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Restoring Property and Citizenship
Land Restitution in South Africa and Canada

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Abstract

The driving question for this paper relates to the deprivation of citizenship and how states must go about correcting these past injustices. Specifically, I look to examine the dispossession and restitution of land and property rights in South Africa and Canada. First, I try to illuminate the role of property rights as a citizenship right, finding a correlation between one’s conception of property as either a positive or negative right and one’s beliefs about what amounts to an equal distribution of rights. Then I determine that in both cases it is the nature of the initial dispossession and the initial injustice which determines how the dispossessed make their claims to property restitution and justice. This explains why dispossessed Aboriginal peoples in Canada make a claim to a specific non-economic relationship to the land, while the dispossessed black South Africans claim restitution more as a means to economic welfare.

Introduction

In this paper, I will analyse the relationship between citizenship and land restitution in South Africa and Canada. More specifically, I hope to determine what role property rights play in the regime of rights available to a citizen and how the relationship between the two affects land restitution processes in the two countries. I argue that perspectives which hold property rights to be more positive correlate to opinions on citizenship that view the differentiation of rights between groups as crucial to equality. In contrast, those that hold them to be more negative see equality as necessitating more uniform rights amongst citizens. Along these lines, the sort of claim upon land demanded by the dispossessed is dependent on the specific type of injustice that motivates a group’s claim to land restitution in the first place.
In Canada, Aboriginal peoples advocate for differentiated citizenship to right the wrong of the Canadian government’s devaluation of their culture, disregard for their sovereignty and attempts to assimilate them into non-Aboriginal society within a Western rights regime. This prompts them to seek a specific relationship with the land as a positive right in itself. In South Africa, the wrong of apartheid is one of forced segregation and economic deprivation. Because of this, black South Africans look to the land reform process to restore deprived land, socio-economic rights and a more formal sense of equality. Therefore, rather than seeking a specific relationship to land and differentiated citizenship, black South Africans will, at most, ask for positive property rights as a means to welfare rather than as an expression of ethnically-differentiated indigenous rights.

**Introducing Citizenship and Property**

Citizenship is a complex concept. One aspect of it is the membership and participation in a national political body. Other aspects outline the duties, protections and guarantees that a state gives to its citizens, while another covers transnational applications of citizenship. I conceive of citizenship in a contractualist sense. That is, in the tradition of Thomas Hobbes, John Locke and John Rawls, a social contract – which citizens tacitly consent to – confers upon the government the role of protecting and enforcing the rights regime set out in that contract.

Property rights first emerged as a prominent feature of social contract theory in John Locke’s *A Second Treatise on Government*. In this, he viewed the state’s primary role as the guardian of its citizens’ three main rights: life, liberty and property. Locke’s property rights, as mentioned above, were largely negative (in the sense that people had a right against others interfering in their property) and solidified during the transition from the state of nature to civil
society (Ellis 2006, 549).\(^1\) Other later theories that see property rights as stronger and more positive (that is, people actually have a right to property) hold that the status quo, or the property distribution at the time of transition, is insufficient.\(^2\) Instead, as has been implied, other rights that are crucial to one’s citizenship, such as a right to autonomy, require that one has sufficient property (Ellis 2006, 550).

Of course, the social contract is an ideal construct, and it does not always play out perfectly in the world. Throughout history, many people have been excluded from various citizenship regimes by wrongful means. These wrongs vary greatly from case to case, but for the purposes of this paper I will examine the wrongs committed by a state when it looks to deprive some of its citizens of certain rights, be they cultural, political or socio-economic. Specifically, I will focus on the dispossession and restitution of property as a right of a citizen. Efforts to restore the deprived rights are often focused around creating a rights regime that is more equal, fair and just. Therefore, when I speak of citizenship I intend to shed light on the distribution of rights by a state to individuals and groups within its jurisdiction.

*Citizenship*

Unfortunately, seeking equality and justice is not straightforward. There are different conceptions of equality, perspectives on injustice and strategies to correct injustices. Charles Taylor explains the dichotomy and tension between the equality of difference and the equality of dignity (Taylor 2008). While the equality of dignity emphasises respect for the universal

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\(^1\) Like Hobbes, Locke conceived of society as emerging from a stateless period, or state of nature. In Locke’s state of nature, people naturally accumulate property, but seek a state to guard that property more effectively than they could, thereby conceding some of their natural rights to appropriate property in favour of a guarantee of their existing property.

\(^2\) See the *Property Rights*, for a more detailed explanation of this.
potential all share, the equality of difference focuses on “the potential for forming and defining one’s own identity, as an individual, and also as a culture” (Taylor 2008, 450). This second conceptualisation of equality is less focused on the formal equality of people and more focused on pursuing other values. It sees identity as a value that a state should promote to ensure equality between groups. One can also conceive of it as recognition of the importance of the equality of outcomes. Poverty and other structural barriers can prevent people from making use of their rights, and formal equality is generally not enough to produce more substantive equality. Both dignity and difference are worthwhile values, but they sometimes come into conflict with each other, as is evidenced by the critiques levelled by proponents of both sides.

Those who lean towards emphasising the equality of dignity rightly point out the moral difficulties with defining equality as anything but something universal, as the law seems fairer when it is difference-blind (Taylor 2008, 451). On the other side, however, the proponents of equality of difference point out that to ignore identity in favour of universalism can lead to the suppression of marginalised identities in favour of the dominant identity, which becomes the de facto identity under liberal universalism (Taylor 2008, 451). On this line of argumentation, it would seem unwise to neglect the salience of difference. Quite clearly one never entirely adopts one stance over the other, and policy makers, legislators and philosophers generally aim for a mix of the two.

The content of citizenship, here defined as a set of rights conferred by the state upon its members, differs based on what conception of equality one has. If one conceives of equality as difference blind, all citizens should have the same rights and responsibilities. If one sees difference as the condition upon which equality is based, one would advocate for different rights and responsibilities for different people, based on their identity and characteristics. Of course, as
mentioned above, neither of these ideal theories play out perfectly in the real world, as one can see even without resorting to controversial cases, such as affirmative action or Aboriginal rights.

For example, in our society children have more limited rights than adults, purely because as a child one is less responsible and capable. Similarly, other groups have different rights that correspond to their needs. Women have different rights from men in issues of abortion and childbirth due to their larger role in the process. Another sort of difference allows those with more money to be more heavily taxed, while those with very little money get access to various welfare benefits. Of course, these are more controversial cases, but it shows that the legal framework in today’s society is neither entirely difference blind nor entirely difference-centric.

A helpful way of considering these two notions of equality and citizenship can be found in Joseph Carens’s conceptualisation of equality under the law. One approach, which corresponds more to the equality of dignity, is ‘hands-off’. Under this approach, the government tries to stay as neutral as possible in relation to issues of culture and identity out of a respect for each person’s right to pursue their conception of the good, while ensuring that an environment conducive to this right exists (Carens 2000, 8). Will Kymlicka proposes such an approach by arguing that the state must focus on maintaining a societal culture that allows citizens to attain their own conception of the good life rather than focusing on any specific culture (Turner 2003, 139). In his mind, there is an important balance that a state must maintain between the goal of creating a sense of national community or unity and the goal of giving separate and substantive rights to communities within the greater polity (Levy 2000, 317). Kymlicka believes that one must consider both the needs of a group and the needs of the broader nation in this deliberation over rights. Congruent with the ‘hands-off’ approach, Kymlicka argues that ‘group-differentiated measures’ like minority rights and affirmative action may be needed to assure an environment
conducive to one’s pursuit of the good life, but this does not extend to a differentiated rights regime (Turner 2003, 139).

In contrast, Carens’s ‘evenhandedness approach’ is more attuned to issues of culture and identity as well as attempts to address issues of identity fairly through ‘differentiated citizenship’ (Carens 2000, 8). To be even-handed, a state must undertake “a sensitive balancing of competing claims for recognition and support in matters of culture and identity” rather than mere neutrality in such issues (Carens 2000, 12). This opinion holds that groups should have ‘differentiated’ rights that do not egregiously violate the politics of dignity. Interestingly, Carens believes that the goals of national unity and recognising distinct identities might not be opposed and could be reconciled in practice. However, he does place less emphasis on the importance of national unity in his consideration of this balance than Kymlicka (Carens 2000, 178).

Property Rights

In the West, property rights have traditionally been conceived of in the way John Locke originally formulated them. That is to say, they are seen as exclusive rights that one acquires in a state of nature through the mixing of one’s labour with an object, such as land (Waldron 1990, 253). These rights, after their acquisition, may not be violated, though they may be transferred. Robert Nozick adopts a largely Lockian perspective when he lays out his theory of property rights. Existing property rights, in Nozick’s opinion, are inviolable unless they were obtained unjustly (Waldron 1990, 257).

Jeremy Waldron states that Nozick’s view of property rights should be seen as a specific rights-based approach. This means that property rights are allotted to those specific individuals who have legitimately acquired property. The protection of such rights can be classified under
the category of negative liberty, or freedom from interference. Thus, a person’s right to property and the right to exclude others from their property comes from the fact that they have that property in the first place (Waldron 1990, 254). Waldron proposes an alternative in his general rights-based conception of property rights. This approach conceives of property rights under the umbrella of positive liberty, or a right to a thing. Effectively it is a right that allows one to exercise one’s negative liberty. His general rights-based approach sees property as a prerequisite for one’s freedom (Waldron 1990, 4). Thus, rather than being doled out to those specific people who own property, it is a right of each person, for without some form of property people’s development would be hindered and thus their autonomy would be violated.

Such a justification for a positive right to property is Rawlsian. That is, a system of property or private ownership of one thing can only be justifiable if it satisfies the conditions that exist under the original position, Rawls’s hypothetical situation through which one determines the justness of certain distributions (Waldron 1990, 275). Someone in the original position should choose a distribution of resources that is acceptable to all members of society, as all people who place themselves in the hypothetical original position must make a decision, as rational agents, without knowing the position in which they will end up. Therefore, all would seek to create the most equal distribution of resources possible. The only inequality that is acceptable in the original position is one that can be justified by the difference principle, meaning that it has to benefit the least well off in society. This way, the person in the original position provides a measure of security for his or her unknown self in the real world, who could be that least well off member in society. This sort of argument is a democratic contractualist one.

Nozick argues that such a Rawlsian conception of justice surrounding the distribution of property ignores the complex issue of historical entitlement to property and instead seeks to start
afresh without regard to people’s rights to the property they have justly acquired (Waldron 1990, 279). In other words, Rawls’s theory cannot account for the fact that people should have a right to the resources they have acquired. However, as Waldron points out, just because resources have been distributed in a certain configuration does not make that distribution fair or just. Instead, we should be able to recognise that some people disproportionately appropriated property to the detriment of others (Waldron 1990, 280). Rawls’s thought experiment of the original position works in this case. People appropriated resources with the knowledge that they would deny others access to those resources in the future, often ignoring issues of social justice while doing so.

Therefore, it is unlikely that someone in the original position would accept the present system of property rights as negative and inviolable rights. Maybe, as Waldron argues, such principles of justice were unavailable to them, either because they hadn’t been developed or because there was insufficient time or resources to address them (Waldron 1990, 279). However, Waldron shows that this should not mean that people’s initial entitlement to resources should be considered eternally just. Instead, their entitlements should be seen as provisionally just, subject to the application of a principle of justice at a later date (Waldron 1990, 280). It was hardly likely that people were so clueless in regards to issues of fairness. Rather, it is more likely that those who disproportionately or unfairly acquired property were perfectly aware of the injustice they brought about.

Corey Brettschneider offers a Rawlsian principle of justice to govern the property regime. He argues that everyone has a right to private property due to a general right to welfare. Underpinning his argument is the Rawlsian conception of democratic contractualism, as described above. Similarly to Waldron, Brettschneider argues that to have full autonomy, one
must have control over certain resources and therefore one must have some private property (Brettschneider 2007, 128). He then asks whether it is justifiable that certain people are excluded from owning property by the current property system. On Rawls’s difference principle, this is unjust. This is because the current property regime and its practice of excluding non-owners from property is not beneficial to those with no property, or those who have so little property that they fall below a set welfare standard (Brettschneider 2007, 133). Therefore, Brettschneider posits that people do have a positive right to property.

Margaret Radin further develops the idea that property is a positive right, but bases her theory in Hegel’s view of the person as a rights-bearer rather than Rawls’s idea of democratic contractualism. This view of a person, Hegel admits, is an abstract theoretical construct that manifests itself within the world through possession of external things, or property (Radin 1982, 972). Therefore, personhood and freedom depend on some forms of property. Radin argues that property is either personal or fungible. Personal property is necessary for our own personhood and thus autonomy, while fungible property is less relevant to our own personhood and is thus less important (Radin 1982, 986). This analysis can easily be applied to groups (Radin 1982, 978/1006) by conceiving of their personhood through concepts like self-determination and culture.

Radin’s example of a wedding ring illuminates this distinction (Radin 1982, 959). Intuitively, one sees a wedding ring as more important than a ring that someone wears because it is fashionable. If someone were to lose their wedding ring, it would seem more of a loss than a ring that was the same physically, but served as a fashion accessory, as a wedding ring is much more related to one’s personhood. While Nozick sees the strength of one’s entitlement to one’s property as stemming entirely from one’s just acquisition of it, Radin sees it as stemming from
how personal, or central to one’s personhood, it is. Land is often personal property. However, what makes it personal is its symbolism, for example as a home or a cultural artefact.

Radin argues that her theory is not compatible with welfarist conceptions of property, as the latter do not fully capture the connection between one’s personhood and one’s personal property (Radin 1982, 988). Many of Rawls’s rights emerge from a social contract, while the Hegelian rights seem more like natural rights. That is, Rawls’s rights stem from autonomous agents’ interactions with each other in society, while Hegel’s rights stem from one’s very existence as an autonomous agent. The Rawlsian perspective, Radin argues, would conflate the unique right to property with all of the other rights that one can claim in the original position (Radin 1982, 989). This is unacceptable to Radin, as her Hegelian perception of property sees it as a right above all other rights. Radin’s theory offers a conception of property rights that is more positive than one based on welfare, as it involves a right not only to a specific piece of property but also to a specific relationship with that property. In contrast, a welfarist notion views one’s right to property as a right to an interchangeable resource.

What do these theories say about unjust property regimes and how to reform them? Nozick’s response to such a question has already been addressed. On his argument, only those who have unjustly acquired their property may have it taken from them. Yet, as Theunis Roux points out, under Radin’s view, this strategy in itself is insufficient. Nozick’s conception of rectification of past wrongs in property cannot fully address the harms created by the unjust appropriation of property (Roux 2009, 153). Such an injustice cannot simply be undone through the return of property or a monetary transfer, as Nozick might argue. Instead, any rectification of an unjust transfer of property must recognise that the harm committed may have been the violation of the personhood of an individual (Roux 2009, 154).
Thus, compensation for the dispossession of personal property must involve more than just a return of said property. Even Nozick concedes that his view is problematic, but not for the same reasons as Radin would propose. Instead, the issue of who took what from whom is often unclear, and the same goes for determining counterfactually what harm has been caused by such an injustice. Nozick reluctantly concedes that when such facts cannot be determined one must fall back on principles of justice and equality to determine how to address historical wrongs in property transfer (Waldron 1990, 289).

If anything, Radin’s idea of redistribution further complicates the matter, as it adds the even more subjective and abstract notions of the degree of personality in property. How does one know whether or to what degree someone’s personhood was violated and what needs to be returned in order to restore it? Radin argues that to determine whether property is personal or fungible one cannot rely on the subjective opinion of the owner nor can one rely on some arbitrary ‘objective’ opinion (Radin 1982, 969). Instead, one must obtain a political consensus to determine whether property is personal (Radin 1982, 969). However, this is vague and controversial. For example there is a Jewish claim that their self-determination requires that they have a right to a piece of territory that is governed by a Jewish entity. However, if anything this claim to personal property exacerbates the Israeli-Palestinian dispute over the land, and Radin’s idea of consensus does not seem to give a firm answer to the problem.

Brettschneider presents a mechanism with which one can justify a welfarist notion of private property. Historically, many have dismissed the idea that the state has a role to play in the private sphere and thus has no reason or justification to interfere in issues surrounding property rights. However, Brettschneider rightly states that property should be subject to political and democratic contractualism. Property rights, he argues, are not simply ‘vertical rights’ that govern
the relationship between the owner and his or her property (Brettschneider 2007, 133). Instead, the bundle of rights that make up property rights also includes a ‘horizontal’ component that dictates the relationship between the owner and other members in society (Brettschneider 2007, 134). This horizontal component is made up of the right to exclude others from one’s property. Because the state plays an essential role in the enforcement of property rights and the right to exclude, property rights regimes are subject to the democratic contractualism outlined above (Brettschneider 2007, 133).

Property Rights as Citizenship Rights

Compared to Locke’s negative property rights, stronger conceptions of property rights see property rights as more crucial to one’s citizenship. Sometimes deemed ‘citizen property’, one might require some property to even be able to participate as a citizen (Vogt 1999, 110).[^1] A more welfarist view holds that property rights are positive, as people are entitled to a certain degree of them so that they can exercise their autonomy and other rights. Radin conceives of property rights as even more positive and important. Firstly, all Hegelian rights are unquestionably based upon the possession of personal property. Without personal property, one cannot exercise one’s personhood. Property rights in this sense are less a means to the end of autonomy, as they are in a welfarist perspective. Instead, they are the means by which one

[^1]: Although negative conceptions of property often allot property rights a crucial status, in their rights regime as one of three rights that the state should guarantee, they do not seem crucial to citizenship in the sense that stronger conceptions of property rights are. Of note, Locke had conceived of property owners as being the only ones who could participate in democracy. However, since then times have changed and holding property is no longer a prerequisite for citizenship, and that idea is anachronistic amongst modern negative property rights theorists. Because of this, property rights have taken less of a central role in Locke’s conception of the rights of a citizen.
projects one’s personhood in the world. Such property rights induce not just a right to a degree of property as a resource, but also rights to specific pieces of property and even to a specific relationship with that property. As one can see, the stronger the property right, the more foundational it is to one’s citizenship, either as a welfare right or a personal right.

Additionally, as property rights become stronger, it is only natural that citizenship rights become more differentiated. Negative conceptions of property rights leave the property regime unchanged. All have the same negative right to property, it is just that only those with property get to exercise it. Welfarist notions recognise the necessity of redistributive measures from the wealthier to the poorer classes. Thus, just like through the case of taxation mentioned briefly above, welfarist conceptions of property privilege those with less financial resources with more substantive socio-economic rights. Finally, the notion of personal property allows for some groups or individuals to have entirely distinct and different rights to their land as long as such rights are necessary to maintain their personhood or culture.

This creates a spectrum of property rights from positive and differentiated to negative and uniform. There is a correlation between an increase in positivity of property rights and a conception of a broader rights regime based more upon difference. Further, as property rights become more positive, they become a more crucial right within the rights regime. I will now examine two cases to demonstrate this. The Canadian case examines the tension between negative conceptions of property rights, which coincide with the equality of dignity, and a more differentiated rights regime partially based on the respect for Aboriginal peoples’ right to live on the land in a way that permits their personhood and identity. The South African case illustrates a view of citizenship as needing differentiation on class-lines with property as a positive welfare
right. Once again, this perspective is held in contradiction to a more negative view of property rights and a citizenship regime based on dignity.

**Citizenship in Former Settler Societies**

Mahmood Mamdani outlines the way in which the colonial and apartheid states laid out their categorisation of citizenship along two spectra (Mamdani 2001, 654-656). The first was reserved for the ‘settlers’, and consisted of a vertical division between races, who fell under the jurisdiction of civil law. The second, customary law, separately governed ‘native’ ethnicities and divided ethnic groups horizontally, or as equals amongst themselves, but inferior to those governed by civil law. One can see this process take place in both the Canadian colonial and the South African apartheid cases, outlined in more detail below, through the creation of multiple separate classes of citizenry.

Through a system of indirect rule, the colonial and apartheid administrations governed their ‘native’ populations. In 19th century Canada, the Indian Act laid out a fiduciary relationship (see below) between the Aboriginal bands, which received minor governance powers, and the federal government, which took over most substantive policy decisions surrounding Aboriginal affairs. This relationship and the institutions that support it are still present today, but now there is an emerging approach to addressing the needs of Canada’s now minority Aboriginal people, which may be more attuned to Aboriginal desires. In South Africa, the apartheid state attempted to move its majority black population onto segregated reserves governed by ‘traditional’ authorities. But while the Canadian government is attempting to redefine its relationship with its marginalised people with existing institutions, the new South African government is seeking to right the wrongs of apartheid with the new institutions of a young democracy. As I will show,
despite the fact that marginalised groups were treated as ‘natives’ in both cases, the claims upon citizenship that both groups make are quite different.

**Canada: Making Treaties**

*Assimilation: The quest for one ‘Canadian’ rights regime*

The Indian Act, established in the mid-eighteenth century, made Canada’s Aboriginal peoples wards of the federal government and, although it allotted them certain rights, put them in a highly disadvantageous situation. Despite the fact that this measure formally gave Aboriginal peoples a separate status, it was hardly because of a desire to achieve equality through the recognition of difference. Instead, the separate citizenship status was designed largely to encourage the ‘civilisation’ of what the new state considered to be a savage people (Milloy 2008, 4). Importantly, however, the Indian Act established Aboriginal people as wards of the government and thus set the stage for the government’s ‘fiduciary responsibility’ towards Aboriginal people (Hurley 2002). This responsibility conferred on the government a duty to act in the interests of Aboriginal peoples while making decisions for them as well as to support them as wards through economic assistance. Although this is in itself is a problematic, vague and paternalistic concept, it has still ensured that the government could not completely ignore Aboriginal issues and has perhaps turned into one of the most powerful tools for redress of past injustices and enforcement of Aboriginal rights (Bryant 1993).

The federal government thus designed programs to encourage ‘enfranchisement’ of Aboriginal peoples, or the choice to become a citizen with the same rights as a non-Aboriginal Canadian. The government created other policies that forced assimilation, like the residential

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4 Notably, there were similar pieces of legislation in pre-Confederation Canada, but the Indian Act really formalised this relationship (Milloy 2008).
school system, which sought to ‘civilise’ Aboriginal children through brutal, inhumane and traumatising boarding schools, and making Indian Status pass through the father, thus forcing mixed race children who were Aboriginal on their mother’s side to be ‘Canadian’ as opposed to Aboriginal. Further, the Indian Act banned various traditional Aboriginal practices regarding governance, cultural activities and property rights and required that Aboriginal peoples use Western norms in the hopes of assimilating them to a more Western and assumed more ‘civilised’ culture (Milloy 2008, 6). Despite these coercive mechanisms, only 250 Aboriginal people decided to become enfranchised between 1857 and 1920 (Carens 2000, 186).

From the nineteenth century through to more than halfway through the twentieth century, federal policy surrounding the Indian Act continued this way. It deepened the dependent and unequal relationship with Aboriginal peoples and continued its goals of assimilation of Aboriginal people into the non-Aboriginal Canadian society. Yet positive changes seemed to emerge in the post-war period. In 1950, the government lifted some of the Indian Act’s restrictive conditions, such as its ban on the political organisation of Aboriginal peoples, and in 1960 it gave Aboriginal people the right to vote in federal elections regardless of their enfranchisement status (Comeau and Santin 1990, 11).

These progressive changes, however, were short-lived. In 1969, the federal government released its highly controversial White Paper. Its goal was to repeal the Indian Act, which federal officials rightly saw as both costly and cumbersome as well as a grossly unfair institution. The federal government sought to make the fiduciary relationship both more efficient and more equitable. Further, the White Paper sought to return Aboriginal land to the control of its inhabitants and give responsibility of Aboriginal affairs to the provincial governments (Turner

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5 1857 is considered the date from which the colonial administration began its policy of assimilation through enfranchisement.
2006, 20). As for the fiduciary responsibility, the government would temporarily increase its funding as a means to make Aboriginal peoples more self-sufficient before phasing out its fiduciary responsibility entirely (Turner 2006, 20). Through processes such as these, the government hoped to end the system of treaties and integrate Aboriginal people into non-Aboriginal Canadian society (Cardinal 1969, 132).

The Aboriginal response to the White Paper was fairly unanimous: although it correctly saw the Indian Act and the unequal situation of Aboriginal people as an urgent problem, the White Paper’s recommendations were far from appropriate. Harold Cardinal perhaps best illustrated this response in The Unjust Society, which has informally earned the name of the “Red Paper”. In it, Cardinal argued that “[Aboriginal people] would rather continue to live in bondage under the inequitable Indian Act than surrender [their] sacred rights” (Cardinal 1969, 119).

Critics have successfully identified the White Paper as attempting to assimilate Aboriginal Canadians into non-Aboriginal Canadian society and hence as a form of the politics of dignity (Turner 2006, Cardinal 1969). They posit that such a strategy completely overlooks a number of important historical and cultural circumstances, like colonialism, the violation of treaties, non-fulfilment or unjust extinguishment of Aboriginal rights and other such injustices. With such a unanimous response that the White Paper was inappropriate and the additional criticism that the government formulated it with insufficient consultation, the critics forced the government to withdraw it and reconsider its approach to Aboriginal issues. Thus, S.35 of Canada’s new constitution guaranteed Aboriginal treaty rights, allowing their difference to be somewhat embodied within formal Canadian law.⁶

⁶ Many Aboriginal activists take issue with this clause, as it preserves only existing treaty rights. Therefore it does not account for rights that older treaties extinguished, however legitimately. Further, it puts up undefined rights for negotiation, a fact that many find problematic because
One view on Aboriginal citizenship in the above debate is the strict equality of dignity perspective of the initial Indian Act, which explicitly sought to take Aboriginal people and integrate them into a uniform non-Aboriginal Canadian form of citizenship. The criticisms of this are obvious, and I have discussed some of them in my general discussion of citizenship above. However, one more criticism is important. A policy that is so rooted in the racist policies of the past cannot hope to recognise the vast and diverse roots of the problems facing Aboriginal peoples and thus will inevitably propose what are essentially similarly racist remedial policies. Policy makers rarely use this explicit assimilationist approach in the modern era, and many government documents such as the Royal Commission for Aboriginal Peoples as well as most recent court rulings have been somewhat favourable to a more historically sensitive and tolerant interpretation of the injustices Aboriginal peoples have faced. Even the infamous White Paper did not take an altogether explicitly assimilationist view.

Another view, espoused by Tom Flanagan, correlates more with Kymlicka’s view of citizenship – described by Carens as the ‘hands-off approach’ – and the White Paper. Under this view, Aboriginal peoples deserve minority rights, but such rights should not exceed those of any other group in Canada. Thus, they should have their rights just as any other citizen should, with the general minimal protections one gives to minorities. Much like Kymlicka does, Flanagan

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they do not see the negotiation process as fair, nor do they like the idea of their rights coming from the non-Aboriginal constitution rather than from history.

7 Of course, there are some differences between these three. Flanagan denies his approach is inspired by ‘White Paper Liberalism’ (Flanagan, Alcantara and Le Dressay 2010, 177) and I am sure Kymlicka would balk at being called a White Paper Liberal as well. However, there are conceptual similarities between them, even if the actual thinkers take a more progressive and often quite different views on issues. Carens even says the White Paper is in line with Kymlicka’s definition of the equality of neutrality (Carens 2000, 188).
treats the clash as a “conflict of visions” between a desire for autonomy of Aboriginal peoples and a desire for national unity through one Canadian identity (Flanagan 2008, 231).

Carens brings up an interesting critique of Kymlicka’s reliance on the preservation of national unity as a worthy end in the Canadian context. He rightly points out that any attempts at preserving national unity, either through the Indian Act or the White Paper, have only succeeded in creating resentment against the non-Aboriginal Canadian state and identity amongst Aboriginal peoples (Carens 2000, 194). Therefore, any effort to create a more unified identity amongst Canadians may well lie in a more difference-based equality, despite the resentment it may create in the non-Aboriginal segments of society (Carens 2000, 196).

The ‘hands off’ view notably does take into account some historical factors, but for some does not capture the full range of injustices inflicted upon Aboriginal peoples. Dale Turner takes issue explicitly with each of Flanagan, Kymlicka and the White Paper as well as with what one could call the ‘hands-off’ approach in general, perhaps at times unfairly conflating their arguments (see previous footnote). He argues instead that Aboriginal rights are *sui generis* (Turner 2006, 29), that Western liberalism is a largely unsatisfactory theory from which to view the more communitarian and substantively different Aboriginal rights (Turner 2003) and that such approaches do not take into account the nature of Aboriginal sovereignty and the true injustice of its violation (Turner 2003, 145, Turner 2006, 29).

One would doubt whether even Carens’s ‘evenhandedness’ approach, despite its greater recognition of Aboriginal rights and identity, would be acceptable to Turner on his account of Aboriginal citizenship. Carens recognises the importance of treaties, substantive self-government, history and even some form of differentiated citizenship (Carens 2000). In this way, his views are compatible with the modern treaty process and the constitutional guarantee of treaty rights,
along with landmark court decisions on Aboriginal Title (see below). But his admitted use of a Western liberal framework (Carens 2000, 179) would count against him in Turner’s eyes.

The final perspective on Aboriginal citizenship is the Aboriginal one itself. Although Aboriginal perspectives of their own citizenship are diverse and dynamic, the arguments of John Borrows outline a central theme common to them. He advocates a system of ‘Aboriginal control over Canadian affairs’ (Borrows 2000, 332). Although this might seem a little dramatic, Borrows seems to mean more Aboriginal influence or substantive input into Canadian affairs than full control. By control, Borrows simply means that First Nations should have a fair say in the determination of Canadian affairs (Borrows 2000, 339).

This idea is based on the initial interactions between Aboriginal peoples and European settlers, when both treated each other as sovereign nations. Aboriginal peoples saw early treaties as guaranteeing a relationship characterised by ‘interdependence’, ‘sharing’ and ‘mutuality’ between Aboriginal and non-Aboriginal peoples, who would nevertheless remain autonomous, distinct and sovereign (Borrows 2000, 335). This can be seen as a form of the politics of difference, as it advocates for a more group-based interpretation of equality. As Borrows argues, Canada “should operate to encourage simultaneous integration and separation of communities” (Borrows 2000, 338). Aboriginal peoples deserve a right to input in Canadian affairs as a sovereign people within the nation, not just as another minority.

However, the Aboriginal perspective is not just the politics of difference. It has a second major tenet in Borrows’s view of Aboriginal citizenship as the idea of considering the land and environment as a citizen to whom people and the state have duties and against whom they have rights (Borrows 2000, 332). The fact that this perspective of Aboriginal citizenship is inherently
connected to land rights provides an interesting perspective from which one can analyse the relationship between property and citizenship.

Land Claims

Canadian Aboriginal peoples in most areas of Canada made treaties with their European settler counterparts. These treaties went through a series of distinct phases. The first of these was one of nation-to-nation negotiation during the 18th and early 19th centuries. During these negotiations, both sides were motivated to make concessions to each other (Borrows 1998). Aboriginal peoples saw the need to negotiate with the European settlers, be they British or French, to preserve their land base in the face of European settlement. The Europeans saw the need to negotiate as well, as not only were they the minority in the colonies at the time, but they also used Aboriginal peoples as allies in the wars they fought with each other and depended on them to some degree for trade and survival. These agreements often involved a one time payment for land followed by a guarantee to respect the agreed upon territorial boundaries. Importantly, these treaties emerged from a dialogue between Aboriginal and European leaders. From this era emerged the Royal Proclamation of 1763 (Borrows 1998, 160). To protect Aboriginal land bases from opportunistic settlers, the Proclamation stated that the only legitimate purchaser of Aboriginal land was the Crown. Further, it reaffirmed Aboriginal title to their land. However, at the same time it emphasised British sovereignty over that same land, creating a tension that exists to this day (Borrows 1998, 160).

Despite this tension, the relationship in the nation-to-nation phase was relatively positive compared to the next stage in Crown-Aboriginal relations. Following the War of 1812, the British achieved some degree of security as the most powerful non-Aboriginal force in Canada,
after having defeated the French in the previous century and making peace with the Americans (Miller 2009, 94). Further, the number of European settlers had drastically increased, and the colonial administration felt the need to expand their territory beyond the previously negotiated boundaries. Yet this desire to revisit the negotiation table, or make new treaties if the Aboriginal people had not yet made them, was not just a European one. Aboriginal people were already feeling the pressures of the increased settlement, with many European activities beginning to hinder Aboriginal peoples’ territorial integrity and way of life (Miller 2009, 99).

Thus began a process of agreement and treaty making that involved land surrenders in exchange for a one time payment, the enshrinement of hunting and fishing rights and the promise of annual payments from the government to Aboriginal peoples (Flanagan 2008, 145/146). Yet land was not the only surrender that Aboriginal groups made in what were to become known as the ‘Numbered Treaties’. The Numbered Treaties formally extinguished Aboriginal title and gave all Aboriginal reserve land to the Crown, while committing Aboriginal people to formally recognise the sovereignty of the Crown over their own (Venne 1997). But the treaty-making process was not a simple and fair agreement between the Aboriginal peoples and the Crown.

Conceptions of ownership of and sovereignty over land were not only somewhat alien to Aboriginal groups, but also were emphasised by the British more in the written treaty than they were in the oral communication between the two peoples (Venne 1997). Considering that Aboriginal cultures were largely based on oral tradition, there is an argument to be made that not only did Aboriginal peoples not understand what they had conceded, but also that to interpret these agreements in the modern day, one must take into account what was also said in the initial
oral agreement (Venne 1997, 174). Often, the British implied non-verbally\(^8\) or said explicitly to Aboriginal groups that Aboriginal peoples would retain control over their land, while writing in the agreement that the Crown would. As many Aboriginal leaders did not read English, their only understanding of these treaties stemmed from their oral agreement with the European settlers.

To resolve various grievances surrounding these treaties, the government has created the Specific Claims Process. This process has three main pillars around which Aboriginal peoples can make their claims: 1) they were never given the promised amount of land, 2) they suffered unfair expropriation or reduction in reserve land and 3) they received insufficient economic assistance (Flanagan 2008, 148/149). Given the nature of the treaty making process and the treatment of those treaties by the Canadian government, one can see how almost every Aboriginal group with a treaty could legitimately make such a claim. The process is expensive (not only in terms of reparations, but also in operational costs) and time consuming. Most importantly, it fails to recognise the unsavoury beginnings of the treaties and gives them legitimacy (Morse 2008, 59).

But not all groups make land claims based on the government’s failure to uphold treaties. In some regions, the government never made treaties with Aboriginal peoples, mostly those that the Europeans settled last. These areas include British Columbia, the territories, Newfoundland, Labrador and some areas of Quebec. Despite this, the government treated various Aboriginal peoples as if they were under a treaty, controlling their land, subjecting them to a reserve-system and placing them under the jurisdiction of the Indian Act and its federal authorities. Yet while

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\(^{8}\) This was often done through the exchange of gifts that corresponded to Aboriginal peoples’ oral traditions. For example, the Wampum belts (effectively Aboriginal tapestries) exchanged at the Treaty of Niagara contained imagery that spelled out the nature of the agreement (Borrows 1998).
the government justified this relationship with other Aboriginal peoples based on what was on
the surface a settlement or compromise in the form of one-sided treaties, it had less of a reason to
treat Aboriginal peoples without treaties as a people who had signed away their sovereignty.
Instead, government officials justified this similar relationship through racism, claiming that, in
the words of British Columbia’s Premier William Smithe in the late 19th century, Aboriginal
people were lucky to live under the reserve system because before it “[they] were little better
than wild animals that roamed the hills” (Blackburn 2005, 588). Effectively, the Europeans saw
Aboriginal people as too uncivilised to have a legitimate claim to owning the land.

Therefore, while other Aboriginal groups forfeited their rights to their land and thus had
their title extinguished (albeit in unfair circumstances), many Aboriginal groups never consented
in any way to forfeiting their land and therefore they still have a claim to the title over it
(Blackburn 2005, 589). This was the argument made by Frank Calder, a Nisga’a leader, when his
attempt to get Nisga’a title recognised reached the Supreme Court in 1973. Of the seven judges,
three ruled that the Nisga’a people had title to their land “from time immemorial”, meaning that
they still had it as the government had never formally extinguished it, while another three ruled
that the government had implicitly extinguished Nisga’a title to their land (Miller 2009, 255).
The seventh and final judge ruled against Calder on a technicality unrelated to the substantive
issue of Aboriginal title, as Calder had not obtained, as he should have done, the permission of
the BC attorney general before bringing his case to the Supreme Court (Miller 2009, 255).

Thus, although he lost the case, Calder had brought about a split decision on the issue of
Aboriginal title that allowed for official consideration of a pre-colonial Aboriginal right to the
land, the existence of which the government had until then vehemently denied (DeVries 2011,
42). Further, in this case, the split nature of the court’s decision had at least put into the official
discourse the possibility that the Nisga’a people and all other non-treaty peoples have a right to their land that continues to the present. (Godlewska and Webber 2007, 6). This concession forced the government, which had been unwilling to deal with the messiness of non-treaty land claims, to deal with such ‘Comprehensive Claims’ through the Office of Native Claims (Miller 2009, 256). These claims sought to create new treaties between Aboriginal groups and the government that would exhaustively define Aboriginal rights such that there was no confusion over them.

Not all levels of government simultaneously adopted the notion that unextinguished Aboriginal Title still existed. While the federal government recognised it through their initiation of the Comprehensive Claims Process, the British Columbian government refused to do so until nearly 20 years after the Calder Case (Miller 2009, 273). In 1990, the Supreme Court ruled on the case of R. vs Sparrow, and although it pertained to issues of hunting and trapping rights, it affected the issue of Aboriginal Title in British Columbia. The Supreme Court ruled that for the government to consider an Aboriginal right extinguished, the government had to have explicitly extinguished it for a legitimate and reasonable policy purpose (Miller 2009, 273). As this had not happened in British Columbia, the provincial government finally had to accept the fact that there was unextinguished Aboriginal Title throughout the province.

The government’s interpretation of the concept of Aboriginal has evolved over the years with a series of landmark court cases (DeVries 2011, 43-45). In Guerin vs. the Queen in 1984, the Supreme Court ruled that Aboriginal title to the land they had lived on had existed since before the arrival of European settlers and that the Royal Proclamation of 1763 affirms that. In Delgamuukw vs. British Columbia, the Supreme Court somewhat defined Aboriginal title, which until then had been a fairly vague concept, including within its definition communal ownership,
the right to act in ways that is in accordance with a group’s ‘traditional’ practices and historical connection to the land and, most importantly, that it includes a right to the land itself.

The Delgamuukw ruling’s definition of traditional practices was not so limited as to say that Aboriginal peoples must live as they lived in the 19th century. Instead, it stipulated that any use of the land must not harm its capacity to be used for its specific historic purpose (Beynon 2004, 270). Thus the Aboriginal relationship with the land “applies not only to the past, but to the future as well…[and] as a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of Aboriginal Title” (Beynon 2004, 270). This allows the concept to be coherent with Aboriginal perspectives on sustainability of land use. Finally, the Delgamuukw decision determined that unextinguished Aboriginal Title existed in most of the province of British Columbia (Blackburn 2005, 590).

Therefore, over the years unextinguished Aboriginal Title has become something the government cannot ignore, as it has grown in substance and in clarity. The Canadian Constitution explicitly affirms this through S.35, which enshrines all existing Aboriginal rights, or rights that were not extinguished by the treaty-making process (Blackburn 2005, 590). Further, recent cases from around Canada have reaffirmed the government’s duty to ‘consult and accommodate’ Aboriginal peoples on decisions that may affect their various rights, including title (Devries 2011, 45).

Yet the Comprehensive Claims Process was hardly perfect (Miller 2009, 256). It was an expensive and long process, and despite the presence of a system to finance the claims negotiations, these factors discouraged many Aboriginal groups from going through with it.

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9 Notably, in this sense, ‘traditional’ practices are almost necessitated by the non-Aboriginal government’s definition of Aboriginal Title rather than by the demands of Aboriginal people themselves.
Further, the government insisted that it negotiate no more than six comprehensive claims at any given time, putting limits on its ability to address the many potential claims that groups desired to put forth. The process was further frustrating for some groups who did not qualify for either process. The government did not consider their claims comprehensive because it felt that it had suitably ‘legislated’ away title at some point in history, and due to the lack of any treaty to abrogate, their claims could not be specific (Miller 2009, 263-264). The Comprehensive process initially proved inefficient, and by 1981 had yet to resolve a case (Miller 2009, 264). Instead, various provincial and other mechanisms took the initiative to resolve comprehensive claims. Yet perhaps the biggest objection that Aboriginal peoples have to the Comprehensive Process is its desire for certainty in the settlement of issues.

As mentioned earlier, S.35 of the Constitution protects only existing or unextinguished Aboriginal rights. When the process settles a comprehensive claim in the form of a treaty, it looks to create an exhaustive and definitive set of rights for an Aboriginal group. Critics have argued that the process represents a mere continuation of the government’s historic policy of extinguishing Aboriginal rights for the purpose of accessing resources (Blackburn 2005) or for assimilationist objectives (Woolford 2004, 438). However, as a trade-off, Aboriginal groups with treaties negotiated under the Comprehensive Claims Process, also known as modern treaties, do provide an unprecedented degree of protection for Aboriginal rights through their constitutional endorsement.

Conceptions of Property

Some see any sort of monetary compensation in either the specific or comprehensive processes as sub-optimal, because it does not address what the Aboriginal peoples see as the key
issue: the unjust dispossession of their land, which the government had promised to them as a means to support their culture (DeVries 2011). Therefore, although they do deemphasise the economic importance of land and replace it with a more symbolic aspect of a specific harmonious relationship with the land, Aboriginal peoples still recognise that land is also important in that it allows one the ability to live one’s life in a certain way. A view of restitution that is sympathetic to Aboriginal perspectives on property is much more in line with that of Radin’s view of personal property. The government cannot, as Aboriginal people see it, simply restore land as an economic resource. Instead, it must restore land in a way that supports Aboriginal culture, which includes hunting and fishing rights (and the conservation of the environment such that Aboriginal people can hunt and fish).

In contrast, the government’s restitution mechanisms place more emphasis on a negative conception of property rights. This can be seen in their preference for financial settlement, which they believe to be a sufficient reparation. Such an approach indicates that the wrong that must be righted is not a violation of personhood, but merely a violation of property. For instance, the claims processes are set up in such a way as to restore property that was dispossessed in a way the government deems unfair. The Specific Claims Process treats the Numbered Treaties as legitimate forfeiture and only addresses injustices related to the violation of these treaties. A broader approach would view the wrong as a violation of sovereignty based on the Royal Proclamation and would recognise the need to restore that sovereignty through the restoration of the group’s cultural base, which allows for the personhood of the group.

The Comprehensive Claims Process is also quite negative in its outlook, as it regards the wrong as a violation of people’s Aboriginal Title, and thus its restoration is necessary. Further, some see the modern treaties as an affront to Aboriginal peoples’ relationship to the land. For
example, the Nisga’a people of British Columbia received a segment of their historical territory in fee simple title, or regular private property. From this, a debate has ensued as to whether fee simple and Aboriginal conceptions of property are reconcilable. Some argue that it forces the Nisga’a to see their land as a resource that they own and thus corrupts their historical relationship to the land and violates their Aboriginal Title (Woolford 2004, 438). Further, some hold that this process has allowed non-Aboriginal norms and customs to define Aboriginal culture once again (Rynard 2000, 223).

While the Nisga’a land had once been a reserve owned by the government, the Nisga’a Lisims government controls its land in the same way non-Aboriginal Canadians land-owners would. Thus, these criticisms do have some credibility. However, in Canada, fee simple title is “the greatest possible bundle of property rights relative to the Crown’s ultimate title (Beynon 2004, 275). Proponents of the strategy to convert all reserve land to fee simple title argue that the agreement “protects a sphere of autonomy and freedom from interference within which the Nisga’a can continue to define their relationship with the land as they wish” (Dufrainmont 2001-2002, 491). For example, the Nisga’a people have chosen the uncommon Torrens system of land registry because it more closely resembles their historical means by which they registered title than the more used deeds registry system (Flanagan, Alcantara and Le Dressay 2011, 160).

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10 Fee simple title is private and exclusionary ownership in its fullest sense in the modern state. The government only holds the ultimate allodial title to land held in fee simple title, that is, it has reversionary and expropriatory rights over it.

11 The Nisga’a’s traditional property system is outlined by Robert Shepherd (2006, 358-359). He shows that historically, the Nisga’a had various wilps (houses) that owned ango’oskw (tracts of land), which were exclusive to that wilp and were divided up amongst its members. Under this system, owning land determined one’s status as a member of the Nisga’a nation. However, this changed when the European settlers came, as the Nisga’a felt that they needed to create a more equitable and unified land system, by which they viewed land as a ‘common bowl’ amongst all members with the same rules regarding inheritance and property management.
Therefore, there is enough flexibility within the non-Aboriginal private property system to somewhat accommodate the Aboriginal relationship with the land.

Yet the fact that there is some leeway for the Nisga’a Nation to define their relationship with the land does not deal with a stronger argument that the conversion to fee simple title is itself an extinguishment of Aboriginal title. A group with Aboriginal title has the ability to use the land for a wide array of activities as long as they do not contradict the Aboriginal group’s historic and cultural relationship to the land or wreck the land for future generations (Slattery 2007, 113). If viewing the land as an economic resource contradicts the cultural relationship an Aboriginal group has with the land, it can be argued that fee simple title at the very least partially extinguishes Aboriginal title. However, this change in the content of Aboriginal title should instead be seen as modification of a continuously held right rather than the extinguishment of it. Therefore, just like the Nisga’a final agreement, modern treaties can address the issue of the restoration of the Nisga’a’s personal property to some degree.

The Interaction of Property and Citizenship for Canada’s Aboriginal People

The politics of difference and dignity are not, as I have outlined above, the extremes of the spectrum of perspectives on citizenship in Canada. Although the Aboriginal perspective of citizenship views the need for Aboriginal peoples to have a right to political participation based in their continuing sovereignty, it is not exactly the politics of difference. Instead, it adds land as a citizen, which does not fit on the spectrum outlined in the theoretical overview.\(^\text{12}\) Therefore, to fully understand the relationship between property rights and citizenship in Canada, one needs to

\(^{12}\) Of course, not all Aboriginal groups take this perspective. Some even advocate for a more commercial relationship with resources. However, Borrows’s perspective captures many of the commonalities of Aboriginal conceptions of a relationship to land.
realise that, under Aboriginal conceptions of property, both property and citizenship are intrinsically connected.

By viewing citizenship from the Aboriginal perspective, one can see another reason why private property is insufficient for many: it is not based on a specific non-economic relationship with the land. As Aboriginal people see themselves as sovereign, they need a strong degree of self-government that should entail they have quite different rights, including a stronger right of self-government than the current model allows.\(^{13}\) The Aboriginal perspective holds that “[l]and rights in [such] a model thus look more like political territory rather than like private property, which explains why such land is often seen as inalienable” (Levy 2000, 306). Thus, the link between personal property and differentiated citizenship regimes, or self-government, is made stronger by its political dimension. Further, a pressure to privatise land has always been present in Indian Act policies, as the non-Aboriginal society saw Aboriginal peoples’ communal tenure as uncivilised (Milloy 2008, 9). Thus, Aboriginal peoples are also reluctant to hold their land as private property for historical reasons.

The Canadian context demonstrates some of the perspectives I outlined in the theoretical overview. For example, Tom Flanagan adopts both a negative conception of property rights and a view of citizenship that leans towards less differentiation on rights. Those who hold Flanagan’s view argue that to differentiate too much between Aboriginal and non-Aboriginal rights, like land rights, would create a fractured society. For example, some, who are less sensible and more extreme than Flanagan, have argued that Aboriginal hunting, fishing and other treaty rights, indeed the entire treaty process, is unfair to or discriminatory against non-Aboriginal Canadians (Miller 2009, 274).

\(^{13}\) The current model of self-government provides for municipal level powers for Aboriginal leaders as well as some control over membership of the band (Kymlicka, 307).
Others, such as Joseph Carens, take an approach that emphasises a differentiated rights regime, with limited self-government and respect for treaties. This view is most compatible with Margaret Radin’s view of personal property. Under it, Aboriginal peoples have special and constitutionally enshrined treaty rights that do not inherently contradict the Canadian state nor do they fulfil the full demands of those who adopt Aboriginal perspectives on citizenship. It is accommodating in a way that Carens’s term evenhandedness suggests, but not hands-off. Thus there is a non-Aboriginal camp that advocates for Aboriginal people’s right to land in a certain way.

Absence of Welfare

There is, notably, an absence of a position maintaining the need for a positive right to property justified by a right to welfare within the debate surrounding restitution of land to Aboriginal Canadians. Due to more than a century of oppression and deprivation, many Aboriginal reserves are impoverished and are reliant on government and treaty money (Flanagan 2008, 174). Thus, the need for poverty alleviation is clear. However, often the connection between a positive right to property and poverty alleviation is not present in the debate. Instead, much of the framing of poverty alleviation is done within a negative conception of property restitution. That is, one of the roots of Aboriginal poverty is the fact that the reserve system deprived them of their land, as they were not able to use it as an economic resource, such as collateral for a loan (Flanagan, Alcantara and Le Dressay 2011). The argument then goes that if one returns to them control over that unjustly deprived land, Aboriginal peoples will be able to use it to their benefit and begin to thrive economically. Poverty alleviation is thus not phrased in

14 Many other roots exist, such as the deprivation of business opportunities (Voyageur and Caillou, 2011) and the hugely detrimental effects of residential schools.
an attempt to allow all access to property so that they can exercise their autonomy, but as a specific redress for a specific wrong. Therefore, it has no real bearing on the differentiation of citizenship. The South African case provides an excellent case for property as a welfare right and its interaction with citizenship.

South Africa: Righting the Wrongs of Apartheid

A Brief Overview of Apartheid-Era Land Dispossession

Mahmood Mamdani argues that the differentiation of the colonial and apartheid periods of South African history is a spurious distinction. Instead, he proposes that one should view apartheid as a clarification, perfection and continuation of colonial policies that involves dispossessing the colonised, benefiting the coloniser and separating the two through indirect rule (Mamdani 1996). I will restrict my historical analysis to the apartheid era and late colonial era, as this is the period that the land reform program in South Africa directly takes into account, and I will deal with the colonial era when I address criticisms of the South African land reform program. That being said, for my analysis I will keep in mind Mamdani’s point that apartheid structures are best considered as colonial continuations as well as his second argument that such conditions of division still remain today and have a huge bearing on contemporary politics.

After the Boer War, the white Afrikaner and British populations formed a compromise in their bid to govern as a minority. This compromise involved the beginning of severe policies of
racialised segregation, of which one of the most important was the Land Act of 1913 (Bernstein 1996, 5). The Land Act set in stone the segregation inherent in many colonial policies on a national scale by putting aside 92% of the South African land for white people and only 8% of it for black people. Through other regulations the Act also served to undermine the tenure of black people who worked on white-owned farms (Bernstein 1996, 5). The Natives’ Land and Trust Act of 1936 futilely sought to increase the amount of ‘reserve land’ for black South Africans to 13%, as the initial 8% had proved too little to avoid overpopulation and soil degradation in the reserves (Bernstein 1996, 7). Yet this minimal increase also came with further restrictive laws on black farm labour (Bernstein 1996, 7).

The apartheid years, which began formally with the election of the National Party in 1948, further defined the segregated nature of the country through laws and acts such as the Group Areas Act of 1950. The Promotion of Bantu Self-Government Act of 1959 created ethnic homelands, which were meant to become semi-sovereign ‘Bantustans’ for South Africa’s black population. It was from these homelands that black South Africans were meant to draw their citizenship and rights. To accomplish this task, the apartheid government forcibly removed 3.5 million black South Africans in the 1960s and 1970s from what they deemed to be land reserved for white South Africans (Bernstein 1996, 12). By 1980, over half of South Africa’s black population lived in such Bantustans (Bernstein 1996, 13), which were so overcrowded that each person only had 0.2 hectares of land (Bernstein 1996, 27). Within these areas, the apartheid government provided vast resources for a few elite ‘traditional’ leaders effectively reinforcing the conditions of indirect rule. These acts of channelling black South Africans into overcrowded reserves and limiting their options for farming to mere subsistence farming or labouring on a
white-owned farm effectively hamstrung their ability to farm, led to the underdevelopment of their farming practices and finally eroded their traditional agricultural practices (Bundy 1979).

*Land Reform and Property Rights in South Africa*

As the apartheid system collapsed in the late 1980s and came to a formal end in 1994, half of South Africa’s majority black population lived in overpopulated and impoverished former homelands, millions of black South Africans found themselves in tenure-insecure urban settlements and many more made their living on white-owned farms, where their security was dependent largely on the whim of their employers. Many of those without access to land had been evicted from their ancestral lands through pieces of legislation like the ones above, while others had been forced off due to more general policies that made life difficult, still others moved to find work due to poor socio-economic conditions related to apartheid discrimination and some had suffered eviction at the hands of white landlords. At the time of the democratic transition in 1994, white South Africans, who represented only 10% of South Africa’s population, owned 87% of the land (Plaatjie 2003, 289).

Control of the land by those who work it had been one of the key tenets of the African National Congress’s (ANC) 1955 Freedom Charter, and the ANC sought to set the ground for institutions that could right both what they saw as the inequitable distribution of land and the wrongful dispossessions of the past. The outgoing white minority government proposed a Bill of Rights that provided such stringent protections on private property that it would have been hard to imagine any redistributive mechanisms more radical than moderate taxation (Spitz and

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15 Such policies, such restrictions against black commercial farming and other racist policies prevented black South Africans from accessing economic resources and made life difficult enough for many that they had to move from their ancestral lands.
Chaskalson 2000, 314). In contrast, the African National Congress’s (ANC) proposal “sought to subordinate the rights of property owners to the needs of the general public” (Spitz and Chaskalson 2000, 314), in the vein of its Freedom Charter “to drive a legislative program of land restoration and rural restructuring” (Spitz and Chaskalson 2000, 316). Just as they did in many other aspects of the transition, the two parties came to a compromise on property rights. The constitution protected private property but allowed the government to expropriate land for a fair price in the public interest to correct the wrongs of apartheid (Spitz and Chaskalson 2000).

This was to be done through a land reform program that had three key tenets: restitution, redistribution and tenure reform (Aliber and Cousins 2013, 142). These three tenets addressed the multiple areas of redress listed above. Restitution aimed at addressing the forced removals, redistribution the unequal land distribution and tenure reform the insecure tenure of those on white farms and in former homelands. Therefore, the program not only looked to address specific and explicit instances of unfair land expropriation, but it also attempted to address the broader apartheid policies that implicitly contributed to the unfair land regime (Aliber and Cousins 2013, 142). For the purposes of this essay I will only analyse the first two pillars.

A major criticism of the restitution pillar is that its intentions seem to have moved towards sweeping the real issues under the rug rather than actually addressing injustices and inequalities. For instance, the government set a deadline of 1998 for the filing of land restitution claims (Hall 2011, 22) and the government pledged to resolve all such claims by 2005 (a deadline that it later pushed back to 2008) (Roux 2009, 168). Critics argue that these limits rush the process and this precludes it from achieving substantive justice (Roux 2009, 169, Hall 2011, 33). Thus, although the Commission on the Restitution of Land Rights settled nearly all the submitted claims by 2007, 69.7% of those were settled by cash compensation (Lahiff 2008, 13-
Some argue that this strategy is a simple sleight of hand by the government so that it can claim the issue resolved, thereby “[engendering] the ‘loss of a loss’, as the memory of dispossession loses its salience as a rallying point for unity” (Fay and James 2011, 47). Such criticism entails that the government not only precludes substantive justice in the present process, but also removes the right of beneficiaries of restitution to claim that justice in the future. This is especially disturbing, given that many of those who do receive land suffer from a lack of post-transfer support (O'Laughlin, et al. 2013, 8) and thus may require more assistance in the future.

To fall under the restitution pillar, a group or person must have been the victim of a forced removal from the 1913 Land Act onward. There were practical reasons for this decision to set the date from which people could make land claims. Colonial South Africa was a greatly dynamic place that was characterised by frequent population movements. Therefore, to allow claims from the colonial period would further complicate an already overcomplicated process through the inclusion of competing and potentially vague land claims (James 2006, 16). However, critics argue that this cut-off preserves much of the white land base that was taken from black South Africans during colonial time in no less unfair circumstances than under apartheid (Roux 2009, 156). The cut-off also neglects Mamdani’s argument, which puts forward the idea that differentiations between colonial and apartheid as well as apartheid and present overlook the real problems of inequality and colonialism.

A similar deeper criticism points out that restitution, although it is an effort to right a wrong, does make any attempt at all to address deeper issues of inequality. Often, those who can prove that they owned property and that it was confiscated had a better life under apartheid due

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16 Admittedly, many, but not all, of these claimants might have wanted the money rather than to return to a precarious rural lifestyle (Roux 2009).

17 See discussion of post-transfer support below.
to whatever ‘compensation’ they received through their forced removal through legislation (James 2013, 31). Land restitution aimed to restore the property rights regime as it existed without much of a consideration for equality or distributive justice. Similar to this critique, Theunis Roux argues that the restitution pillar entails a quite Nozickian conception of property rights (Roux 2009). That is, land restitution was meant to fix only unjust transfers. However, when a dispossession was less explicit, such as in the colonial era or through more indirect dispossession of property, it would be under the jurisdiction of another pillar that followed a more redistributive principle of justice.

This other principle of justice was the redistributive pillar of land reform.18 This aspect of the reform process had the lofty goal of redistributing 30% of white-owned South African land between 1994 and 1999 (Hall 2003, 257). This deadline was vastly unrealistic, and the government had to re-evaluate it in the face of sluggish progress, pushing it forward to 2014 and then again to 2025 (Hall 2003, 257, Greenberg 2010, 4). By early 2011, only 7.2% of white-owned land had exchanged hands under the land redistribution program (O'Laughlin, et al. 2013, 8). The root of the slowness can be found in the model of land redistribution that the South African government has adopted, the ‘willing-buyer, willing-seller’ model. This strategy requires that the government or the beneficiary of land redistribution must pay the market price of the land they wish to purchase and that the owner must be willing to sell the land. It is easy to see how such a process can get bogged down in litigation, become hostage to the obstinacy of farm owners and also be prohibitively expensive (Sihlongonyane 2005, 151).

An additional problem of the process is its demand that recipients of redistributed land farm in a commercially viable manner, a practice that many do not want to participate in or

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18 Arguably, tenure reform is also part of this.
cannot, given the support available (Greenberg 2010, 7/40). Further, like the beneficiaries of restitution, the beneficiaries of redistribution have generally not fared well after receiving their land due to a lack of support. As many black South Africans were banned under the apartheid system from farming commercially, they do not have the skills to do so and thus have special trouble adapting with such poor post-transfer support, such as training and loans (Goebel 2005, 357).

Yet this trend towards requiring commercial viability indicates a broader trend in the redistribution strategies: a shift away from an approach focused on distributive justice to one focused on economic gains in general. This can be best viewed in the government’s changing emphasis from the welfare-based Reconstruction and Development Plan to the growth-based Growth, Employment and Redistribution initiative in 1996 (James 2013, 38). Thus property is no longer seen as a positive welfare right in the way Brettschneider advocates. This has made welfare, and thus the redistributive pillar of land reform, less important in terms of delivering justice than the restitution pillar. In this development, one sees the phenomenon on which Roux comments: the South African land reform program uses Nozick’s conception of restitution, with property restored to those who can prove unjust confiscation and ‘other’ principles of justice to right the disposessions that cannot be definitively determined.

Yet while Roux seems to imply that this was the case throughout the land reform program’s history, it does not seem to be so. As Deborah James shows, various forces drove the land reform program to move from an initial dual focus on historical reparations and present-day welfare to an increasing focus, as time went on, on historical justice (James 2006, 31). Therefore, at one point the land reform program was based on both the concepts of restorative and

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19 Ironically, one reason for the lack of post-transfer support was the post-apartheid dismantling of the apartheid government’s vast agricultural subsidy program
redistributive justice as “interdependent” and equally valuable principles (James 2006, 32). Part of this shift in emphasis was pragmatic, as looking at positive rights to property is inherently more difficult and more expensive, and the discourse of restitution and other poverty-alleviation mechanisms appealed much more to the ANC’s predominately urban supporter base than rural redistribution did (James 2006, 31/43). Another factor was ideological, as Thoko Didiza succeeded Derek Hanekom as the minister in charge of land reform in 1999. While Hanekom came from a background of resistance to apartheid based on liberal principles and thus favoured more poverty-alleviation mechanisms, Thoko Didiza came from a family that had once owned land in South Africa and therefore had a stronger preference for restoring historical property rights than for redistributing land (James 2006, 39). Whatever the reason, the effective policy focus on land reoriented to focus on a program based more on negative than on positive property rights.

Land as a Restoration of Citizenship

Apartheid was characterised by a very differentiated citizenship regime based upon the denial of civil, political and socio-economic rights, and thus citizenship, to large segments of the population (James 2013). Therefore, any mechanism of justice would have to restore those rights. The citizenship regime that post-apartheid South Africa naturally tended towards was one that emphasised “inclusionary, liberatory and egalitarian” citizenship (James 2013, 28). In other words, the citizenship regime of post-1994 South Africa was very much defined by the politics of dignity in direct reaction to the gross politics of difference from which it had just emerged. With the regime’s focus on redistributive measures and some minority protections, it could easily be classified as Kymlicka’s hands-off approach to differentiated citizenship.
Through the attempt to preserve the idea of a unified ‘rainbow’ nation, the post-apartheid government did its best to maintain good group relations through limited redistributive mechanisms like Black Economic Empowerment and the many facets of the negotiated settlement. But such conceptions of limited differentiation leave in place many of the pre-existing structural inequalities of apartheid in pursuit of some sense of formal equality. With the levels of inequality and poverty in South Africa, formal equality of rights leaves some unable to use the very rights they have gained (James 2013, 35). James argues that the “welfarist vision of citizenship as fulfilling needs and providing entitlements has been quickly superseded by market-oriented notions which posit the individual citizen as responsible for her own wellbeing and sustainable reproduction” (James 2013, 36).

This has effectively created a system where there are two notions of citizenship at play. One emphasises positive socio-economic rights as a means to equality (du Toit 2013), while the other looks to give people more or less the same rights such that they can be actors in the market. I have identified the latter as a less differentiated approach and the former as a more differentiated one. Although the socio-economic rights approach deals with class rather than more clearly defined identities like race\(^\text{20}\), it still involves a more interventionist role for the government in mediating between classes through more radical mechanisms of wealth redistribution and poverty alleviation than market-based approaches or affirmative action. But because the lines of class are less set in stone than those of ethnicity\(^\text{21}\), it seems that a class-differentiated system is less differentiated than one based on ethnicity. Therefore, to some degree

\(^{20}\) There is, of course, a racial dimension to class in South Africa. However, there are some wealthier black South Africans who have benefited from the hands-off approach and thus endorse it (James 2006, 52)

\(^{21}\) This is not to say that ethnicity is a fixed concept. Instead, it just means that although ethnicity is fluid, it is intuitively more salient than class.
it assigns different socio-economic rights to achieve equality as an outcome rather than as a starting point.

The link between property and citizenship in South Africa is perhaps more pronounced even than in Canada. James argues that “apartheid denied citizenship – or assigned it on a second-class basis – through a planned relationship of people to place” and thus “land was seen as crucial to restoring citizenship…because earlier it had been central in denying the entitlements of the citizen” (James 2006, 11). However, what citizenship various actors sought to restore depended largely on what sort of conception they had of property rights, and vice versa. Those who emphasise stronger and welfarist property rights advocate for such positive socio-economic rights on a broader scale for citizens in general (James 2013, du Toit 2013). On the other hand, those who are comfortable with restitution of negative property rights seem satisfied with a more limited and negative citizenship that leaves more up to the market.

**Conclusion**

One noteworthy aspect of the South African case is an absence of distinct indigenous perspectives in the major discourse surrounding land reform. Such indigenous perspectives might be similar to the ones put forth by Canadian Aboriginal peoples that emphasise the role of a group’s historical relationship to the land. James largely attributes this to the same factors used to justify the cut-off date for restitution: “most [historic South African] land occupation has been fleeting and transitory” (James 2006, 16). But regardless of the reason, there seem to be few major demands to respect indigenous approaches to either citizenship or property, and if they do
come they are for minority groups whose opinions don’t really affect the national debate. In fact, there seems to be a general wariness in South Africa of referring to indigenous perspectives. For example, James points to the influence of western liberal human rights discourse in the struggle movement and Christianity in customary African claims, which she says has placed welfare rights above indigenous rights as the most extreme claim made for land restitution (James 2006, 16). Further, as pointed out above, the homeland system put indigenous structures under great strain.

In other words, when South Africans advocate for ill-defined positive rights, the analysis is generally restricted to defining and substantiating people’s informal right to land as a welfare right rather than as a right to land in a certain way. In some cases there is some demand to define a relationship with the land for particular groups and create broader land rights. However, this is done in an effort to approximate the community and limited relationship a group once had with the land (Mostert 2010). Although these desires to reinvigorate communities correspond to Radin’s view of a right to property that supports personhood or an identity (Roux 2009), they are not equivalent to the much more fully developed indigenous perspectives on land evident in Canada.

Others in South Africa regard indigenous claims much more critically, calling them “idealised notions of a pre-colonial past” and “essentialist Africanist discourses about colonial land theft [that] potentially provide ideological cover for processes of elite enrichment that have little to do with equitable change” (du Toit 2013, 19). This line of argument, which is expressed primarily by those on the left, views the past and tradition as too complex and problematic to

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22 See Ellis (2010), which discusses the land restitution and of the ≠Khomani San people in South Africa. By not including these in my analysis, I by no means intend to marginalize them. Instead, I am analysing the debate that dominates the discourse surrounding land reform in South Africa.
serve as the basis for rights. It is part of a larger trend in Africa that distrusts the language of indigeneity and autochtony (Pelican 2009, 53). The contrast with Canada is striking. Those who dismiss tradition and indigenous ideas in Canada tend to be on the right,\(^{23}\) while those in South Africa do so from the left. Of course, they promise very different solutions. The Canadian right looks to market-driven solutions, while the South African left looks to welfare-driven solutions.

At this point one must revisit Mamdani’s argument in *Settler and Native*. Within his broader argument about colonial institutions breaking people up ethnicities through law, Mamdani puts forward the idea that colonialism simultaneously made political identities line up with those ethnic identities (Mamdani 2001, 661). Political identities, which Mamdani defines as forward-looking, do overlap with the more history-oriented ethnic ones, but they need not be the same. Political identities “accent common residence over common descent – indigeneity – as the basis of rights” (Mamdani 2001, 661). One must thus assume that Canadian colonial policies made ethnicity more salient than in South Africa, Aboriginal peoples use their indigeneity as a tool for claiming reparation. In South Africa, ethnicity does not play such a huge role in the justification for reparations. Therefore, one could say that apartheid may not have made these ethnic identities as salient.

What does this mean for the relationship between citizenship and the restoration of property rights? To answer this, one must use James’s idea that the claims to land come from a desire to restore or equalise citizenship. As land confiscation was a means of depriving people of their citizenship, black South Africans make claims on land to right the wrongs of apartheid. Using the relationship between property rights and citizenship determined above, one can see

\(^{23}\) See Flanagan’s *First Nations, Second Thoughts*. In this book Flanagan argues that Aboriginal perspectives on land are anachronistic and cannot last in the contemporary world (184).
why black South Africans and Aboriginal Canadians make such different claims: they are responding to different wrongs.

The citizenship regime that the South African government perpetuated was one that intentionally segregated the ‘native’ black population and the white settlers in an attempt to create a semi-sovereign and second-class black majority that served the white minority. Black South Africans were left with their cultural and group rights intact, but were deprived of formal equality through the apartheid state’s denial of their civil, political and socio-economic rights. Therefore, the natural reaction to this is to seek justice via a system of formal equality and greater socio-economic rights for those who were once deprived of those very two things. From these two goals stem the desire of some black South Africans for the return of the land that they lost and from others a radically redistributive state that provides them with resources that they had long been denied. This political identity was removed, in some ways, from the ethnic identities set out by apartheid and colonial policies.

Similarly, the Canadian government perpetuated a racist scheme that denied formal equality to its ‘native’ citizens. Aboriginal people were greatly restricted in what they could do. However, the intention and operation of the Canadian state was much different from the apartheid one. While the apartheid state sought to permanently segregate black South Africans from white South Africans, the Canadian system was designed to forcibly assimilate Aboriginal Canadians into non-Aboriginal Canadian society. Therefore, the segregation was only temporary.\(^\text{24}\)

\(^{24}\) This is not to say that the Canadian government’s approach to Aboriginal peoples was any better than the apartheid state’s treatment of black South Africans. Instead, they are just two different wrongs, and to try and judge one against the other is not a worthwhile past time.
Canadian Aboriginals are thus looking to right a different wrong. Rather than seek justice through formal equality, Aboriginal people want the differentiated rights in the form of their sovereignty through self-government and culture, which the Canadian state tried for so long to deny, repress and destroy. Therefore, Canadian Aboriginal peoples root their claims to rights and citizenship in terms of their indigineity and their once sovereign past, which encourages them to demand both differentiated rights and positive property rights that are specific to their group. This means that their political identity (what they hope to achieve) lines up neatly with their ethnic identity (their colonially assigned ‘native-ness’ or their indigineity). Conversely, black South Africans by and large do not make claims upon their indigineity because to do so would be to employ the categories and discourses delegitimized by their association with apartheid and therefore the drive for political ends does not line up so neatly with ethnic identities (Pelican 2009, 56).

I must make clear that I do not intend to imply that claims of indigeneity or the avoidance of making such a claim is determined by pure interest, nor do I mean to label either these groups as instrumentalist. Instead, I wish to show why some groups choose to focus on claiming certain rights because they were deprived of those rights in the past. Which claim a group makes is a matter of what citizenship rights they lost. It is not a matter of pure material interest, rather, it is a matter of correcting an injustice.

In conclusion, there is a relationship between how one views the distribution of citizenship rights and how one conceives of rights to property. If one sees property as a more positive right, one sees citizenship as needing more differentiation. In contrast, if one sees property rights as more negative, citizenship requires less differentiation. Further, the more positive a property right, the more crucial it is to one’s status as a citizen. Finally, indigenous
conceptions of citizenship and property are inseparable. These theoretical conclusions are quite useful in understanding issues of land restitution in South Africa and Canada. With such a framework, one can understand that people make different claims upon land depending on the sort of injustice they are seeking to address. Such claims are thus significantly determined by the view taken of the relationship between citizenship and property rights, but, as I have argued that relationship is itself significant determined by the particular history of injustice.

Importantly, one must learn to distinguish between the colonially reinforced ethnic identity from the political one, or else solutions run the risk of reproducing or preserving the unequal and oppressive colonial citizenship regime of settler and native, or civilised and traditional (Mamdani 2001, 661-662). This is not just true for Canada and South Africa, but also for other former settler societies looking to overcome their pasts and move on to more equitable futures. In fact, the above relationship adds something to Mamdani’s explanation of the citizenship regimes of settler societies by shedding light on what all settler societies have in common: the indirect rule of settler over native and unfair land expropriation. These conclusions can help one flesh out the political identity of the group claiming reparation by showing that the way people make a claim on land correlates with a specific vision for a societal rights regime. Therefore, it allows one to see the political nature of such solutions rather than the ethnic nature of them. This is very important in realising that differentiated citizenship regimes need not just perpetuate the old divide between settler and native, but may also be a legitimate way to address the wrongs of colonialism.
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