendency to overvalue consensus, order, and rational deliberation, for example) without being entirely persuaded by their cure .¹²⁰

As can be seen, the agonal approach might encourage further conflict in society given that every voice has to be heard. This could result in an never-ending supply of voices seeking a place in the public sphere thus threatening to destroy the fragile ties that unite a community. If a community

¹¹⁹ Ibid at 171.

¹²⁰ Villa, Supra note 98 at 109.

must continuously reexamine all the democratic rules and institutions to ensure that all voices are recognized, then the democratic process might become stalled by conflict and contestation. This legitimate problem with the agonal approach is the reason that I suggest that any use of agonal theory should be relegated to a supplementary role. No political theory can be useful if it is constantly embroiled in perpetual debate, such a theory risks estranging individuals by encouraging ideological divisions. Thus, a supplementary agonism should inform the work of political theorists in their discussion of democratic politics in order to determine how those that have been excluded can now be guaranteed a voice in the public sphere. However, because of the possibility that it opens up democratic participation to every individual and reexamines all democratic procedures, it might be most usefully viewed as a valuable supplement to existing approaches.

3. Unified Communities And The Challenge Of Agonistic Politics

As I indicated in the first chapter, the basis of Walzer's theory of admission is to ensure that the political community is a unified community of individuals. For Walzer, the shared understandings of one community differ from the next. Thus, determining which immigrants may be granted access to the territory is a decision made by the community. In the two-part admission process, the first step of gaining entry into a community is crucial to the composition of the political community. For Walzer, admission into a community (open borders) ensures that only those immigrants who are compatible with the majority culture are granted entry. Given that Walzer's theory is relatively closed to those who do not share the identity of the community, my strategy of supplementing political theory with agonism is fundamentally at odds with Walzer's

project. However, the agonal approach may be used as a tool to flesh out the inadequacies of Walzer's unity of the political community. Agonism cannot, however, correct the significant problem of privileging of one culture above others that is prevalent in Walzer's theory. Thus, Walzer's theory of membership is not retrievable with a supplementary agonal approach. The work of William Connolly and Bonnie Honig will be used to illustrate the problems with Walzer's assumption of the unified political community and the need to reject his project for one that employs elements of agonism.

In *Identity/Difference*, Connolly's attempt to rewrite the terrain of democratic theory leads him in the direction of agonistic democracy. For Connolly, it is in the democratic forum that the politics of identity becomes affirmed. Connolly's project is an attempt to re-inscribe the terrain of democratic politics previously based on rational consensus, with the theoretical concept of agonism which affirms that identity cannot be a stagnant concept.¹²¹ For Connolly, the relationship between the individual and the collective are severely threatened when the state suppresses an individual's ability to self-identify. Since our identity is constituted by our surroundings, shared language and institutionalized roles, the state consistently reinforces the shared historical identity of the collective.¹²² He argues that, "in the territorial state, the politics of collective identity tends to organize the idealisms and egoisms of its legitimate members into a collective egoism."¹²³ In Connolly's opinion, if a democracy is defined by an identity that is

¹²¹ William E. Connolly. Identity/ Difference: Democratic Negotiations of Political Paradox. (Ithaca & London : Cornell University Press, 1991.)p. x-xi.

¹²² To see how, in Connolly's opinion, the state maintains its dominance over its members, see Ibid at 201-204.

¹²³ Ibid at 205.

premised upon the suppression of alternate identifications and has been manipulated by the state to create a collective egoism, then by its very nature the political identity is a fictitious account. For Connolly, there must be the realization that this form of democracy has hegemonic qualities. A democratic hegemony is attained when “the perspectives of an identifiable constellation attains predominance in several areas of public debate. . . .”¹²⁴

As I argued in the first chapter, Walzer’s concept of the political community and his argument that shared understandings can be determined to create a fictitious and unified community or to use Connolly’s term, create a “collective egoism.” Let me review my objections to Walzer’s position. First, according to Walzer’s view, there is little need to acknowledge the claims of outsiders; the only concern is to ensure that immigrants who might get in are compatible with the general culture of the community. Thus, the political community has a right to determine who it views would be a good member. In other words, it may look for the qualities (family relations, ethnic and ideological affinity) in immigrants which most resemble those privileged by the political community. Second, I do not deny that citizens share a collective identity – for example, they refer to themselves as Canadians or Americans – yet it is this shared understanding that is constantly challenged. At any given time, what it means to be a Canadian or American depends upon who is articulating it. As Parekh indicates, “the concept [of identity] reifies and homogenizes what is distinctive to a society and suppress diversity and fluidity. It also arrests history and implies that a society’s character has persisted more or less unchanged over

¹²⁴ Ibid at 212-213.

time.”¹²⁵ Thus, my second criticism of Walzer argued that his formulation of locating shared understandings (based on his subjective interpretive approach) gives rise to the sort of “fictitious” account of which Connolly is critical. This results in a broad hegemonic conception of the community’s shared understanding which devalues opposing interests.

In order to encourage a democratic politics that stimulates cultural plurality, Walzer’s formulation of the political community has to be rejected for one that retains elements of the agonal approach. For Connolly, a democracy that is agonistic provides:

Spaces for difference. . . [which] are established through the play of political contestation . . . the terms of contestation *enlarge opportunities for participants to engage the relational and contingent character of the identities that constitute them*, and this in effect in turn establishes one of the preconditions for respectful strife between parties who reciprocally acknowledge the contestable character of the faiths that orient them and give them definition in relation to one another.¹²⁶

Only a reciprocal understanding of the character of the citizens can promote real recognition. Walzer’s theory does not seek to enlarge opportunities for participants, but rather it ensures that the community identity remains intact. While Walzer’s theory does not suppress diversity within its territory, one can see that his conception of the political community determining its membership and locating shared understandings does not encourage contestatory relationships, but rather a consensus on the membership of the community and unity of shared understandings.

¹²⁵ Bhikhu Parekh. “Three Theories of Immigration” Strangers and Citizens: A Positive Approach to Migrants and Refugees. Ed. Sarah Spencer. (Great Britain: Rivers Oram Press: 1994.) p.102.

¹²⁶ Connolly, Supra note 121 at 211. [emphasis added]. Therefore, what is required to make a democracy more legitimate in Connolly’s view is a “counter-hegemonic coalition” that would not express a unified view of all its members. Instead, these counter-hegemonic interests “would consist of a variety of constituencies drawn together in varying proportions by considerations of interest, identity, and ethical concern and moved to varying degrees by new interpretations of danger and possibility.”

In Walzer's theory, there appears to be little room for contestation by differing voices, instead the community speaks with a unified voice. Walzer's formulation of the political community and his assumption that a community's shared understanding can be located is in direct contrast with the agonal perspective. Unlike the agonal orientation, in Walzer's theory there seems to be little room for perpetual debate and contestation, rather, consensus is the goal. The political community may select who can gain entry based on its right to preserve and continue the majority culture, and shared understandings are interpreted by Walzer as common to all citizens (even though there might be alternative understandings). Thus, there is little likelihood that a supplementary agonal approach could assist Walzer's theory of membership since he places such limited value on openness and conflicting interpretations.

For Walzer, guaranteeing that the community identity remains intact involves making certain that those admitted will not alter the identity of the community. Thus, Walzer's theory ensures that those selected for immigration are the "right kind" of immigrant. As I articulated in Chapter One, my primary objection to Walzer's theory of membership is the criteria that he selects for choosing potential immigrants. Bonnie Honig's work offers a critique of theories such as Walzer's that utilize the selection of immigrants as a means to justify and reinforce the identity of the community. Choosing potential immigrants based on characteristics that are desirable from the perspective of the community attempts to ensure continuity of the nation's cultural traditions, thereby preserving the identity of the community. Instead, Honig argues that an agonal approach would bring to light the way immigrants have been utilized to reinforce the identity of the community.

Honig's work centers around the myth of the immigrant which has been used to justify the shared identity of the political community. She is particularly concerned to take on the challenge of re-describing immigrant identity and how it has altered the vision of the nation. In her study of the Biblical Book of Ruth, she discredits two other theorists for their interpretation of Ruth as an immigrant. Honig uses the Book of Ruth to dispel the myth of immigrants and their perceived role in the community as newcomers who must assimilate to the collective identity.

According to Honig, Cynthia Ozick sees Ruth, a Moabite, as the model immigrant who is forced to assimilate and brings completion to the Israelite community. For Ozick, Ruth the immigrant reinvigorates the Israelite community while not corrupting it because she has chosen to leave her home and her numerous gods. Therefore, Ruth becomes a convert and her distinctiveness is assimilated into the majority.¹²⁷

Julia Kristeva's Ruth unsettles the Israelite community that she joins because she is an "other" and an outsider to the community. Thus, it becomes imperative for the Israelites to protect their unified community. What Kristeva praises in Ruth is her difference, which makes for a more open and accepting community when she is accepted by the Israelites. For Kristeva, Ruth's gift to the Israelite community is her foreignness and its challenge to Israelite sovereignty. Yet, what Honig finds disturbing about Kristeva's Ruth, is Kristeva's inability to recognize the complexity of the immigrant's "undecidability." Kristeva does not capture the many dimensions of the immigrant's personality such as the yearning for home that many immigrants experience. Thus, Ruth is the model immigrant because she is willing to affirm the existence and worth of the

¹²⁷ Bonnie Honig. "Ruth, the Model Émigré: Mourning and the Symbolic Politics Of Immigration" Ed. D. Campbell Moral Spaces: Rethinking Ethics and World Politics. (University of Minnesota Press, 1999)pp.190-194.

community that she disturbs.¹²⁸ The problem for Honig is that Kristeva's "cosmopolitanism already knows what it is – and what it isn't – and so it risks becoming another form of domination, particularly when it confronts an Other that resists assimilation. . . ."¹²⁹ As Honig points out "both responses [to Ruth] judge the immigrant in terms of what she will do for or to us as a nation."¹³⁰

For Honig, there cannot be a community that values plurality and difference if foreigners are required to assimilate into the community. Rather she suggests that, ". . . the renewal of cosmopolitanism, the site and source of its energies, will come from engagement with foreigners who seem to threaten but with whom joint action is nonetheless possible."¹³¹ Immigrants cannot enter the political community like Ozick's and Kristeva's Ruth, because they exist to justify the unified collective identity. They are the outsider and the potential threat to the community. Therefore, the community must see to it that they are assimilated into the majority or, in the case of Walzer's theory of membership, ensure that only those immigrants that are most like the citizens of the community are allowed admittance.

However, according to Honig, the community must engage in deliberation with the new member. The community must be revitalized with the perspective of the newcomer. Immigrants must be free to engage in deliberation with the political community, otherwise they are merely joining the collective yet have no public voice. She states:

¹²⁸ Ibid at 195-197.

¹²⁹ Ibid at 199.

¹³⁰ Ibid at 188.

¹³¹ Ibid at 199.

successful democratic transitions and expansions depend on the willingness of both receiving populations and immigrants to *risk mutual transformation*, and to engage and attenuate their home yearning for each other's sakes and for the sake of their political life together.¹³²

Walzer's theory of membership ensures that any potential new members are selected based on their ability to affirm the identity of the political community. Immigrants are granted entry based on their capacity to be like other juridical citizens in order to further justify the common identity of the community. As Honig points out, by choosing immigrants based on what they can do for the community, the community is doing nothing more than reaffirming its own identity. An agonal approach, by contrast, stipulates that the membership of the community is no longer based on this *selective* identity, but rather it risks allowing those not like the community the opportunity to join and have a public voice and at the same time preserve their cultures and traditions.

Essentially, the relatively narrow and exclusive formulation of the community adopted by Walzer limits the capacity for plurality and difference to thrive. In Walzer's theory, the identity of political community is fixed. If new immigrants are going to join, then they must be easily assimilated into the majority culture. An agonal approach takes a fundamentally different track by encouraging contestation and disputation of the identity of the political community. Moreover, it allows immigrants that enter the political community to maintain their diverse cultures and traditions.

¹³² Ibid at 203. [emphasis added].

4. Rejuvenating The Political Culture

Habermas' theory of constitutional patriotism provides a method for all individuals, including new immigrants, to join the political culture of a nation without having to give up their cultures and diverse traditions. Thus the restrictions that are found in Walzer's theory of admission on the first part of the admission process (open borders) are not evident in constitutional patriotism. Nevertheless, as I indicated in Chapter One, constitutional patriotism is not without its problems. Most notably, constitutional patriotism requires that individuals be socialized into a "common political culture" that is based on historically embedded constitutional principles of the nation. Therefore, as I suggested (and Habermas recognizes), the ability of new immigrants to participate in their new community is restricted since they must already consent to the state's governing values. The second part of the admission process (naturalization) is more restricted since the interpretation of these constitutional principles is done without the influence of immigrants.

Habermas's theory of constitutional patriotism encourages a redirection of national immigration policies away from state-centered assimilationist and ethnocultural understandings of the community in order to avoid excluding potential new members because they do not share the same cultural traditions as the community. However, as Rogers Brubaker's study on the immigration history of France and Germany illustrates, national citizenship traditions have remained virtually consistent for centuries. Brubaker states that:

the state-centered, assimilationist understanding of nationhood in France is embodied and expressed in an expansive definition of citizenship, one that automatically transforms second-generation immigrants into citizens, assimilating them – legally – to other French men and women. The ethnocultural, differentialist understanding of nationhood in Germany is embodied and expressed in a definition of citizenship that is remarkably open

to ethnic German immigrants from Eastern Europe and the Soviet Union, but remarkably closed to non-German immigrants.¹³³

While this implies that both the French and German understandings of nationhood have been relatively stable, Brubaker insists that “cultural idioms” were reinforced and mobilized throughout specific historical and institutional settings in order to reproduce the national identity. Once cultural idioms have been repeated they shape the judgement of the state regarding what is politically imperative and in its own interest. “Judgements about what is in the interest of the state are mediated by self-understandings, by cultural idioms, by ways of thinking and talking about nationhood . . . cultural idioms constitute interests as much as they express them.”¹³⁴ Thus Brubaker has argued that historically citizenship which has been conceived within a nation-state is inevitably bound up with nationhood and national identity. Membership within a state entails membership within a nation. Thus, debates about citizenship requirements are fundamentally discussions about what it means to belong to a nation-state. For Brubaker, “the politics of citizenship today is first and foremost a politics of nationhood”¹³⁵ The state identity must appear to be unified, and constructing the identity of the political community is a continual project.

Although, Habermas’ constitutional patriotism explicitly rejects the state-centered assimilationist model in France, and the ethnocultural understanding of nationhood in Germany, Brubaker’s study does illustrate the deep-seated traditions that have constructed the national

¹³³ Rogers Brubaker. Citizenship And Nationhood In France and Germany. (Massachusetts and London : Harvard University Press, 1992.)p. 3.

¹³⁴ Ibid at 17.

¹³⁵ Ibid at 182.

identity of these nations. Even though they are rejected in constitutional patriotism as that which unifies the community, these historical understandings of the German and French culture are enshrined in their constitutions.¹³⁶ As I indicated earlier, Habermas is aware that a nation cannot escape its historical identity, yet he argues that it can still be open to new voices. I agree with him, but I think that in order for constitutional patriotism to be open to new voices, it must reflect a different method of understanding the perspectives of newcomers, something which we find in James Tully's work.

Tully's study, *Strange Multiplicity* (1995), explores the question of whether a constitution can give recognition to the demands of members of diverse cultures that would enable them to freely consent to a form of constitutional association. As Tully indicates, the issue arises from nationalism's (basing belonging on ethnic or cultural identifications) recognition of one culture at the expense of excluded or marginalized cultures. The solution cannot presume that a constitution can avoid recognizing any culture. For Tully, a just constitution must begin with the mutual recognition of the different cultures of its citizens. Second, mutual recognition cannot take the form of recognizing each culture in the same constitutional form, because that runs the risk of misidentifying cultures as being uniform. Thirdly, it must be recognized that cultures are not homogenous. Rather, cultures are "continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others. The

¹³⁶ For example, recently in France the rights of Muslim women to wear the hijab was challenged based on France's tradition of the secular state and confining religious matters to private life. Therefore, it is clear that historical interpretations of the constitution still are reflected in the everyday life of France. See Carens for an exploration of this issue (2000).

identity, and so the meaning, of any culture is thus aspectival rather than essential.”¹³⁷ As Tully indicates, the politics of recognition takes place on “intercultural common ground” which he defines as the re-negotiation, interaction, and overlapping of cultures that evolved over time.¹³⁸ While these are arguments that are seen in the work of Habermas, what distinguishes Tully’s approach to constitutionalism from that of Habermas is his agonal approach.

According to Tully, in order to be able to ensure cultural diversity one must explore modern constitutionalism, which developed over the last four centuries around the equality of independent, self-governing states and the equality of citizens. Constitutionalism came into prominence throughout the world as former colonies freed themselves from European imperialism, the result of which was the construction of equal and independent states, and citizen’s struggles for equal recognition. Therefore, Tully states, what we should be doing is investigating how much of the inherited forms of modern constitutionalism need to be rethought in order to do justice to the various demands of cultural groups now residing within these nations.¹³⁹ For Tully, in order to achieve popular sovereignty in culturally diverse societies,

¹³⁷ James Tully. Strange Multiplicity : Constitutionalism in an Age of Diversity. (Cambridge University Press, 1995.) pp. 7-11. Since Tully’s study is based on the historical exclusion of Aborigines one might reasonably question whether his work can be extended to the problem of immigration. Immigrants are new members, and as such, they do not have a long history of their voices suppressed with the writing of the constitution. However, as potential new members Tully would recognize that their voices should be heard. Thus, I think he would be inclined to argue that the voices of new members should be able to challenge the constitution. Overall, the goal of Tully’s project is to demonstrate the problems with the rise and stability of modern constitutionalism, yet he seeks to translate this into present-day problems of cultural recognition and illustrate the process for contemporary constitutions to encourage greater cultural recognition.

¹³⁸ Ibid at 14.

¹³⁹ Ibid at 15-17.

“people [must] reach agreement on a constitution by means of an intercultural dialogue in which their culturally distinct ways of speaking and acting are mutually recognized.”¹⁴⁰

Of central concern for Tully is the language of modern constitutionalism which he claims has remained static for hundreds of years. The result has been the disabling of critical discussion surrounding constitutionalism. Instead, the language of modern constitutionalism is firmly rooted within the authoritative traditions of interpretations provided by constitutional societies.¹⁴¹ The three authoritative schools of political theory that have reinforced the language of modern constitutionalism are liberal, communitarian, and nationalist. As Tully explains, there is agreement in the use of the language embodied in constitutionalism even though it is interpreted differently in each theoretical tradition. He argues that although the discussants use the terms differently, the agreement is implicit in their actual usage of the terms or in the language. For example, Tully suggests that when Aboriginal groups employ terms such as “people” or “sovereignty” they are utilizing terms that already contain a certain meaning, and such usage might distort the meanings and understandings of the Aboriginal group.¹⁴²

Tully traces the history of the formation of the modern language of constitutionalism, which he claims has come to reflect the customary ways of the just constitutional order. As a result any challenges to the constitutional order must employ this language which has been consistently reasserted and justified in the writings of contemporary constitutional theorists. It is argued by these theorists that:

¹⁴⁰ Ibid at 29.

¹⁴¹ Ibid at 41.

¹⁴² Ibid at 38-39.

by a self-conscious act of reflective reason and agreement, the [sovereign] people give rise to a constitution which 'constitutes' the political association. The constitution lays down the fundamental laws which establish the form of government, the rights and duties of citizens, the representative and institutional relation between government and governed and an amending formula.¹⁴³

This developed from the work of theorists that have managed to construct the superiority of the modern constitution through seven features that are shared in all authoritative versions.¹⁴⁴

Tully demonstrates that they have created modern constitutionalism which legitimated their language, dismissed the constitutions of diverse groups, and has subsequently kept the differing cultures' constitutions hidden.¹⁴⁵ Tully discovers that the language of modern constitutionalism that has been created and adhered to for three hundred years is a partial forgery. Although it masquerades as universal (representing the will of all members of the community) it is in fact imperial, because it served to justify European imperialism, (the imperial rule over the colonies, and cultural imperialism over the diverse citizens of the community). Imperial conventions were used to exclude, dominate, assimilate, and exterminate diverse voices.¹⁴⁶

¹⁴³ Ibid at 58-59.

¹⁴⁴ Ibid at 62-70. The seven features of modern constitutionalism are: 1) the definition of popular sovereignty according to the three authoritative traditions; 2) modern constitutionalism stands in contrast to ancient constitutions and is a more progressive version; 3) once again in contrast to the ancient (irregular) constitution, a modern constitution is more uniform where individuals are treated equally; 4) the recognition of custom where the government recognizes the transformed character and economic and social progression of the community; 5) the modern constitution is identified with European institutions such as the rule of law; 6) the constitutional state possesses an individual identity as a nation; 7) the constitution comes into effect at some "founding moment" and provides the rules of democracy.

¹⁴⁵ Ibid at 99-101. These constitutions of differing cultures are hidden because of the language of modern constitutionalism that has narrowed the language that cultural groups can use to be heard.

¹⁴⁶ Ibid at 96-97.

Hence, for Tully, what is required is a *contemporary*, rather than a modern constitution, based on “. . . intercultural dialogue in which culturally diverse sovereign citizens of contemporary societies negotiate agreements on their forms of association over time. . . .”¹⁴⁷ In order to ensure that the voices of all individuals are heard in a constitutional debate, contemporary constitutionalism must involve a “reflective dimension.” Thus, for Tully, “the norms of rational acceptability of constitutional recognition are themselves questioned, in a piecemeal fashion, in the course of the discussion.”¹⁴⁸ Contemporary constitutionalism should be thought of as a game where the participants alter and challenge the rules and regulations as they progress. In order to demonstrate that it is the *language* of modern constitutionalism that has secured this static understanding of modern constitutions, Tully draws on the work of Ludwig Wittgenstein.

For Wittgenstein, the language of modern constitutionalism has been perceived as uniform. It has been seen as dominant over hundreds of years, woven out of the practices and institutions of contemporary societies. Drawing upon Wittgenstein, Tully claims that the identity of modern constitutions (based on the seven features of modern constitutionalism) is a presumption of “the craving of generality.”¹⁴⁹ Quoting Wittgenstein, Tully states:

The idea that ‘to get clear about the meaning of the general term’ it is necessary ‘to find the common element in all its applications’ has ‘shackled’ philosophy: ‘for it has not only led to no result, but also made the philosopher dismiss as irrelevant the concrete

¹⁴⁷ *Ibid* at 30.

¹⁴⁸ *Ibid* at 40

¹⁴⁹ *Ibid* at 104-105.

cases, which alone could have helped him [or her] to understand the usage of the general term'.¹⁵⁰

This reasoning suggests that the presumption and search for a general term or understanding has shaped and molded political thought. Wittgenstein's theory has three relevant arguments that translate his point of view to the language of modern constitutionalism. First, understanding a general term such as constitutionalism in this case, is a fiction. It is always possible to interpret and apply the general term in various ways. Second, while theorists have sought to bring to light the various rules embodied in a practice, this too is a fiction. Rather, there are many tangled and contested practices which cannot be accounted for by theorists which shape each individual's understanding. Finally, the only way to comprehend the various examples and versions of the general term is in a dialogue with others.¹⁵¹ Thus what can be seen is that an agonal approach to constitutionalism is required in order to ensure cultural recognition. To guarantee that individuals do not remain "subjects" with power exercised over them, Tully's agonistic perspective encourages participation of all individuals based on their own understandings.

Although the goal of Habermas' theory is ensuring all voices are heard and recognized in the democratic dialogue, Tully notes that during the creation of modern constitutions some voices were excluded and silenced. Concurring with Tully, Dominique Leydet states, "instead of writing a national history from the fictitious perspective of a reconciled society, sharing a basic consensus . . . it would be more interesting and helpful to write from the perspective of its actual

¹⁵⁰ Ibid at 105.

¹⁵¹ Ibid at 105-111.

divisions”¹⁵² A constitutional association which provides the basis for “critical reflection” ensures that one’s traditions and cultures will not be taken for granted and that it enhances tolerance for other views.¹⁵³ Tully’s contemporary constitutionalism is a supplementary agonal approach to issues of cultural diversity. For Tully, if the voice of all citizens is to be heard then all must have a voice in the interpretation of constitutional principles. As his work illustrates this is not the case in most modern constitutions which have created and reinforced their own language, at the expense of other cultures whose voices were silenced. For Tully, an agonistic approach dictates that a consensus cannot be reached on the language of constitutionalism, but rather that individuals should be allowed to use their own languages and their own experiences to multiply the perspectives that influence constitutions. Tully’s examination of constitutionalism is informed by this critical reflection that is a feature of agonal theory. By examining the constructed and manipulated features of modern constitutionalism a better understanding of the difficulty of achieving equality among differing cultures is seen.

While Habermas’ constitutional patriotism can be informed by the knowledge and traditions of other cultures, it asserts that new immigrants must *assent* to the already established political culture of the nation contained in the constitution. Thus, as I argued, the possibility of immigrants challenging the interpretation of, and having a sphere of influence over, constitutional principles is unlikely, given that they are excluded until they pass the second part of the admission test (naturalization). The importance of Tully’s work for Habermas’ theory of

¹⁵² Dominique Leydet. “Lifeboat” Eds. Ronald Beiner and Wayne Norman. Canadian Political Philosophy: Contemporary Reflections. (Oxford University Press, 2001) p. 258.

¹⁵³ Tully, Supra note 137 at 190-197.

constitutional patriotism is that it provides an examination of the exclusionary techniques employed in modern constitutions. This is not a dismissive critique of Habermas' theory, but rather it encourages reflection on his interpretation of the constitution and its construction. Tully's approach offers a necessary insight into the construction of constitutions which he has indicated have been constructed in a dominant language for hundreds of years. As I argued, Habermas is aware that constitutions reflect the historical understanding of the community, yet Tully's work asks him to reconsider whether all voices in the community were recognized and whether under his formulation of the constitution all new voices can be heard (if they have to unreflexively assent to the principles of the constitution). In contrast to the rejection of Walzer's theory of membership, a supplementary agonal approach is a necessary corrective to an inherent limitation in Habermas' interpretation of constitutionalism. Considering Habermas' statement that individuals must "assent" to the already established political culture, Tully's approach would question whether those immigrants assenting are actually given a voice in the public sphere or if they are merely agreeing to constitutional principles. For Tully, individuals should have the capacity to contest and alter the rules, whereas in Habermas' theory, these rules are not up for debate by immigrants until they become juridical citizens. Habermas' theory of constitutional patriotism is not "incorrect" per se. Indeed, as I will argue in chapter three, it is the model that a theory of membership should follow with respect to integrating immigrants, but it should be supplemented with an agonal approach in order to ensure that all voices are heard in the public sphere.

5. Conclusion

Liberal theory will most likely continue to dominate political thought, yet it is precisely because of its supremacy that we must question whether it encourages or discourages greater social inclusion of all members, including immigrants. As I argued, another approach to political theory is required, one that seeks to contest the fixed rules and institutions of democratic politics. I suggested that a supplementary agonal approach would encourage greater discussion and debate over the rules and institutions that govern our community.

Furthermore, I argued that Walzer's theory of membership must be rejected based on the criticisms that a supplementary agonal approach offers. The work of Connolly and Honig must be examined as an alternative perspective on the identity of the community. Walzer's emphasis that the community may select the characteristics of its members thereby attempting to preserve the integrity of the community, and determining shared understandings, presents a fixed and unified identity. The supplementary agonal approach corrects Walzer's assumption that a political community must preserve its cultural traditions by keeping out those that do not contribute to it.

In addition, I argued that Habermas's theory of constitutional patriotism should also be informed by a supplementary agonal approach in order to further examine whether the process that has created modern constitutions has excluded any voices, and whether it has the potential to further exclude any voices. In the next chapter, I will examine the elements of a supplementary agonal approach in the work of Joseph Carens.

Chapter Three

Carens And A Contextual Approach To Justice

1. Introduction

As I suggested in the second chapter, Michael Walzer's theory of the selective community is not retrievable with a supplementary agonal approach. The intent of the agonal perspective to question the rules and procedures that govern democracies is in fundamental opposition to Walzer's theory of membership which promotes consensus in the political community. However, in contrast, Jürgen Habermas's theory of constitutional patriotism could be aided by a supplementary agonal approach. I suggested that agonal theory has the potential to address the inherent limitations within modern constitutionalism and its implications for the integration of immigrants. In this chapter, I shall examine the work of Joseph Carens and I suggest is his implicit application of a supplementary agonism to liberal theory.

Since the publication of the now classic article *Aliens and Citizens: The Case for Open Borders* (1987), Carens remains one of the leading scholars who explores immigration from a normative perspective.¹⁵⁴ His vast body of work on immigration theory demands that the fundamental principles of justice embodied in liberalism be revised in order to determine the appropriate measures that a state can employ in constructing its immigration policy. Thus, through his commitment to the liberal value of equality, he has sought to develop a just method to accommodate the diverse traditions and cultures of immigrants. From my perspective,

¹⁵⁴ Peter C. Meilaender. "Liberalism and Open Borders: The Argument of Joseph Carens" 30 International Migration Review. (1999)p.1062.

Carens's article "Aliens and Citizens" and its defence of an unrestricted right to freedom of movement, is a step in the supplementary agonal direction. Although I argue that this article is important for its reconsideration of liberal theory and its use of elements from the agonal approach, I shall contend that Carens' recent contextual approach to justice has abandoned the agonal perspective for what I will suggest is a disappointing retreat to Walzer's communitarian project.

The first section of this chapter will examine Carens' early article "Aliens and Citizens", which features the open borders argument. I will argue that Carens' emphasis on the priority of the individual employs certain elements of the supplementary agonal approach. In this article Carens' recognition that liberal theory's emphasis on the rights of the individual prior to the community questions the rules that have governed the identity of the political community.

However, I submit that Carens' theoretical orientation shifted from a supplementary agonal approach, to one that is more concerned with preserving the identity of the community. Thus, I argue that Carens' most recent theory, "justice as evenhandedness", while sensitive to the historical context of the nation, resembles Walzer's ethno-cultural understanding of the community. Using the two-part admission process, I will explore how Carens' most recent theory is socially exclusionary to immigrants and more like Walzer's theory of membership.

Finally, this chapter will conclude with a reconsideration of Habermas' theory of constitutional patriotism and Tully's supplementary agonistic orientation and the benefits of this approach as opposed to Carens' and Walzer's.

2. Open Borders

The effect of Carens' article "Aliens and Citizens" (1987) is to prompt in the reader a rethinking of the approach that liberal democratic nation-states follow with respect to their immigration policy. Using the first part of the admission process (open borders), I will outline Carens' argument as it was presented in this article.¹⁵⁵ Following the first part of the process it becomes evident that Carens places considerable emphasis on the rights of all individuals rather than juridical citizens. In order to justify his ideal that borders should generally be open and that freedom of movement should be a guaranteed right, Carens relies on the arguments of two distinguished liberals and the utilitarian perspective. For Carens, the work of Robert Nozick, John Rawls, and the utilitarians leads to the same conclusion, that there is little justification for states to restrict immigration policies.¹⁵⁶ What can be seen is that there is a general presumption of the *equal moral worth of individuals* prior to the community, thus rendering illegitimate the attempt to differentiate between aliens and citizens since all individuals are entitled to the same basic liberties regardless of their legal status as citizens.

Carens believes that, given the high proportion of economic inequalities between industrialized states and Third World countries, states which are better off have an obligation to admit immigrants from less fortunate countries. In order to support this position, Carens explores

¹⁵⁵ I will not discuss the second part of the admission process (naturalization) in this section because it is only in Carens' later work that he reveals his position on the acquisition of citizenship.

¹⁵⁶ Joseph H. Carens. "Aliens and Citizens: The Case for Open Borders" 49 Review of Politics. (1987)p. 251-273. Carens also challenges Walzer's communitarian theory and suggests that he does not provide sufficient reason for a state to create an exclusionary immigration policy. I will not explore this critique of Walzer, since it was my focus in Chapter One.

the sovereign right of the state to limit and constrain entrance to immigrants. Carens begins with the theoretical position that borders should generally be open and that citizenship should not be utilized as the tool for closure of borders. For Carens the significant concern is that:

Citizenship in the modern world is a lot like feudal status in the medieval world. It is assigned at birth; for the most part it is not subject to change by the individual's will and efforts; and it has a major impact upon that person's life chances. To be born a citizen of an affluent country like Canada is like being born into the nobility. . . to be born a citizen of a poor country like Bangladesh is (for most) like being born into the peasantry in the Middle Ages. In this context, limiting entry to countries like Canada is a way of protecting a birthright privilege.¹⁵⁷

In Carens' perspective, simply because an individual is born in a nation that decreases their life chances should not limit them from emigrating to a nation where they can improve their future. Rather, possessing citizenship is "arbitrary from a moral point of view" and based almost entirely on the circumstance of birth.¹⁵⁸ Thus, Carens suggests that theories of citizenship should be rethought with concern for the individual as the objective.

In order to argue that the just goal of immigration policy is concern for the individual, Carens examines three liberal theories. In his exploration of Robert Nozick's work, Carens argues that one of the most popular positions surrounding immigration is exclusion based on the sovereign right of the state to govern its territory. Carens suggests that this claim is based on individual property rights and he examines the work of Nozick as one of the leading liberal representatives of the property rights tradition. Carens argues that Nozick assumes that all individuals in the state of nature are equal and thus they each have the right to obtain property.

¹⁵⁷ Joseph H. Carens "Migration and Morality: A liberal egalitarian perspective" Ed. Brian Barry and R. Goodin. Free Movement: Ethical issues in the transnational migration of people and money. (London, Harvester, 1992.)p. 26. Although this quote is in another article, it is an expansion of the same idea in the "Aliens and Citizens" (1987) article see page 252.

¹⁵⁸ Carens, Supra note 156 at 261.

The state can only enforce the rights of each individual to enjoy their property. Under Carens' interpretation this right to individual property is granted to all individuals even though they may not be juridical citizens. The state must protect the rights of individuals, thus the legal status of citizenship does not entitle one to more protection of their property. According to Carens, this does not give the *state* the right to exclude aliens (non-juridical citizens). Individuals may still exclude aliens from the land that they own, but they have this right as individuals. As Carens contends, Nozick declares that the territory of a nation is not the collective and joint property of its citizens, thus the state cannot limit access to its territory based on the collective interests of its citizens.¹⁵⁹ From Carens' perspective, Nozick's theory grants the individual the right to own property, hence prohibiting entry to aliens is a function that the state cannot pursue because its sphere of power resides in enforcing the rights of individual property owners.

Next, Carens explores the theory of liberal scholar John Rawls. In a *Theory of Justice* (1971) Rawls introduces the idea of the "original position" which provides the mechanisms for a liberal activist state. In order to determine what justice requires, Rawls argues that individuals must place themselves in the "original position" behind what he calls "a veil of ignorance" in which they know nothing about their own personal situations such as class, race, gender, or beliefs. Rawls contends that individuals placed in this position will impartially choose two principles. First, they would want to guarantee equal liberty to all individuals, and second they would allow for economic and social inequalities if they advantaged those who were in the least well off position (what Rawls calls the difference principle). The ultimate goal of the original position is to make all individuals equal so that their identities will not bias their reasoning. For

¹⁵⁹ Ibid at 253-254.

Rawls, this reasoning suggests that individuals will imagine themselves in the least advantaged position and thus will want to secure basic liberties for all individuals.¹⁶⁰ Thus, for Carens a person's personal views on restricted immigration and aliens are absent behind the veil of ignorance, rather, individuals are more likely to share a concern for the rights of all individuals.

Rawls draws a distinction between ideal theory and non-ideal theory. Ideal theory is defined as after the veil of ignorance is lifted individuals will abide by the decisions reached in the original position. Thus the ultimate goal of ideal theory is social reform and justice. Non-ideal theory is understood as taking into account the history of the world and past injustices. In other words, it reflects the conditions that constrain the society we currently live in.¹⁶¹

With respect to immigration in ideal theory, Carens suggests that the original position is a valuable formulation for reducing restrictions on immigration. In the case of freedom of movement, Carens argues that since individuals under the veil of ignorance are likely to adopt the perspective of the most disadvantaged in society, they will insist that no restrictions be imposed on immigration. This reasoning suggests that individuals will want to ensure that they can emigrate to any nation in order to improve their life chances. Although Rawls recognizes a limitation on liberty known as the "public order restriction", this, Carens contends, can only be used if there is reasonable evidence that is apparent to all individuals that the public order might be disturbed (liberty cannot be restricted without justifiable cause).¹⁶² Hence, under ideal theory

¹⁶⁰ Ibid at 255-257.

¹⁶¹ Ibid at 255.

¹⁶² Ibid at 258-259.

Carens argues that concern for the individual will prevail over ensuring that the community is not overwhelmed by massive immigration movements.

In a non-ideal world, Carens indicates that certain restrictions on immigration may be justified such as restricting large-scale immigration from overwhelming the ability of an industrialized state to accept immigrants, nevertheless, he still contends that a right of immigration can be guaranteed because of the basic right of liberty. For him, restricting immigration on the grounds that it would reduce the economic benefits of juridical citizens is not justifiable. Carens contends that arguments intended to preserve the economic well-being of the community are unacceptable based on the public safety restriction and the priority of liberty. Once again the public order exception comes into effect. In order to justify restrictions on immigration, there would have to be evidence that shows that the economic stability of current citizens would be reduced by immigration and even if this were the case, restrictions on immigration could not be upheld based on the priority of liberty.¹⁶³ Thus, Carens admits that in non-ideal theory there might be some grounds for restricting immigration, yet in ideal theory these do not hold. What Carens can determine from Rawls' original position is that in an ideal moral world and even a non-ideal moral world, limiting immigration is a difficult task for the state to justify given the basic priority Rawls accords to the individual.

Finally, Carens examines the work of utilitarians, for whom the fundamental principle is "maximize utility." Although Carens argues that under a utilitarian philosophy there would be greater reasons for restricting immigration if immigration would economically disadvantage some

¹⁶³ Ibid at 259-262.

individuals and not maximize utility, in his opinion this restriction may not be justifiable.¹⁶⁴ As Carens suggests, from a utilitarian perspective “the best immigration policy would be the one that maximized overall economic gains.”¹⁶⁵ From this position the claims of juridical citizens would not weigh more than that of aliens, since what is important here is the maximization of economic gains.¹⁶⁶ In many cases the free mobility of labour and capital would increase economic gains. Therefore, closing borders to cheap immigrant labour would not maximize utility.

Before I move on to my assessment of the open borders argument, I think it would be useful to discuss Carens’s division between idealistic and realistic moral theory. The idealistic approach to morality requires that the reality of the world that we inhabit be assessed by our highest ideals. This approach is concerned with fundamental justice. It encourages critical reflection on existing institutions and practices. A realistic approach to morality is concerned with constraints that a community must accept if morality is to serve as a guide for the real world. Its focus is on what can be improved within this moral perspective given the reality we inhabit. The realistic approach tries to minimize the gap between what *is* and what *ought* to be.¹⁶⁷ Carens’s work on immigration has consistently shifted between these two forms of morality. I

¹⁶⁴ Ibid at 263.

¹⁶⁵ Ibid at 263.

¹⁶⁶ Ibid at 263.

¹⁶⁷ Joseph H. Carens “Realistic and Idealistic Approaches to the Ethics of Migration” 30 International Migration Review (1996)pp.156-157. The distinction between idealistic and realistic approaches to morality, although not found in the “Aliens and Citizens” article, is a necessary tool to understand what Carens tries to accomplish in this article. It serves as the reason for what I will argue are his two distinct versions of the first part of the admission process (open borders).

think it is significant that he has made this distinction between the two approaches to morality.

The importance of this separation allows him to explore what *should* be expected of immigrants when they move to a new nation (an idealistic approach), and to explore the ability of a state to limit admission given the reality of the world we live in (the realistic approach).

Thus, in “Aliens and Citizens,” Carens relies on a fundamental moral right to freedom of movement and equality of all individuals. Essentially, he advocates opening borders in the sense of complete freedom of movement. This is an idealistic version of morality, one that is concerned with promoting justice for all individuals. Under this argument the equal moral worth of all individuals must be protected. As Carens states “if people want to sign the social contract, they should be permitted to do so.”¹⁶⁸ The distinction between juridical citizens and aliens is not upheld in this theory of open borders. Instead, a wealthy liberal democratic state has an obligation to foster the protection of individual rights regardless of the individual’s legal status. Therefore, as Carens demonstrates, both liberal thinkers and utilitarian theory would on some level, promote the rights of individuals before securing the rights of the community of citizens. This illustrates that the protection of the community from outsiders or aliens is not the first concern of these three perspectives. Instead, there is an implicit presumption in all three theories that ensuring the happiness and security of the individual is paramount. Hence, for Carens, since that these theories each begin with the implicit assumption of the equal moral worth of all individuals, there can be no justification for drawing a distinction between citizens and aliens.¹⁶⁹ If there is no guarantee in

¹⁶⁸ Carens, Supra note 156 at 270.

¹⁶⁹ Ibid at 252.

these three theories that the community must be protected from aliens then there is little (public order restriction), if any, justification to close the borders to the entrance of immigrants.

2.1 The Agonal Spirit

For Carens the necessity of his open borders argument based on idealistic moral theory, is that it offers a “critical perspective on the ways in which our collective choices are constrained even when we cannot do anything to alter those constraints.”¹⁷⁰ The social institutions which embody a nation’s way of life may be unjust yet relatively accepted. While it would be close to impossible to foresee open borders, Carens points out that this critical reflection is necessary “otherwise we wind up legitimating what should only be endured.”¹⁷¹ For Carens, “the point about the open borders argument is to call into question the complacent certitude that there is nothing fundamentally wrong with the way we have constructed our collective lives with our decisions to exclude others from the social resources we enjoy.”¹⁷² While it may seem an improbability to foresee open borders, (for example, it might lead to an influx of poor immigrants which drain the social services of their new home) the idea that citizenship is unjust because it depends so heavily upon territory, requires at least reconsideration in order to be justified.

Although the open borders argument reflects Carens’ normative perspective, his argument may be *consistent with the supplemental agonal approach* described in the second chapter. While his theory of justice does not encourage its actors to engage in face to face confrontation and

¹⁷⁰ Joseph H. Carens “Open Borders and Liberal Limits: A response to Ibister” 34 International Migration Review. (2000) p. 636.

¹⁷¹ Ibid at 636.

¹⁷² Ibid at 640.

negotiation it does encourage a critical rethinking of the dominant understandings of the division between juridical citizen and alien (non-member). His theory questions the nation's sovereign authority to determine an admission policy. Carens argues that these three liberal theories begin from the same presumption of the equal moral worth of the individual, thus they reflect the possibility that the distinction between a citizen and an outsider might become blurred. Although Carens acknowledges that open borders might be an impossible ideal, the agonal approach which I think underlies Carens' theory encourages a reexamining of the consensus on the notion of the self-determining political community. In this sense, Carens' theory of open borders does what Walzer's theory of admission did not. Carens advocates a resistance to the determinacy of concepts such as the "political community" that organize democratic politics. While Carens is committed to liberal theory his argument for free movement based on the rights of the individual prior to the security of the community suggests that the rules binding the political community should be open to dispute, contestation, and reconsideration. Thus, Carens' open borders argument employs the agonal spirit in its questioning of the rules that govern entrance and exit of the political community.

The "Aliens and Citizens" article defends an admission policy of essentially unrestricted immigration. Based on this argument Carens' argues that states are severely limited in constructing exclusionary immigration control systems, and in an idealistic world the physical borders of nations should be open to immigrants. However, Carens' recent work has focussed more on developing a position based on a realistic moral approach to issues of immigration control. The following section is an exploration of Carens' current position on the first part of the admission process (open borders).

3. Justice as Evenhandedness: Rethinking Open Borders

While Carens is quick to defend the importance of the open borders argument, his recent work illustrates his worry that open borders does not allow for sufficient recognition of the importance of the historical community. In this section I will examine Carens' statements on how immigrants are expected to integrate into their new home. Following the two-part admission process, I will argue that the first step to admission (open borders) in the justice as evenhandedness approach limits the social inclusion of immigrants. Although Carens states that immigrants do not have to abandon their cultures and traditions, I will contend that in his example of the Quebec case there is more of an inclination to promote and preserve the ethical culture of a community. Thus, I will suggest that Carens' justice as evenhandedness approach is as problematic as Walzer's theory of membership.

Since "Aliens and Citizens" Carens' position has evolved [in the direction of] the communitarian critique of liberalism which suggests that political theory cannot overlook the historical importance of the community. According to Carens, what is required is:

a version of liberalism that takes rights seriously without making them absolute and that retains the fundamental liberal commitment to human freedom and equality, but is more pluralistic and open-ended in its understanding of the human good, and *more sensitive to context and history*.¹⁷³

Carens' argument now reflects the possibility that some limitations on immigration might be justifiable. In other words, the distinctive community with a valuable way of life should create limits for the exclusion of immigrants. This "zone of morally permissible" behaviour gives the distinct political culture the opportunity to preserve and protect its way of life. Carens' first

¹⁷³ Joseph H. Carens. "Reconsidering Open Borders: A Reply to Meilaender " 33 International Migration Review. (1999) p.1083. [emphasis added].

attempt at the first part of the admission process (open borders) was based on idealistic moral theory, in this articulation of the open borders argument Carens employs the other approach: realistic moral theory. Thus, this realistic approach is attentive to the constraints that are evident in the world in which we live. Carens was aware of the communitarian critique of his work as he addressed Walzer's theory of membership in the "Aliens and Citizens" article, yet he dismissed the importance of cultural integrity to his theory of membership. Nevertheless, now that his theory is based on a realistic understanding of the world, he is more inclined to accept Walzer's emphasis on preserving the traditions and culture of the community.

Carens' most recent contribution to issues of membership appears in *Culture, Citizenship, and Community: A Contextual Exploration Of Justice As Evenhandedness* (2000).¹⁷⁴ He focuses on a conception of justice as fairness which he calls justice as evenhandedness. This conception of justice states that if individuals are to be treated with equal respect then they must be treated "concretely". That is, in order to comprehend the perspective of others we have to understand that which makes each cultural tradition unique. As Carens states, this requires "immersion rather than abstraction. It emphasizes contextually sensitive judgments more than general principles."¹⁷⁵

¹⁷⁴ Joseph H. Carens. Culture, Citizenship, and Community: A contextual exploration of justice as Evenhandedness. (Oxford University Press, 2000.) Since the "Aliens and Citizens" article, Carens has published many other articles. This book is the most recent publication by Carens on issues of justice, yet in the several articles that I refer to, Carens articulates and expands on many of the same ideas that are reflected in this book. Thus I interpret the articles as supporting his argument in "Culture, Citizenship and Community."

¹⁷⁵ Ibid at 8. Carens states that there are two conceptions of justice. His justice as evenhandedness approach is the second one, and the one that must prevail. His first approach to justice is based on fairness. According to Carens this approach is best articulated by John Rawls in a "Theory of Justice" (1971). He defines justice as fairness as in order for individuals to be treated equally they must be thought of abstractly. That is looking at their generic human interests and not their particular identities. This requires that liberal democratic states are neutral with

For Carens, liberal democracies cannot be neutral with respect to culture and national identity for three related reasons. First, while a liberal democratic culture is a generic culture – one that includes liberal values that are common to most liberal nations (such as respect for democratic procedures) – they cannot reflect the feeling of belonging to a particular nation. In other words, differences between the German national history and the American version cannot be overlooked, they reflect what it is to be a national citizen of a particular nation.¹⁷⁶ Second, every liberal democratic nation will have to decide how to draw internal political boundaries and decide upon the language for public discussion. The guiding function of justice as evenhandedness entails a balancing of competing claims to recognition and a respect for particularism. Not every claim for recognition can be given equal weight, this depends on factors such as history, the size of the group, and the importance of the claim.¹⁷⁷ Thus, what counts as an evenhanded approach is open to contestation. Third, Carens argues that an evenhandedness approach requires immersion in the particulars of a case in order to make *contextually sensitive judgments* rather than relying on abstract principles.¹⁷⁸

Carens applies his principle of justice as evenhandedness in his exploration of the requirements that states can impose on new immigrants. He attempts to ascertain how immigrants should adapt (assimilation or integration) to the receiving state. Like Walzer and Habermas, Carens wrestles with the precise obligations that liberal democratic nation-states can expect from

respect to competing conceptions of the good, allowing citizens to make their choices.

¹⁷⁶ Ibid at 10-11.

¹⁷⁷ Ibid at 12.

¹⁷⁸ Ibid at 14.

immigrants and how deeply these potential new citizens must conform to the cultural identity of the host state.¹⁷⁹ Specifically, Carens is interested in whether states are entitled to expect *cultural transformation* in the immigrant as a condition for entrance and later juridical citizenship. While each liberal democracy has its own historical identity, Carens argues that there are certain principles that every liberal democracy has in common, he cites freedom of speech as an example.¹⁸⁰ He acknowledges that there will be disagreement on how these liberal principles will be adopted. However as Carens suggests, context and history cannot be overlooked when liberal democratic nations create their immigration policy. Thus, I suggest that while Carens intends to delicately balance competing claims for recognition in liberal democratic states and requires that new members are not required to abandon their traditions and cultures, his emphasis on sensitivity to the historical context of a nation leads to guaranteeing the preservation of the distinct identity of the community.

In order to illustrate the type of requirements that a liberal state can justly impose on immigrants, Carens offers the example of the province of Quebec. He considers Quebec because, while it is not a state, it does have a government that has almost complete authority over its immigration policy.¹⁸¹ Carens describes Quebec as a “distinct society” because over 80 per cent of its population are francophones (direct descendants from the original French settlers of New France during the seventeenth and eighteenth centuries). Furthermore, as Carens points out, the

¹⁷⁹ Like Walzer, Carens also argues that new immigrants are potential or future citizens. For Carens, the open borders aspect of the two-part admission process is integral. Once immigrants have been admitted and reside within a nation for a significant amount of time, they should be granted the opportunity to acquire citizenship (naturalization).

¹⁸⁰ Carens, Supra note 174 at 107-108.

¹⁸¹ Ibid at 108-109.

Quebec government has spent many years reinforcing the distinct identity of Quebec. In order to determine what the Quebec government may justly expect of its new members, Carens relies on a document released by the Quebec government about the integration of immigrants.¹⁸² According to the document, the Quebec government outlines three principles that should guide the integration process. In order to be granted entry under the first part of the admission process (open borders), immigrants are expected to accept these propositions and adhere to them. These policies that represent the “moral contract” between Quebec and that new immigrants *must accept* are, first: that Quebec is a society in which French is the shared language spoken in public life; second, Quebec is a democratic society, hence all members are encouraged to participate and contribute; and third, Quebec is a pluralist society that is open to many influences as long as they coincide with respect for fundamental values.¹⁸³ Although immigrants are expected to accept these characteristics, the Quebec government has a “moral duty” to ensure that the means are available for immigrants to subscribe to these principles.

The two principles of democracy and pluralism will be examined together. For Carens, Quebec is a democratic society that encourages participation by all citizens. Accordingly, the state has the obligation to ensure that immigrants are able to participate in the social, cultural, and political life of the state, and that they are free to pursue their own cultural traditions. Thus, all

¹⁸² *Ibid* at 108. To see a discussion of the policy document that Carens refers to and a discussion of the problems with selecting one document as representative of Quebec immigration policy refer to pages 108-112. Even though there are significant problems associated with the choice of this document (the main one being it does not reflect a unified version of the public’s view of immigrants) I will refer to this example because it illustrates Carens’ belief that a state could lose its culture with increased immigration.

¹⁸³ *Ibid* at 112-113.

traditions are accepted as long as they are compatible with liberal values such as toleration and equality. An emphasis on democracy and pluralism cultivates openness between groups and toleration for differing cultures. This notion that immigrants must adhere to liberal democratic principles echoes Habermas' limitation on entrance to a nation. Thus, for Carens and Habermas ensuring that potential immigrants respect liberal values is a just limitation.¹⁸⁴ However, one area where Carens' theory becomes problematic is his request that immigrants "join this distinctive society."¹⁸⁵ Although they are allowed to bring in their own cultures and traditions, I think there is an implicit emphasis that immigrants share certain characteristics with the *cultural* community.

Carens accepts the proposition that immigrants must be expected to communicate in French in Quebec public life. He argues that immigrants are properly required to be familiar with the French language and the national identity and history of Quebec because of the possibility that Quebec is in danger of losing its French culture. He argues that given the dominance of English in North America immigrants would otherwise be more inclined to learn English rather than French. In order for the French language and culture to be preserved, the Quebec government wants to ensure that any immigrants entering the community must accept the French language and culture.¹⁸⁶ For Carens, the message of the policy document suggests that:

if you want to belong in Quebec, both to feel that you belong and to have the rest of the population feel that you belong, you have to learn French and accept the central place of

¹⁸⁴ *Ibid* at 117-122. I have not gone into a lengthy explanation of the reasons why democracy and pluralism are easily reconciled with fundamental commitments that a liberal democracy must embody because commitments to democracy and pluralism are generally accepted as two principles that must be found in any liberal democracy.

¹⁸⁵ *Ibid* at 115.

¹⁸⁶ *Ibid* at 113-114.

*the French language in Quebec society. . . There is nothing wrong, the government seems to be saying, in making full social membership contingent upon this sort of adaptation.*¹⁸⁷

This requirement of immigrants, Carens argues, can be justified because the language legislation is aimed at promoting French and not excluding any other language. Thus, it is not the expectation of linguistic assimilation, only that in public life the language of communication is French. Furthermore, the Quebec government is under a duty to make it possible for new immigrants to learn French.¹⁸⁸ Carens states that “consent alone cannot make an agreement whatsoever legitimate, regardless of the circumstances.”¹⁸⁹ Thus, it is not enough that immigrants are told that these are the principles that they must adhere to if they move to Quebec, but liberal democratic nations have an obligation to ensure that immigrants are given the opportunity to learn French. The most demanding requirement for immigrants moving to Quebec is to contend with learning a new language, yet for Carens as long as the government is under the obligation to provide public education to its new immigrants to teach them French, the government can justify its requirement of learning the French language.

In contrast to the Quebec experience, Carens offers an example of a liberal democratic state pursuing a policy that conflicts with liberal democratic principles. In a chapter that focuses on Muslim religious practices, Carens discusses the case of three girls in France that were expelled from their school for wearing the Islamic scarf, the hijab. The main argument of the French government emphasized that wearing the hijab was not reconcilable with the French tradition of secularism in public schools and France’s strategy of assimilating new members. For

¹⁸⁷ *Ibid* at 115. [emphasis added].

¹⁸⁸ *Ibid* at 124-131.

¹⁸⁹ *Ibid* at 119.

Carens, the practice of denying Muslim immigrants the opportunity to express their religious beliefs cannot be justified within a liberal democratic state. Carens argues that the claim that the hijab is a religious symbol and thus is unacceptable in the French secular tradition, does not provide a convincing reason why basic freedoms consistent with liberal values should be dismissed.¹⁹⁰ As Carens states, “the mere fact that a contextual account is offered does not mean that we have to accept it.”¹⁹¹ Rather, denying fundamental freedoms cannot be legitimated in a liberal democratic state which values the principles of freedom of expression and religion.¹⁹² While an argument can be made that the Quebec government did not restrict any of the traditions of its new members as France did, I contend that these practices are similar because they seek to ensure the majority culture of the nation survives. Before I discuss the similarities between Carens and Walzer and their defence of preserving the cultural integrity of the nation, I will address one more aspect of Carens’ argument, that of the second section of the two-part admission process (naturalization).

3.1 Carens And Acquisition Of Citizenship

With respect to the second aspect of the two-part admission process, the acquisition of citizenship (naturalization), Carens, like Walzer, is inclined to ensure that once immigrants are granted entry, they should be granted juridical citizenship. According to Carens, when a state admits an individual for a significant period of time he or she becomes a member of that state and

¹⁹⁰ Ibid at 155-159.

¹⁹¹ Ibid at 158.

¹⁹² Ibid at 156

citizenship should not be denied to them.¹⁹³ As Carens states, “citizenship should be treated as a threshold concept. Once over the threshold, all are to be treated alike. We do not and should not hand out more legal rights (or legal duties) to some – say, the more patriotic – and fewer to others – say, the less patriotic.”¹⁹⁴ For Carens, people have a moral right to become juridical citizens of any community of which they are members.¹⁹⁵ Furthermore, as Carens argues, to allow individuals the right of entry into a community and then to deny them juridical citizenship with its corresponding rights and obligations, runs the risk of creating a group of vulnerable members who cannot have an active public voice in matters that might affect them. The governing principle for acquiring citizenship, from Carens’ perspective, is “the longer the presence, the stronger the claim to membership and hence the stronger the claim to citizenship.”¹⁹⁶ Thus people who live in a state for a significant period of time (from Carens’ view this amounts to two to five years of residence) regardless of how they got there (illegally, as guest workers, or through family reunification laws) are entitled to become juridical citizens.¹⁹⁷

¹⁹³ Carens, Supra note 156 at 29. For Carens there is a distinction between members and citizens. Members are individuals who have been admitted (passed the open borders part of the admission process) and reside within a state, yet have not acquired juridical citizenship (naturalization). Citizens are legal members of the community.

¹⁹⁴ Ibid at 114.

¹⁹⁵ Joseph H. Carens. “Membership And Morality: Admission To Citizenship In Liberal Democratic States” Ed. Rogers Brubaker. Immigration and The Politics of Citizenship in Europe and North America. (Lanham, MD. University Press of America Inc. 1989.) p. 32.

¹⁹⁶ Ibid at 42.

¹⁹⁷ Ibid at 46.

3.2 Similarities Between Carens And Walzer

The two central criticisms that I had of Walzer's theory of membership concentrated around the first step of the two-part admission process (open borders). I argued that his emphasis on the community determining the characteristics of potential new citizens resulted in a community that preferred those immigrants that shared the same characteristics as the majority of citizens. My second objection centered around Walzer's fiction of shared understandings.¹⁹⁸ Although Walzer wants to ensure that the second part of the admission process (naturalization) is guaranteed to all immigrants, he ensures that those immigrants coming in are desirable from the perspective of the community. Therefore, he does not need to argue that immigrants should assimilate since he ensures that those granted entrance have the qualities that the community desires. Accordingly, in the second chapter, I demonstrated the need to reject Walzer's approach based on the reasoning of a supplementary agonal approach. In this chapter, I have indicated that Carens' early interpretation of the "open borders" argument is consistent with the general commitments of a supplemental agonal approach. His attempt is to critically examine the premise that preserving the identity of the community must precede the protection of individual rights. Carens' critical investigation of the ability of the political community to adopt a consensus on admission is consistent with elements of the agonal approach that resists homogenous understandings and interpretations of the political community. However, while Carens' early article "Aliens and Citizens" is compatible with the supplemental agonal approach, his most recent work is a shift from this position and more like Walzer's theory of membership.

¹⁹⁸ Carens, *Supra* note 174 at 118. I will contend that the fiction of shared understandings is not present in Carens' theory. Rather, Carens argues that the Quebec government recognizes the contributions that various ethnic immigrant groups have made to the culture of Quebec.

Carens' justice as evenhandedness approach is ultimately as problematic as Walzer's theory of membership. As I indicated, I think Carens was influenced greatly by the communitarian critique of his work. He is much more sensitive now to the historical context of a nation. Essentially, he shares the same emphasis on the preservation of the distinctiveness of the community that is found in Walzer's theory. Although Carens explicitly rejects selecting immigrants based on their compatibility with the ethnic culture and identity of the community, his discussion of the Quebec case suggests that in order for immigrants to pass the first part of the admission test (open borders) they must *accept* the cultural traditions of the Quebec community.

Carens indicates that the preservation of Quebec's distinct society is of paramount importance, thus any potential immigrants must learn the French language in order to communicate in the public life. Carens equates the French language with the "symbol of Quebec identity."¹⁹⁹ Thus potential immigrants are expected to contribute to the Quebec identity by speaking French and learning the history and culture of the community. The same presumption that immigrants must "fit in" to the community is apparent in Carens' theory of evenhandedness that I argued is found in Walzer's theory. The idea that a nation-state claims sovereign authority over a territory which extends, in Walzer's words, to a legitimate capacity to "restrain the flow of immigrants" in order to preserve "a particular community's understanding of itself" is also apparent in Carens' work.²⁰⁰ In Carens' formulation, the goal of the Quebec government is to *preserve the French distinct society*. If immigrants want to belong, they must adopt the French culture and language.

¹⁹⁹ *Ibid* at 115.

²⁰⁰ Walzer, *Supra* note 27 at 51.

Unlike Walzer, Carens does not outline the precise characteristics that immigrants must possess (such as ethnic and ideological affinity and family reunification) before they are granted admission. Nevertheless, I do not think that it is much of a stretch in thinking to suggest that this Quebec government policy would favour immigrants from former French colonies, because the inhabitants would already be likely to speak French. The fact that Carens argues that the Quebec legislation is not aimed at suppressing any immigrant languages and cultures, from my perspective, is not the point (since this would be a very unjust and undemocratic practice for a liberal democracy to pursue).²⁰¹ Rather, basing the first part of the admission process on ensuring that those immigrants that seek to immigrate to Quebec are willing to adopt the French language and culture would certainly ensure that the immigrants that get in are the “right kind” of immigrant. In other words, that they would continually reproduce the culture and language, thus maintaining the dominance of Quebec’s distinct society. While Carens embraces accepting those immigrants with differing cultures, I find that his reasoning that immigrants must accept the French culture and language are similar to Walzer’s restrictive vision of the community.

4. Conclusion: Constitutional Patriotism, Agonism, And The Future

In chapter one I indicated that the first part of the admission process (open borders) in Habermas’ theory of constitutional patriotism encouraged integration of immigrants into the

²⁰¹ Joseph H. Carens. “The Rights Of Immigrants” Ed. Judith Baker. Group Rights. (Toronto: University of Toronto Press, 1994) p.161-162. In this article Carens refers to a discussion that he had with a Quebec immigration official. Carens’ points out that while the official was cautious about selecting immigrants to Quebec with a certain religious background, he was more willing to acknowledge that a general preference was given to immigrants that could speak French.

political culture of a nation. Unlike Carens and Walzer, Habermas argues that political integration of prospective immigrants is required based on the shared recognition of a political life, rather than an ethical-cultural form life. For Habermas, since the political culture is reflected in the constitution of the nation based on liberal principles, immigrants are allowed to maintain and foster their diverse cultures and traditions.

Therefore, unlike in Carens's and Walzer's theories, immigrants are not being selected for the similar characteristics that they share with members of the community and their ability or willingness to reproduce the culture of the receiving nation. Both Carens' and Walzer's theories of membership establish the entrance of new immigrants into a liberal democracy on the possibility that they are going to preserve the cultural traditions of the nation. While Carens and Walzer state that they advocate diversity and plurality of cultures, their theories suggest that they are more concerned with securing the future of the cultural identity of the nation. Thus, I think that Habermas's emphasis that all a liberal nation can expect from new immigrants is that they are politically integrated into the political culture of a nation, is the most just practice.

Following the second aspect of the two-part admission process (naturalization), I argued that in Habermas' theory of constitutional patriotism the integration of new immigrants into the political culture might be problematic because the ability of new immigrants to have a public voice in matters that affect them is limited by Habermas' reliance on historically embedded constitutional principles. The political integration of immigrants can only be achieved if they *assent* to the principles of the constitution. Furthermore, unlike Carens and Walzer, Habermas does not advance the idea that once an immigrant is admitted they should be considered a future citizen, thus they should have a voice in community. Carens and Walzer encourage, at the very

least, the presumption that immigrants should be granted juridical citizenship. Habermas does not deny immigrants citizenship, yet he does state that they must accept the prevailing constitutional principles and can only challenge them once they have become legal citizens. For Carens and Walzer immigrants are effectively members (although they do not have juridical citizenship) of the community, thus they should be granted a voice in matters that influence them. Immigrants, under Habermas' theory, must unreflexively assent to the principles of the constitution as they are interpreted by the political culture. However, as I have argued these constitutional principles cannot be divorced from the ethical-political historical understanding of the nation. As Habermas and other political theorists acknowledge they are part of the nation's shared history and identity and cannot be completely removed from the collective identity of a nation. Thus these historically sedimented principles of the constitution are problematic for the social inclusion of immigrants, because until immigrants are juridical citizens they are not granted a voice in the negotiations.

In chapter two, I discussed the relevance of a supplementary agonal theory to liberal theory. I suggested that the work of James Tully contributes to Habermas' theory of constitutional patriotism by demonstrating the problems with assuming that modern constitutionalism can mutually recognize all cultures. I argued that Tully's work in no way discredits Habermas', but rather contributes to the discussion of the construction of constitutions. As I argued, the one significant area of concern in Habermas' theory is the ability of constitutions to be open to new voices. Tully challenges Habermas' theory of constitutional patriotism to examine the process that created modern constitutions and what this implies for the integration of new citizens. As Tully argued the language of modern constitutionalism has been perceived and continually interpreted as uniform. His approach to contemporary constitutionalism, on the other hand,

enables all participants to alter and challenge the rules that govern the discussion in order to ensure that they can participate in their own method to multiply the voices that interpret the constitutional principles. Thus Tully's agonal approach must supplement this inherent limitation in Habermas' theory.

Nevertheless, while I find that Habermas's theory of constitutional patriotism poses significant problems for the social inclusion of immigrants in the second part of the admission process (naturalization), in particular the ability for immigrants to be guaranteed a voice in public, his theory is preferable to that of Carens' and Walzer's. Both Carens' and Walzer's selection of immigrants in the first part of the admission process (open borders) is more concerned with the preservation of the community's identity and culture than it is in admitting immigrants and allowing them to express and reproduce their cultures and traditions. Habermas' theory of constitutional patriotism encourages integration for new immigrants so that they do not have to abandon their cultures and traditions. Finally, the central criticism of Habermas' theory is reflected in the second part of the admission process (naturalization). Essentially, Habermas must reexamine his emphasis on the requirements that immigrants assent to the principles of the constitution. As future juridical citizens, Habermas' theory must provide and guarantee immigrants the ability to challenge and negotiate with the political community.

Conclusion

One of the greatest challenges facing immigration policy in liberal democratic states is the status of illegal or undocumented workers who reside within and often are employed in the receiving state. Since they possess no formal/legal status as “citizens”, they are often withheld the civil, political, and social rights that accompany juridical citizenship. This class of immigrants are the most vulnerable to exploitation by employers and oppression by the host state.²⁰² Although there is a recent trend to limit and abolish many basic public benefits to aliens or non-members, there is also a recognition that there is a class of immigrants that reside within the receiving territory that are excluded from the basic rights afforded by citizenship.²⁰³ For example, the United States has entered talks with Mexico over the possibility of negotiating an amnesty agreement for the estimated 4.5 million illegal Mexican immigrants that reside and work within the United States. The possible agreement would create a new category of immigrants that are entitled to work in low-wage industries with basic civil rights protected in the United States, and could travel back and forth to Mexico (thereby alleviating the strain that immigration has placed

²⁰² Although throughout the thesis I make no reference to a specific category of immigrants, my focus in the conclusion on illegal or undocumented workers serves to highlight what I suggest is the most difficult immigration dilemma facing policy makers. Margot Roosevelt. “Illegal But Fighting For Rights” Time Magazine. (January 22, 2001): 58-60. The abuse from employers that I am referring to is in the form of sexual harassment, hazardous working conditions and violating the minimum wage laws. Additionally, they are exempt from forming trade unions and are subject to deportations.

²⁰³ Linda Bosniak “Universal Citizenship And The Problem Of Alienage” 94 Northwestern University Law Review. (2000): 964. Bosniak cites California’s Proposition 187 and the 1996 Welfare Reform Act as two examples of attempts to limit access to juridical citizenship in the United States.

on the Mexican agrarian economy).²⁰⁴ What was once thought an impossibility in the United States granting amnesty to illegal migrants because it might encourage a flood of new immigrants trying to qualify for juridical citizenship is now a probability. As can be seen, there is an awareness by some states that the immigration control system must contend with the absorption of immigrants that legally apply for admission and those immigrants that have circumvented the legal admission process. The reality that many immigrants reside within the territory of a liberal democratic community yet possess no basic rights, has forced the state to rethink its policy decisions with respect to immigrants.

A state's immigration policy (who its selects to be potential citizens) is often conceived as a reflection of its national identity. Thus any future or potential members are carefully scrutinized so as to continue and renew the traditions and cultures of the community. However, as the above example illustrates, the reality of illegal or undocumented workers residing in the United States does not coincide with its attempt to control those entering its borders. A just immigration policy must contend with the various dynamics of immigration that occur today and develop a strategy to ensure social inclusion for all individuals (even those that arrived illegally).

My attempt in this thesis has been to determine whether liberal democratic states have the right to select certain immigrants that fulfill the national identity at the expense of immigrants that differ culturally from the majority. I questioned how open a liberal democratic nations' borders should be to immigrants with diverse traditions and cultures that are dissimilar from the majority. I also examined the extent to which those immigrants who are granted entry are allowed

²⁰⁴ Michael Duffy. "Out Of The Shadows" Time Magazine. (July 30, 2001.): 22-25. Of course this possible agreement poses new problems for immigrants not least of which is the implication that immigrants are only suited for the lowest paid jobs that Americans will not do.

to join the conversation within the nation on matters that directly concern their cultural practices. The answers to these questions, I suggested, should be guided by the obligation of liberal societies to develop and promote cultural plurality in order to guarantee social inclusion. Theories of citizenship such as Michael Walzer's theory of membership and Joseph Carens' justice as evenhandedness approach place a great deal of emphasis on preserving the identity of the community. This is not a mistaken goal, but it should be tempered with the state's responsibility to promote cultural pluralism. Potential immigrants should not be selected based on their cultural similarity to juridical citizens and liberal states cannot privilege one culture over another.

Although I argued that Jürgen Habermas' theory of constitutional patriotism presents a challenge to immigrants who must unreflexively assent to the principles of the constitution, I suggested that if supplemented with agonal theory then social inclusion for immigrants can be realized. Citizenship can no longer reflect national identity; it must be reconceived to promote the interests of all of those that reside within its territory including those that arrived illegally. The future of citizenship is to ensure that a nation secures rights for all individuals within its physical boundaries, rather than grant the status of "citizen" to those that are the "right kind of immigrant."

A multiethnic community can no longer base belonging to a nation on membership in the cultural majority. Implicit assimilation (which is present in Walzer's theory of membership, and Carens' justice as evenhandedness approach) in order to ensure that a nation's cultural traditions can continue, is an unjust option for liberal democracies. Walzer's and Carens' assimilationist strategy of removing cultural conflict and creating homogeneity by ensuring that those immigrants admitted share the characteristics of the majority, must be abandoned. Instead,

Habermas' project of disentangling citizenship from its nationalist underpinnings, supplemented with Tully's agonal perspective, can ensure that immigrants that are granted admission are permitted to reproduce their cultures and traditions and are entitled to have a public voice in matters that affect their culture.

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