As One United People:
An Inclusive Communitarian Approach to
Constitutional Rights in Singapore

Thesis submitted for the requirements of the degree of Doctor of Philosophy in Law

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Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

It does not exceed the prescribed word limit for the relevant Degree Committee.
To Mom and Dad
We, the citizens of Singapore,
pledge ourselves as one united people,
regardless of race, language or religion,
to build a democratic society
based on justice and equality
so as to achieve happiness, prosperity
and progress for our nation.

— National Pledge
# Contents

Preface.............................................................................................................................................ii

Introduction.........................................................................................................................................1

Chapter One: Singapore’s Communitarian Approach to Constitutional Rights ..........20

INTRODUCTION.................................................................................................................................20

I. FREEDOM OF RELIGION, NATIONAL SECURITY AND NATIONAL UNITY .23
   b. Religious Freedom vs. National Unity ....................................................................................31

II. EQUALITY, SEXUAL ORIENTATION AND PUBLIC MORALITY .........................35
   a. No Substantive Right to Liberty ...............................................................................................36
   b. Maintaining a Conservative Society .......................................................................................38

III. FREEDOM OF EXPRESSION, MULTIRACIALISM AND POLITICAL
     PROTEST........................................................................................................................................43
   a. Multiracialism and Sedition ......................................................................................................44
   b. Political Protest and Public Order ............................................................................................48

IV. THE DEATH PENALTY AND DRUG TRAFFICKING........................................53
   a. The Mandatory Death Penalty .................................................................................................54
      i. The Lawfulness of the Mandatory Death Penalty .................................................................55
      ii. The Reasonableness of the Mandatory Death Penalty Classification ..............................57
   b. The Discretionary Death Penalty Regime under the MDA ..................................................60
      i. The Lawfulness of the Discretionary Death Penalty ...............................................................61
      ii. Substantive Assistance and Equal Protection .......................................................................64

CONCLUSION .......................................................................................................................................66

Chapter Two: A Normative Critique of ‘Collective Over Individual’ .......................68

INTRODUCTION.......................................................................................................................................68

I. DEFENDING SINGAPORE’S COMMUNITARIANISM.......................................................70
Chapter Three: Constitutive Communities

INTRODUCTION

I. CONSTITUTIVE COMMUNITIES

a. The Theory Explained

i. Sandel’s Argument
ii. A Sense of Familiarity: Social Friendship and Special Obligations .............. 179

II. THE DUTY TO INCLUDE .................................................................................. 184
   a. Community and Inclusiveness .................................................................. 184
   b. The National Community’s Duty to Include .......................................... 188
      i. Who Bears the National Identity? .................................................. 189
      ii. Equality of Membership .................................................................. 192
   c. A Thin Theory of the Communitarian Politics of the Good ..................... 196
      i. Members of the National Community ............................................ 196
      ii. Treatment of Non-Members .......................................................... 199

CONCLUSION ........................................................................................................... 201

Chapter Five: Singapore Revisited ..................................................................... 203

INTRODUCTION ........................................................................................................ 203

I. THE INCLUSIVE COMMUNITARIAN APPROACH AND SINGAPORE ............. 204
   a. Singapore’s Definition of Community .................................................. 204
   b. Significance of the Nation in the Constitutional Case Law .................... 208
   c. Singapore’s National Community and Multiracialism ............................ 211
      i. Multiracialism as the Foundational Principle of the Singaporean National Community ................................................................. 212
      ii. The Limits of Singapore’s Multiracialism ......................................... 215
      iii. The Duty to Include, Equality and the Singaporean National Community ...... 218

II. A REINTERPRETATION OF SINGAPORE’S CONSTITUTIONAL RIGHTS CASE LAW ..................................................................................................................... 222
   a. First cluster: encroachment into a constitutive community ...................... 223
      i. Freedom of Religion, National Security and National Unity ................ 224
      ii. Sexual Orientation and Public Morality .............................................. 231
   b. Second cluster: no encroachment into a constitutive community .............. 236
      i. Multiracialism and Sedition ................................................................ 237
      ii. Political Protest and Public Order .................................................... 240
iii. The Death Penalty and Drug Trafficking .................................................................242

CONCLUSION .................................................................................................................245

Conclusion ......................................................................................................................247

Bibliography ....................................................................................................................251

Cases Cited .......................................................................................................................260
This thesis—its conceptualisation, its research, its writing—has been a long, arduous, sometimes pleasing, often painful, and ultimately rewarding process. I began thinking about its problem as an LLM student at the London School of Economics and Political Science, where I was introduced to the idea of rights inflation in Dr Kai Möller’s Theory of Human Rights Law class. The idea is essentially that all autonomy interests are *prima facie* protected as rights, and whether or not a right has been violated is to be decided at the balancing stage. I was struck by the sharply divergent situation in Singapore, where as little interests as possible are protected as constitutional rights, and where constitutional rights claims have never been vindicated. I wanted to find out why—and one under-explored reason is Singapore’s communitarian approach to rights. I then wanted to know what communitarian means, and why this appeared to be the accepted reason—or at least attribution—in the scholarship for Singapore’s *prima facie* weak protection of rights. My digging deeper into the issue has led me on a journey that, I think, is the point of academia: discovering new ideas (I had never heard of communitarianism before this), revising old ones (I had once claimed—in private, thankfully—that liberal democracy is the most superior form of governance), and putting it all together to form a coherent argument that reflects parts of the author that are both intellectual and personal. Just as this thesis has shown me that orthodoxies are not static, I hope to persuade the reader that a communitarian approach to rights, one that takes rights seriously, is not just plausible, but normatively attractive as well.

I had the occasion to present the ideas in the thesis at various workshops and conferences, and I would like to thank the convenors for giving me the opportunity to do so. An amalgamation of Chapters One, Two, Three and Four was presented at the 4th Legal Scholarship Workshop, University of Hong Kong. Chapter Three was presented, and rigorously challenged, by the participants in the Cambridge Legal Theory Discussion Group and the 7th Annual Yale Law School Doctoral Scholarship Conference. The argument in Chapter Four was presented at the Cambridge Forum for Legal and Political Philosophy during my session on Chapter Three of David Miller’s *On Nationality*. The core argument of the thesis was presented at the 5th International Society of Public Law Conference at the University of Hong Kong. The comments that I have received from the presenters, participants and audience
members at these workshops and conferences have helped me sharpen and refine my arguments, for which I am grateful.

This thesis would not have been possible without the support of a handful of important people. My utmost and unquantifiable thanks goes to Mom and Dad. Not only has their generous financial support allowed me to do this PhD at all, but their unwavering and unconditional love gave me the freedom to break from the mould of Singaporean conventionality so that I could explore and define the contours of my authentic self. I owe special thanks to my supervisors, Dr Kirsty Hughes, Dr Haris Psarras and Dr Antara Haldar, who challenged my assumptions and arguments, and often believed in the feasibility of my project, and my ability to see it through, more than I did. Thanks also to my advisor/first year examiner, Professor David Feldman, and my other first year examiner, Dr Stephanie Palmer, whose challenge to my original, nebulously conceived thesis led to the thesis as it stands today. Thanks is also due to Professor Matthew Kramer for giving me the opportunity to test a key idea at his Cambridge Forum for Legal and Political Philosophy.

My Cambridge experience has been made immeasurably more colourful and rewarding by the life-changing friendships that I have made. John Adenitire and Raffael Fasel have been my anchor in the sea of confusion that Cambridge has often been. It is through their support, both intellectual and personal, that I discovered the true meaning of community. I am also grateful to Chung Wei-Yun, Ivan Lee, Kaara Martinez, Joshua Neoh and Barry Solaiman for the hours of conversation and laughter over a glass (or many glasses) of wine, at Magdalene College’s candle-lit formal dinner, on a walk to Grantchester, and/or while walking several times around Magdalene’s magnificent garden on study breaks. I would also like to thank my friends back home, Chang Rui Shan and Magdelene Seraphiel Sim, the repositories of the parts of myself that I sometimes lost to the whirlwind of the Cambridge PhD experience. Finally, I would like to thank my partner, Etienne De Braekeleer, for being the calm amidst the storm, the voice of clarity amidst the cacophony of self-doubt, and for his endless patience and love.

The Chinese, Japanese and Korean names in this thesis follow their naming convention: surname (Chang), then given name (Ya Lan). Christian names, however, will precede surnames.

Cambridge, London and Singapore
Introduction

In 2010, two men in their forties\(^1\) were arrested for having oral sex with each other in a public toilet in Singapore. They were charged under section 377A of the Penal Code\(^2\) which criminalises acts of ‘gross indecency’ between men.\(^3\) No similar provision for women exists, and the old section 377 which criminalised acts ‘against the order of nature’ regardless of gender was repealed in 2007.\(^4\) Although the 377A charge was eventually amended to public indecency,\(^5\) the original charge set off a series of challenges to 377A’s constitutionality, finally culminating in Singapore’s highest court, the Court of Appeal (CA), ruling in 2015 that 377A violated neither the right to liberty nor the right to equality.\(^6\)

What is striking about the decision is that it flows against the tide of LGBT rights liberalisation in many liberal democratic societies, including constitutional courts’ striking down of similar legislations on grounds of privacy and equality, among others.\(^7\) Without suggesting that these societies set the standard for rights protection, the contrast between the CA’s ruling and the successive legalisation of gay marriage in countries such as the United Kingdom, the United States, Australia and Taiwan suggests that Singapore’s approach to rights diverges sharply with the approach generally taken by liberal democratic countries. A survey of the outcome of all the constitutional rights cases in Singapore reinforces this impression. In Singapore’s 54 years as an independent nation, including 24 years after the right of appeal to

\(^{1}\) Tan Eng Hong v Attorney-General [2012] 4 SLR 476 [4].

\(^{2}\) Cap 224, 2008 rev ed.

\(^{3}\) Section 377A reads: ‘Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.’ (377A)

\(^{4}\) The current section 377 criminalises sexual penetration of a corpse.

\(^{5}\) i.e. under section 294(1), which criminalises ‘any obscene act in any public place’.


\(^{7}\) See e.g. National Coalition for Gay and Lesbian Equality v Minister of Justice [1998] ZACC 15, Lawrence v Texas 539 US 558 (2003), Dudgeon v United Kingdom Application no. 7525/76 (ECtHR, 22 October 1981) and the recent Indian Supreme Court’s decision in Navtej Singh Johar v Union of India (Writ Petition No 76 of 2016). The Indian Supreme Court struck down section 377 of the Indian Penal Code insofar as it criminalised ‘carnal intercourse against the order of nature’ between consenting adults.
the Privy Council was abolished, and save for one case\(^8\) that was later overturned on appeal,\(^9\) there has never been a single successful constitutional rights challenge to legislation and executive orders.

Something, then, seems to be different about Singapore’s approach to rights. A ubiquitous diagnosis of the situation piggybacks on Singapore’s unfavourable reputation as an authoritarian and/or illiberal state, and charges that Singapore’s human rights practice is similarly authoritarian and/or illiberal.\(^{10}\) While these criticisms accurately describe the impression produced by the unsuccessful outcomes of the constitutional rights cases and some draconian laws,\(^{11}\) they merely scratch the surface. The criticisms miss a possible alternative, more nuanced understanding of the ‘something’ that is different about Singapore’s approach to rights which better reflects the values that inform the courts’ constitutional rights adjudication. Scholars have described this ‘something’ as a communitarian\(^{12}\) approach to rights, which has as its reference point Singapore’s state-sponsored communitarianism that prioritises the collective interest over individual rights and interests. Chua Beng Huat states that ‘central to the communitarian ideology in Singapore’ is the ‘tension between abstract “collective” good and the costs it extracts from or imposes on the individual’.\(^{13}\) Eugene KB Tan describes the state’s communitarianism as ‘the belief that collective security and well-being must take precedence over the individual’.\(^{14}\) Thio Li-ann argues that the courts’ rights

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8 Taw Cheng Kong v Public Prosecutor [1998] 1 SLR(R) 78.
9 Public Prosecutor v Taw Cheng Kong [1998] 2 SLR(R) 489.
11 For example, the Internal Security Act (Cap 143, 1985 rev ed) which allows for preventive detention; various restrictions on Article 14 freedom of expression, association and assembly; and the death penalty for drug trafficking, discussed in more detail in Chapter One, Part IV, 53–66.
12 For present purposes, communitarianism can be crudely understood to mean an ideology or philosophy committed to the good of the community, broadly understood. I will explore a more nuanced conception of communitarianism in the thesis.
reasoning ‘frequently reveals a bias towards communitarian concerns’, evident from its ‘prioritisation of collective welfare over individual concerns and of basic needs over civil-political rights’. It is an approach that ‘rejects the idea of rights as trumps or determinative interests’ in prioritising the collective interest over individual rights. Instead of viewing Singapore’s approach to rights as illiberal, draconian, etc., it can be understood as communitarian.

Accepting this view at face value, however, means that Singapore’s communitarian approach to rights has caused constitutional rights challenges to fail. Not only does the outcome of the approach suggest a weak protection of rights, but by a priori placing the collective interest over individual rights, it is incongruous with Singapore’s constitutional supremacy. Since Article 4 of the Constitution declares that the Constitution is the ‘supreme law’ of the nation, the rights contained therein have some elevated status—but Singapore’s current communitarian approach is inherently incapable of recognising this status due to its a priori normative commitment to ‘collective over individual’. While it may be said that there is no disjunction if the Constitution itself does not recognise full-blown ‘liberal’ rights anyway, the crucial point is that the vague wording of the rights does not demonstrate any a priori normative commitment. Hence, the extent to which the rights are vindicated is a matter of constitutional interpretation—and Singapore’s commitment to the priority of the collective interest over individual rights creates a disjunction between the elevated status of constitutional rights, and Singapore’s ‘collective over individual’ approach to them. To bridge this disjunction, either Singapore’s constitutional supremacy must yield—or its approach to rights must change.

One obvious solution is for Singapore to adopt a liberal approach. However, it would mis-prescribe the problem, for Singapore is not a liberal society and the government has expressed its disdain towards liberalism. Foisting a liberal approach on Singapore would thus

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15 Thio Li-ann, ‘Protecting Rights’ in Thio Li-ann and Kevin YL Tan (eds), The Evolution of a Revolution: 40 Years of the Singapore Constitution (Routledge-Cavendish 2009) 195.
17 It is worth noting that Article 5(2A) of the Constitution, which required a two-third majority in a national referendum before any Part IV fundamental liberties can be amended, has been repealed in 2016. Fundamental liberties are thus not entrenched in the Constitution and can be easily amended by a two-third majority in a Parliament dominated by a single party. Nonetheless, the rights’ formal status as constitutional rights give them an elevated status over other rights contained in ordinary legislation and collective interests not contained in the Constitution.
be forcing a square peg into a round hole. More importantly, it would be a missed opportunity to scrutinise Singapore’s communitarian approach in light of *communitarianism*. My proposed critique, then, will speak the same language as its target, and hopefully be more resounding and forceful as a result. Simultaneously, this is an opportunity to theorise about how rights can be protected within a communitarian framework, a question which has implications for Singapore specifically, and for the literature on rights more generally—and scant attention has been paid to these tasks.

Liberalism is the dominant political philosophy with which rights are usually associated. Hence, while a copious amount of work has been put into different liberal approaches to rights,18 little has been done from a communitarian perspective, at least in the English language. Some contributions include: Michael Sandel’s brief communitarian arguments for the rights to religious liberty and free speech;19 a Harvard Law Review communitarian defence of anti-hate speech legislation;20 Michael Freeden’s communitarian view on human rights and welfare;21 Amitai Etzioni’s sociological accounts of how to balance rights and the common good with regard to specific issues;22 and a communitarian approach to assisted suicide, reconstructed from cases that the author characterises as communitarian.23

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23 Donald L Beschile, ‘The Role of Courts in the Debate on Assisted Suicide: A Communitarian Approach Symposium on the Right to Die’ (1995) Notre Dame Journal of Law, Ethics & Public Policy 367. Beschile argues, at 398, that a communitarian approach to the right to die would neither grant unlimited power to the government to act, nor begin by asserting a right to assisted suicide. Rather, ‘it would acknowledge the legitimacy … of social choice in these matters, and encourage public deliberation … [and] courts would retain a role in the process, insisting that legislatures justify their actions with rational argument’.
What the existing literature lacks is a theoretical account, from first principles, of a communitarian approach to rights.

In Singapore’s case, the alternative understanding of Singapore’s approach as communitarian is not the dominant narrative when ‘Singapore’ and ‘rights’ are mentioned in the same breath. Major international human rights organisations paint a draconian picture of Singapore’s human rights standards and practices. In the Singaporean legal scholarship, Thio is the leading scholar who first introduced the idea of Singapore’s communitarian approach to rights. While it has been picked up by some scholars—Yvonne Lee, for instance, argued for a communitarian case to preserve 377A; Eugene Tan examined Singapore’s communitarian legalism; and David Tan analysed political communication within Singapore’s neo-Confucian and communitarian framework—it remains a somewhat esoteric way to think about Singapore’s constitutional rights, though the communitarian language has been used in other disciplines, such as sociology, education and crime control.

The disproportionate focus on the authoritarian and/or illiberal narrative has resulted in two important gaps in the literature which I aim to fill. First, by insisting that Singapore’s approach is authoritarian and/or illiberal, critics miss the possibility that there is more going on in the case law than judicial deference to the state. While this deference certainly appears to exist in some cases, other cases strongly suggest that values other than statist ones are at play in the courts’ rights adjudication. Focusing too much on the state’s authoritarian restrictions on

26 Tan, ‘Communitarian Legalism in Singapore’ (n 14).
28 Chua Beng Huat, Communitarian Ideology and Democracy in Singapore (Routledge 1997); and Chua, ‘Communitarianism without Competitive Politics in Singapore’ (n 13).
rights and the courts’ seeming deference to it risks losing sight of what these values are, and how they may shape a plausible communitarian approach to rights for Singapore that does not result in the disjunction pointed out above.

The second gap is almost the opposite of the first: whereas the authoritarian and/or illiberal critique does not acknowledge the communitarian counter-narrative, those who accept the counter-narrative do not interrogate it. Specifically, scholars have not questioned whether a communitarian approach to rights would look like Singapore’s. They have taken for granted, somewhat tautologically, that Singapore’s approach to rights is communitarian because it places the group over the individual, which is apparently what communitarianism requires. The problem with not questioning whether Singapore’s communitarian approach is communitarian, or the best communitarian approach, is that it risks legitimising Singapore’s prima facie flawed approach simply because it has been slapped with the communitarian label. In other words, a defender would say that criticisms of Singapore’s approach are wide of the mark because the approach is tailored to, and appropriate for, Singapore’s unique cultural circumstances. This forecloses the plausibility that a different communitarian approach could remove the disjunction between the elevated status of rights and their practical application. Accepting Singapore’s current communitarian approach at face value, then, also accepts, fatalistically, that Singaporeans’ constitutional rights cannot be better protected within a communitarian framework.

I accept that Singapore’s approach is communitarian insofar as some of the cases evince a palpable concern for the community’s interests. But I dispute that it is the only communitarian approach that could conceivably be adopted, let alone the best one. This thesis, then, constructs an alternative communitarian approach to rights, one that Singapore can adopt. I call this the Inclusive Communitarian Approach, and it consists of two elements: a pluralistic conception of community as constitutive communities (i.e. the communal attachments that partly constitute our identity); and a basic duty to include owed between members of the national community, which is one of many constitutive communities. Under the Inclusive Communitarian Approach, rights protect our constitutive communities, and our interest in them, from unjustified encroachment by the state and/or the majority, thus enabling us to have access to, and participate in, our constitutive communities. Because constitutive communities mark out fundamental features of our identity, such as gender, sexual orientation, religion, ethnicity and nationality, enabling us to live as members of our constitutive communities is to, first, promote living our lives in accordance with our deepest self-understanding; and second, protect us from
the social harms, such as discrimination, that come with membership in constitutive communities.

These social harms are, unfortunately, unavoidable in plural modern societies. Hence, the duty to include steps in to mollify these harms, and it is defeated if a constitutive community’s beliefs and/or practices violate the duty itself. The duty to include provides an important reason for the majority in a national community to recognise fellow members’ unpopular constitutive communities: due to the special concern that members of a national community usually show for each other, when clashes arise between constitutive communities, members are obliged to continue to display this special concern. This is done by including their fellow members; that is, recognising and respecting their fellow members’ equality of membership in the national community, which entails taking their interest in their constitutive communities seriously.

The Inclusive Communitarian Approach proposes that, when reasoning about whether a rights claim should be vindicated, the inquiry should focus on the constitutive community and its importance to its members’ lives. Unless the constitutive community’s beliefs and/or practices violate the duty to include, members of the national community ought to discharge their duty to include by recognising the constitutive community’s members’ equality of membership in the national community. This entails that the constitutive community is prima facie protected by constitutional rights. When assessing whether the right(s) being claimed can be justifiably limited, the Inclusive Communitarian Approach has in mind three communitarian values: the members’ interest in the constitutive community; the constitutive community itself; and unity in the national community. The Approach would thus determine the limits to the right in a manner that best protects these values.

Although inspired by Singapore’s constitutional rights problem, the Inclusive Communitarian Approach is generally applicable and can be adopted by societies looking for a more community-centric justification for rights. The generality of the Approach is reflected in the theoretical Chapters Two, Three, and Four. My inspiration, however, is Singapore. The thesis is thus bookended by Chapters One and Five, dedicated to analysing relevant constitutional rights cases to illustrate Singapore’s current approach, and applying the Approach to Singapore, including the cases, respectively.
Singapore’s Communitarianism: 1991 White Paper on Shared Values

Before outlining the thesis, I will first contextualise the problem. My claim that Singapore’s approach to rights is communitarian may raise a few eyebrows: Singapore, as is well known, has an open, capitalistic free market economy. A country undergirded by a capitalist free market is hardly one that one would associate with communitarianism because of capitalism’s individualistic drive towards private profits. In this regard, Daniel A Bell, who spent three years in Singapore and whose communitarian theory I will rely on, described life there as ‘a more individualistic form of life than [he] had encountered in any Western country’.31 In the same vein, one of the government’s twin principles of governance is meritocracy,32 which is also an individualistic principle that rewards individual achievements. It seems, then, that there is an incongruity between scholars’ claim that Singapore and its approach to rights are communitarian, and Singapore’s individualistic reality.

It is thus important to clarify that the government first made the communitarianism claim in response to Singapore society’s perceived individualism, and it applies only to social and cultural matters. In the late 1980s, the government noted with concern the corrosive effects of Singapore’s open economy on Singaporeans’ social values. There was a ‘worrying trend’, then-Prime Minister Goh Chok Tong said, of a shift in values from communitarianism to individualism due to Singaporeans’ ‘[exposure] to “Western values”, primarily individualism’.33 Singapore’s leaders noted with alarm the social malaise that had beset an excessively individualistic American society, including ‘guns, drugs, violent crime, vagrancy, unbecoming behaviour in public’.34 To them, these were the consequences of a rampant individualism that entailed the ‘expansion of the right of the individual to behave or misbehave as he pleases’, which stemmed from the idea of the ‘inviolability of the individual’, i.e. the notion that ‘human beings had arrived at this perfect state where everybody would be better off

32 The other is multiracialism. This will be explained in more detail in Chapter Five, Part I(c)(i), 212–214.
if they were allowed to do their own thing and flourish’. 35 This has led to ‘the erosion of the moral underpinnings of a society and the diminution of personal responsibility’. 36

To prevent these social vagaries from taking root in Singapore, and to stem the tide of ‘Westernisation’, the government sought to anchor Singapore society in a set of supposedly anti-Western, ‘Asian’-inspired communitarian values. On 15 January 1991, these values were promulgated in a policy paper that Parliament adopted, the White Paper on Shared Values, 37 which enshrines the government’s conception of communitarianism. The White Paper states that the shared values that hold Singaporeans together and shape the Singaporean identity are: (1) nation before community and society above self; (2) family as the basic unit of society; (3) regard and community support for the individual; (4) consensus instead of contention; and (5) racial and religious harmony.

While the White Paper has no constitutional force, it is frequently cited as an authoritative source of Singapore’s communitarianism and a significant policy document. Chua, for instance, argues that the White Paper, ‘[as] a publicly promoted and politically sanctioned document … is now available to the government and its supporters as rational grounds for action’. 38 This means that, even if officials do not explicitly refer to it, the White Paper provides a publicly-promulgated ideological basis on which state policies can be justified and understood. It has also been argued that the White Paper has putative constitutional significance. Benedict Sheehy asserts that the White Paper is a ‘quasi-Constiution’ that ‘sets out fundamental principles suitable for organising many aspects of a society such as those found usually in the preamble of a constitution’, 39 and Thio refers to the White Paper as ‘soft constitutional law’, i.e. ‘deliberately created, constitutionally significant norms that are not legally binding but have some legal effect in ordering constitutional relationships’. 40 Regardless of whether these claims are persuasive, the important point is that the White Paper

35 ibid.
36 ibid.
38 Chua, Communitarian Ideology and Democracy in Singapore (n 28) 33.
provides evidence of Singapore’s specific understanding of communitarianism, according to which the judiciary’s constitutional rights adjudication can be characterised as communitarian.

What does the White Paper reveal about Singapore’s communitarianism? As the first value reflects, it is based on the idea that the group’s interest takes priority over the individual’s; I will call this ‘collective over individual’. That ‘nation before community and society above self’—which essentially exhorts Singaporeans to place the nation/society’s interests above their own—occupies the apex spot in the hierarchy of values demonstrates its importance. This is justifiable, the White Paper claims, because Singapore, as an ‘Asian’ society, ‘has always weighted group interests more heavily than individual ones’, a ‘balance [which] has strengthened social cohesion’. Even though the balance is skewed towards the group, it is nevertheless the right balance because, the White Paper asserts, ‘Asian societies emphasise the interests of the community, while Western societies stress the rights of the individual’. The White Paper attempts to provide empirical evidence for this claim, stating that a ‘major factor’ of Singapore’s success was Singaporeans’ willingness to ‘[put] the interests of society as a whole ahead of individual interest’ which ‘enabled the country to overcome difficult challenges, such as the withdrawal of British forces in the early 1970s and the severe economic recession in 1985’. During these trying times, Singaporeans demonstrated that they were ‘willing to make temporary individual sacrifices for the sake of the group’ which led to ‘greater success for all’ in the long term. These sacrifices included workers ‘accepting a “pay-cut” which enabled Singapore to fully recover from the recession’ in two years. The White Paper refers to this prioritisation of interests as ‘communitarianism’.

How does this ‘collective over individual’ conception of communitarianism interact with the third value, ‘regard and community support for the individual’? This third value is the White Paper’s attempt to ‘remember that in Singapore society, the individual also has rights

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41 ‘Community’ specifically refers to the Singaporean’s official racial group. More will be said about this in Chapter Five, Part I(a), 204–207.
42 White Paper (n 37) [26].
43 ibid [24].
44 ibid [11].
45 ibid. However, the White Paper does not provide details of these events, though some Members of Parliament described the sacrifices that Singaporeans made during the recession. See text to n (46).
47 White Paper (n 37) [30].
which should be respected, and not lightly encroached upon’. Curiously, however, the explanation of what this means makes no reference to actual constitutional rights, but a specific individual interest that is not enshrined in the Constitution: assistance for the poor. Expressing concern for ‘a small number who have not kept up’ with the opportunities generated by Singapore’s ‘efficient free-market economy’, the White Paper implores Singaporeans to support the individual and ‘do all we can to assist the needy [by] helping to meet some of their most pressing needs … so that poor families can make good in the next generation’. The White Paper does not comment further on the individual’s rights that must be respected and not lightly encroached upon.

The discussion so far shows that Singapore’s communitarianism is essentially premised on the normative commitment to the priority of the collective interest viz. individual ones. This prioritisation is also evident in the judiciary’s adjudication of constitutional rights cases, thus rendering the courts’ approach communitarian; I will demonstrate this point in greater detail in Chapter One. The point for now is that the Singapore judiciary’s approach to rights can be characterised as communitarian per the White Paper because the case law contains a discernible trend of the judiciary prioritising the collective interest over individual rights. ‘Collective interest’ refers broadly to any objective pursued in the name of the collective, be it the public interest, the public good, public safety, the common good, national security and so on. This communitarian approach is adopted by a conservative judiciary that adheres to a strict interpretation of separation of powers, a judiciary that declines to venture outside the confines of law-as-formally-enacted and to engage with the amorphous principles that arguably underpin constitutional rights. It does, however, endorse wide restrictions placed on rights that favour the collective interest, resulting in the collective interest trumping constitutional rights.

The Constitution

Two things are noteworthy about the Constitution for our purpose. First, Part IV contains an exhaustive list of rights, called ‘fundamental liberties’, but which I will call constitutional rights

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48 ibid.
49 ibid [33].
50 ibid [32].
51 ibid [33].
to reflect that they are rights contained in the Constitution. These rights are: life and liberty of the person (Article 9); prohibition against slavery and forced labour (Article 10); protection against retrospective criminal laws and repeated trials (Article 11); equal protection of the law (Article 12); prohibition of banishment and freedom of movement (Article 13); freedom of speech, assembly and association (Article 14); freedom of religion (Article 15); and rights in respect of education (Article 16). Only Articles 9, 12, 14 and 15 have been substantively litigated; as such, the analysis in Chapter One will focus on these four Articles.

Second, Article 4 declares that the Constitution is the ‘supreme law’ of Singapore. This Article has been interpreted by the courts as empowering them to strike down unconstitutional legislation. In Public Prosecutor v Taw Cheng Khong, the Court of Appeal declared, ‘The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution’.\(^{52}\) In Tan Eng Hong v Attorney-General, the Court of Appeal stated that Article 4 provides for one of the most important features of the Constitution, viz, that it is the supreme law of Singapore. The supremacy of the Constitution is necessary for the purposes of the Constitution to be protected as it ensures that the institutions created by the Constitution are governed by the rule of law, and that the fundamental liberties under the Constitution are guaranteed.\(^{53}\)

Article 4 thus empowers the courts to void ‘any law [that] does not conform to and cannot be reconciled with the Constitution through a process of construction’,\(^{54}\) including laws that pre-date the Constitution. Yet, the courts display a peculiar tension by affirming, on the one hand, constitutional supremacy; but on the other hand, failing to recognise any of the constitutional rights claims that have come before them. This tension has produced the ineluctable impression that Singaporeans have rights on paper only. I hypothesise that this tension is caused by the courts’ communitarian approach to rights: by prioritising the collective interest over individual rights, rights face an uphill battle for vindication, and are easily trumped, as it were, by the competing collective interest. This approach is problematic because it is inherently at odds with Singapore’s constitutional supremacy, and thus, the elevated status of constitutional rights. This is the problem that the thesis addresses.

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\(^{52}\) Taw Cheng Kong (n 9) [89].

\(^{53}\) Tan Eng Hong (n 1) [60].

\(^{54}\) ibid 59.
**Definitions, Assumptions and Caveats**

Before setting out the thesis’ structure, some clarifications on definitions, methodology and assumptions are in order.

First, I presuppose an *interest theory of rights*. Instead of protecting all autonomy interests, I assume that rights protect only *especially important interests* from unjustified state and/or majority encroachment. I have in mind John Tasioulas’ reformulation of Joseph Raz’s interest theory. This theory says that rights are grounded in universal basic human interests, such as health and autonomy, that are sufficiently important to justify imposing duties on others to respect, protect or advance these interests by securing to the individual a right to her interest. These duties have to be ‘feasible claims’ on others given constraints in resources and facts about human nature. Hence, if \(X\), the object of a putative right, is a human interest of such import, then there is a right to \(X\).

An important advantage of Tasioulas’s interest theory is that it is a *pluralist* account. The interests that ground rights, Tasioulas argues, are pluralistic because they are irreducible to one overarching value. Hence, it could well be the case that more than one interest, or a combination of interests, ground a right. This can be distinguished from monist interest theories, such as Griffin’s, that ground rights in an overarching value, such as personhood. The advantage of Tasioulas’s pluralist account is that it can accommodate the communitarian interests, i.e. constitutive communities, that I will argue should be protected by rights. As Tasioulas says, his is a ‘flexible, many-faceted approach to the grounding of human rights,

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56 Raz (n 18).
57 Although Tasioulas refers to moral rights, I will not distinguish between moral and constitutional rights since the constitutional rights that I am concerned with (e.g. freedom of religion, the right to equality) are also moral rights.
59 ibid 51.
60 Griffin (n 18). Though Griffin considers his theory a ‘trinitarian’ one as it appeals to three criteria for personhood; autonomy, liberty and minimum provision.
whereby more than one interest...grounds the existence of any given right’. Tasioulas’ account is particularly advantageous because the Inclusive Communitarian Approach departs from conventional understandings of rights that focus primarily on the individual’s agency or autonomy, her ability to form and pursue her conception of the good independently of others, as if she were an island.

While one could certainly extrapolate from a monist value like agency to the constitutive communities that I will argue for, Tasioulas’s pluralist account does away with the convoluted reasoning and simply accommodates interests other than agency or autonomy as grounds for rights. For an interest to qualify, it has to be universal; that is, every human being, simply in virtue of being human, and within a specified historical context, has an interest in it. A universal human interest falls under his theory if it is ‘objective, standardized, pluralistic, open-ended, and holistic in character’. In other words, rights are grounded in a range of human interests that are human interests for ‘the standard case of an ordinary human being living in a modern society’, regardless of whether it is believed that they are human interests, or whether their fulfilment is desired; and these interests ‘bear important non-instrumental relations to each other, so that an interest’s nature and significance is partly determined by its location within a broader web of prudential values’. Chapter Three will show that our interest in our constitutive communities are just these universal human interests.

The one important limitation placed on interests that can ground a right is that the interest has to be sufficiently important to generate a duty on others to respect or protect a right to it. Duties, Tasioulas says, are ‘moral reasons of a special kind: categorical, exclusionary, and subject to an array of moral responses—such as blame, guilt, etc—in light of their violation’. A classic example is the right against torture: our interest in bodily integrity and freedom from pain is sufficiently important such that it gives rise to a duty—on the state, for instance—not to torture an individual; and when this duty is violated we feel, and are, justified in holding the violators morally blameworthy. The other advantage of Tasioulas’s theory, then, is that it protects the normative force of rights by resisting rights inflation—and so it corresponds with

61 Tasioulas (n 58) 51.
62 ibid (emphasis removed).
63 ibid.
64 ibid 52.
65 ibid 57.
the elevated status of Singapore’s constitutional rights, which protect interests that are important enough to impose a duty on the state and the national community to respect them. Finally, the two-part formulation of the theory—(1) sufficiently important interest that (2) generates a duty to respect—also corresponds to the two elements of the Inclusive Communitarian Approach, explained below.

Second, a clarification on what I am not claiming. I am not claiming that communitarianism is superior to liberalism, or that the Inclusive Communitarian Approach protects rights better than liberal ones. My approach is developed, first and foremost, for Singapore’s context, and seeks to improve Singapore’s existing practice. That said, liberal and communitarian approaches to rights are not necessarily opposed to each other. There is no immediate reason why communitarian reasoning, like the sort I am proposing, cannot be utilised in a liberal context, particularly because communitarianism is not liberalism’s opposite.\textsuperscript{66} Indeed, the difference between communitarianism and liberalism is one of degree, not of kind, for both are interested in individuals and communities; they merely locate the emphasis in different places.

Relatedly, I could be accused of trying to sneak liberalism through the backdoor of communitarianism, such that what I claim is the most favourable interpretation of communitarianism is really liberalism reconceived. The boundaries between communitarianism and liberalism are, of course, porous; but what distinguishes my approach from some liberal ones, and what makes it communitarian, is that it stresses the importance of community to the individual’s self-understanding. On my account, rights protect the individual’s interest in her constitutive communities, and the communities themselves. My approach does not focus on autonomy or agency as justifications for rights, e.g. we need the right to liberty so that we can form and pursue our own conception of the good. Rather, my approach stresses our dependence on our constitutive communities in developing our identity and self-understanding, and the importance of these communities to our ability to live meaningful lives.

Finally, definitions. ‘Singapore’ refers to the state, including the government, Parliament, and the judiciary, and does not refer to Singapore society unless explicitly stated.

\textsuperscript{66} See Chapter Two, Part II(c), 96–97.
I use ‘rights’ in a general sense that includes moral, human and constitutional rights, and I specify when I am referring to constitutional rights by using precisely this phrase.

The Thesis

Given the problem with Singapore’s communitarian approach to rights that I have identified, my question is: How can we construct an alternative communitarian approach to rights that is consonant with the elevated status of constitutional rights? My answer to this question fills the two important gaps in the literature outlined above. First, it provides a theoretical account of a communitarian approach to rights. Second, it questions whether Singapore’s communitarian approach is the best communitarian approach which has not been addressed by scholars. It is important that this latter gap is filled because, as mentioned previously, accepting Singapore’s communitarian approach at face value is also to accept that the outcome of this approach, of no successful constitutional rights challenges in Singapore’s history, is inevitable. It thus also accepts that a communitarian approach to rights would not vindicate constitutional rights claims because only this particular communitarian approach can be adopted.

I reject these tacit acceptances in the thesis. I begin, in Chapter One, by demonstrating how this ‘collective over individual’ communitarian approach has resulted in the competing collective interest overriding constitutional rights in the case law by focusing on specific cases. Although it is arguable that this approach is evident in all the cases, in the interest of space and cogency, I will focus on cases where the courts have explicitly upheld a collective interest over the competing individual right(s), and where it is not so apparent that the courts were constrained by the wide restrictions of the constitutional text itself, as is the case with Article 14.\(^{67}\) The cases that I will not discuss, then, include Article 14 cases relating to political defamation,\(^ {68}\) contempt of court and scandalising the judiciary; Article 9 cases relating to

\(^{67}\) For this reason, I am excluding most of the Article 14 cases. I do, however, discuss one Article 14 case where the High Court’s reasoning is particularly communitarian; see Chapter One, Part III(b), 48–53.

\(^{68}\) See Tan, ‘Communitarian Legalism in Singapore’ (n 14) for an analysis of the courts’ communitarian approach to these cases.
criminal procedure, and Article 12 cases on the Attorney-General’s prosecutorial discretion enshrined in Article 35(8) of the Constitution.\(^{69}\)

My discussion of the most pertinent cases will proceed thematically as follows: freedom of religion, national security and national unity; sexual orientation and public morality; multiracialism, political protest and freedom of expression; and the death penalty and drug trafficking. I will show that the judiciary’s communitarian approach is manifest in the courts’ overwhelming emphasis on various collective interests, including the national interest, and comparatively little emphasis on the importance of rights. This approach is facilitated by its conservative view of its role in the system of separation of powers, and its reluctance to take an expansive, moral interpretation of the vague wording of most rights. In contrast, the courts endorse broad restrictions on rights that favour the collective interest. The analysis will show that the problem with Singapore’s communitarian approach is its basic principle, collective over individual, which causes it to be incongruous with the elevated status of rights. Due to the open-ended wording of most rights, however, the courts are not bound to adjudicate the cases in this specific communitarian way.

Given that the problem with Singapore’s communitarian approach is ‘collective over individual’, Chapter Two interrogates whether communitarianism necessarily requires the collective to be prioritised over the individual. It answers the question negatively by subjecting ‘collective over individual’ to a normative critique in light of ‘Western’ and Confucian communitarianism. The critique shows that ‘collective over individual’ does not necessarily follow from either the communitarian conception of the self as a social, situated and relational self, or from the communitarian politics of the common good. I make two conceptual claims about the most favourable interpretation of communitarianism: first, it values both the individual and community; and second, it advances only a thin theory of the good, that of inclusiveness. Since Singapore’s conception of communitarianism falls short of the most favourable interpretation of communitarianism, its communitarian approach to rights is not the best communitarian approach. As such, we have good reasons to abandon it and theorise about an alternative approach.

\(^{69}\) This issue has arisen where there are two or more offenders jointly involved in the same criminal enterprise, but one is charged with a more serious offence than other. See *Sim Min Teck v Public Prosecutor* [1987] SLR(R) 65; *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362; and *Ramalingam v Attorney-General* [2012] 2 SLR 49.
Chapter Three picks up from the first conceptual claim about communitarianism, that it values both individual and community, and develops the first element of the Inclusive Communitarian Approach: a pluralistic conception of community as constitutive communities. After explaining the constitutive communities theory with reference to Sandel and Bell, I argue that this conception should be adopted, and not a monist conception of community. The constitutive conception comports with the first conceptual claim about communitarianism: being pluralistic, it values both individual and community by appreciating our interest in our various constitutive communities, and these constitutive communities themselves. I then respond to a formidable objection to the theory, that from autonomy, and argue that the theory should be premised on what I term the Constituted Autonomous Self, i.e. a self who exercises content-neutral autonomy within the framework provided by its constitutive communities. I conclude Chapter Three by identifying two features that elevate communal attachments to constitutionally protected constitutive communities: the Fundamental Feature, which points to the fundamental importance of our constitutive communities to our self-understanding; and the Social Harm Feature, which points to the inexorably social nature of our constitutive communities, and the social harms to which they expose us. When these two features are present, our interest in our constitutive communities has the requisite degree of importance to be protected by rights.

Chapter Four expounds on the second element of the Inclusive Communitarian Approach, which also follows from the second conceptual claim about communitarianism. This is the duty to include, which essentially exhorts members of the national community to recognise and respect each other’s equality of membership. My starting point is David Miller’s conception of the nation as an ethical community where members owe each other special obligations in addition to what we owe to humans as such. Membership in the national community has ethical significance. If an individual possesses the morally relevant criterion for membership—i.e. national identity—then she is a member of the national community, and so fellow members have a duty to include her in the national community. The duty’s implication is that, given the importance of her constitutive communities to her self-understanding, and the social harms that she faces because of them, the national community cannot impede her access to and participation in her constitutive communities unless the communities’ beliefs and/or practices violate the duty to include. I then suggest a few ways in which the communitarian state can promote the good of inclusiveness.
Chapter Five applies the Inclusive Communitarian Approach to Singapore. I begin by showing that the Approach is relevant to Singapore because Singapore’s communitarianism already contains the two elements of the Inclusive Communitarian Approach: a constitutive understanding of community, and an emphasis on the nation. More importantly, I argue that the normative core of the duty to include, equality of membership, is arguably the essence of Singapore’s multiracialism. After demonstrating how the latter is underpinned by the notion of equality, I argue that it should be extended to equality *simpliciter*. I follow this with the reinterpretation of the cases discussed in Chapter One. The cases are divided into two clusters: first, when the impugned legislation or executive action encroaches into a constitutive community; and second, when it does not. It will be shown that, under the Inclusive Communitarian Approach, the cases discussed in Chapter One will have a successful outcome.

The thesis ends by reiterating that Singapore should abandon its current communitarian approach and adopt the Inclusive Communitarian Approach because the latter is better able to recognise the elevated status of rights within a communitarian framework. I also make some concluding remarks on the likelihood of the Singapore judiciary adopting this approach and what I hope to have achieved with the thesis.
Chapter One

Singapore’s Communitarian Approach to Constitutional Rights

INTRODUCTION

This chapter illustrates how Singapore’s ‘collective over individual’ approach to rights has operated in practice by analysing constitutional rights cases where the courts have upheld a collective interest over the competing individual right(s). It will be shown that, by prioritising the collective interest over individual rights, Singapore’s communitarian approach is incongruous with the elevated status of the rights contained in the Constitution. The courts’ communitarian reasoning combines a narrow, plain interpretation of the constitutional text with a broad interpretation of the permissible restrictions that can be placed on rights. Hence, although the courts generally assume that the rights claimed in the cases are applicable, they tend to adopt justifications for restrictions that favour the collective interest. However, as my analysis of the relevant cases will show, this particular communitarian approach is not inevitable because of the open-textured nature of most of the rights. The courts, then, are not bound by this specific communitarian approach, and are, in theory, free to adopt another communitarian approach.70

The distinguishing features of Singapore’s communitarian approach will be demonstrated by contrasting it with the approaches taken by liberal democratic courts.71 What is unique about Singapore’s approach is the judiciary’s circumscribed view of its role in a system of separation of powers. On this view, the judiciary merely interprets and applies the law, and does not make new laws or policies. In this regard, there are three features of Singapore’s communitarian approach that distinguish it from the approaches of liberal democratic courts.

First, unlike some courts like the United States Supreme Court, the Singapore courts adopt a plain and/or narrow reading of the constitutional text and have consistently declined to take an expansive, moral interpretation of rights when, arguably, the open-ended nature of the

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70 The plausibility of the Approach will be demonstrated in Chapter Five, Part II, 222–245.
71 The comparative work here is only minimal. The purpose is only to show how Singapore’s approach is different without necessarily saying that it is worse than the approaches taken by these other courts, or that these other approaches are the benchmark of how rights should be protected.
text lends itself to such an interpretation. This is because, pursuant to the courts’ narrow conception of the separation of powers, anything beyond a plain reading of the text would be creating a new right where none previously existed—and this would impermissibly encroach into Parliament’s sphere of expertise. For instance, the courts did not see it fit to interpret Article 9(3)\textsuperscript{72} as encompassing a right to be informed of a right to counsel. According to the High Court (HC), the imperative ‘shall be allowed’ is ‘couched in negative terms in a sense that there is no obligation imposed on the relevant authority to inform … the person under custody of his right to counsel’.\textsuperscript{73} This was contrasted with Article 9(4)\textsuperscript{74} which clearly imposes an obligation on the arresting authority to inform an individual of the grounds of his arrest. Hence, to read into Article 9(3) a right to be informed of the right to counsel would be ‘tantamount to judicial legislation’ as it is ‘clearly contrary to Parliament’s intention’.\textsuperscript{75} A similar approach has been taken to the word ‘law’ in Article 9(1) which will be explored in more detail in Part IV below.

The second distinguishing feature is the courts’ reluctance to inquire into whether a restriction of a right is proportionate, legitimate, necessary, and so on. While it could be said that courts generally engage in some kind of balancing exercise even if they either do not explicitly state it, or explicitly reject it like the Singapore courts have done, we should take the Singapore judiciary’s professed non-inquiry into these matters at face value because it demonstrates its narrow conception of its role in the system of separation of powers. It is also arguable that when the Singapore courts appear to engage in a balancing exercise, they are usually affirming the balance that has already been struck by Parliament. This is especially apparent when contrasted with the overt proportionality analysis undertaken by courts such as the European Court of Human Rights (ECtHR) when assessing whether an interference with some rights, usually those that are not absolute, is justified. For the Singapore judiciary, assessing whether the purpose of a rights-restricting statute or executive action is legitimate

\textsuperscript{72} Article 9(3) reads: ‘Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.’

\textsuperscript{73} Rajeevan Edakalavan v Public Prosecutor [1998] 1 SLR(R) 10 [19].

\textsuperscript{74} Article 9(4) reads: ‘Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate, in person or by way of video-conferencing link (or other similar technology) in accordance with law, and shall not be further detained in custody without the Magistrate’s authority.’

\textsuperscript{75} Rajeevan (n 73) [19].
would stray inappropriately into policy-making. This was what the CA explicitly stated in *Lim Meng Suang v Attorney-General*. The CA upheld the constitutionality of section 377A (377A) of the Penal Code which only criminalises sex between men. According to the CA, it is not for the courts to assess whether 377A’s purpose of criminalising sex between men is legitimate because there are no legal standards to determine legitimacy; this will be explored in more detail below. Suffice to say for now that, by not examining whether a right is restricted for a legitimate purpose, or whether the restriction is proportionate, the judiciary exhibits considerable deference to Parliament’s statutory intention or the government’s reasons for issuing an executive order; and in so doing, adopts a broad interpretation, one that favours the collective interest, of the relevant constitutional limits.

The third distinguishing feature of the courts’ constitutional adjudication is explicitly communitarian: the courts place overwhelming emphasis on the importance of the collective interest, such as public safety, public order, and national security and unity, that justifies the restriction of the right, and a corresponding lack of emphasis on the importance of the individual right. Hence, even though a public interest limitation is not unique to Singapore as it is contained in most human rights documents such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), the Singapore judiciary’s public interest analysis is different in two ways. First, the courts’ emphasis on the importance of the various collective interests is overwhelming because there is comparatively little pronouncement on the importance of rights beyond vague statements to that effect. In contrast, the courts pontificate extensively on the importance of the collective interests that eventually outweigh the individual rights. Second, there is, at times, a palpable concern for the national interest, which reveals a nationalistic bent to the courts’ constitutional adjudication. Taken as a whole, the courts’ public interest reasoning is distinctively communitarian because of its lack of attention to the importance of rights, and its emphasis on the collective, including national, interest.

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76 *Lim Meng Suang* (n 6).

77 377A (n 2).

78 See Part II(b), 38–42.

79 Unless clearly stated otherwise, assume that, in the cases discussed here, the courts did not expound on the importance of the various individual rights claimed.

80 I will argue in Chapter Four that the nation is an important constitutive community; as such, I do not distinguish between communitarianism and nationalism.
As mentioned in the Introduction, I will only analyse cases where the communitarian feature is explicit. What is noteworthy about the decisions is that the constitutional text is often vague enough that the courts are arguably unconstrained by broad restrictions contained in the text itself. Hence, it could be argued that Singapore’s communitarian approach is not inevitable; that the courts have more interpretive freedom than they acknowledge to adopt another communitarian interpretation that would vindicate the right(s) being claimed. These cases relate to the following themes: national security and national unity; sexual orientation; multiracialism; political protest; and the death penalty for drug trafficking. The courts’ reasoning in these cases reveals an imperative need to protect the collective interest against a supposedly detrimental exercise of the individual right that is being claimed.

In sum, I will illustrate that the problem with Singapore’s communitarian approach to rights is that it \textit{a priori} elevates the collective interest above individual rights in a manner that impedes the exercise of these rights. This approach is thus unable to reconcile the elevated status of these rights, situated within the country’s supreme law, and the not-unjustified communitarian impulse to account for the collective interest, too. The result is a disjunction between the rights’ constitutional status, and their non-application in practice.

I. **FREEDOM OF RELIGION, NATIONAL SECURITY AND NATIONAL UNITY**

The courts’ communitarian approach is clearest in a series of cases involving a clash between the collective interest in national security, national unity and public order, and the Article 15 right to religious freedom.\footnote{Article 15 provides:}

\begin{enumerate}
\item Every person has the right to profess and practise his religion and to propagate it.
\item No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.
\item Every religious group has the right —
  \begin{enumerate}
  \item to manage its own religious affairs;
  \item to establish and maintain institutions for religious or charitable purposes; and
  \item to acquire and own property and hold and administer it in accordance with law.
  \end{enumerate}
\item This Article does not authorise any act contrary to any general law relating to public order, public health or morality.
\end{enumerate}

81 These claims were filed by a group of Jehovah’s Witnesses against three government orders that effectively banned the Singapore Congregation of the Jehovah’s Witnesses.
Witnesses (SCJW) and all their religious materials. The first order was made in 1972 by the Minister for Home Affairs under section 24(1) of the Societies Act which dissolved the SCJW as a society (Deregistration Order). According to the government, the SCJW’s ‘continued existence is prejudicial to public welfare and good order in Singapore’ because their beliefs had ‘led to a number of Jehovah’s Witnesses in the National Service to refuse to do any military duty. Some of them even refuse to wear uniforms.’ Subsequently, publications of the Watch Tower Bible and Tract Society (WTBTS), the Witnesses’ main legal entity, were banned in 1972 (WTBTS Ban); and in 1994, another government order was issued to prohibit the importation, sale and circulation of materials printed by the WTBTS and the International Bible Student’s Association (IBSA) (IBSA Ban). These latter two orders were made pursuant to section 5 of the Undesirable Publications Act (UPA).

These blanket bans demonstrate the Singapore government’s broad-brushed communitarian approach to the issue: the Witnesses’ Article 15 right has to be restricted for the collective interest in maintaining national service, national security, and public welfare. In safeguarding these interests, Parliament interpreted the right to freedom of religion narrowly. Unlike the ECtHR which recognises the centrality of freedom of conscience to a person’s identity, the Singapore Parliament has explicitly rejected freedom of conscience as integral to the freedom of religion. In 1990, Parliament stated that Jehovah’s Witnesses who refused to perform military service had to be court-martialled because Singapore does not recognise conscientious objection:

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82 Gazette Notification No. 179 (Order 179).
83 Cap 311 (2014 rev ed). Section 24(1)(a) empowers the Minister to dissolve ‘any registered society is being used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Singapore’.
84 Press statement quoted in *Chan Hiang Leng Colin and others v Public Prosecutor* [1994] 3 SLR(R) 209 [3]. National service is Singapore’s compulsory military service for men.
86 Gazette Notification No. 405 (Order 405) dated 4 February 1994.
87 Cap 338 (1998 rev ed). Section 5(1) confers a discretion upon the Minister to ban publications if ‘[h]e is of the opinion’ that these publications are ‘contrary to the public interest’.
88 E.g. *Bayatyan v Armenia* App no 23459/03 (ECtHR, 7 July 2011) [118]: ‘The Court reiterates that, as enshrined in Article 9, freedom of … conscience … is one of the foundations of a “democratic society” … This freedom is, in its religious dimension, one of the most vital elements that … make up the identity of believers [and] is also a precious asset for atheists, agnostics and the unconcerned.’
Conscientious objection does not apply in Singapore. There is no such tradition in Singapore. If we try to introduce the practice here, the whole system of universal National Service will come unstuck. Many other people will ask: why should I also not decide to have conscientious objections and therefore exempt myself from National Service? … Therefore, the Enlistment Act … does not recognize conscientious objections. National Service is a secular issue, subject to government laws.  


*Chan Hiang Leng Colin v Public Prosecutor* was decided against this backdrop. This case involved the conviction of five Jehovah’s Witnesses for possessing publications by the WTBTS, an offence under what is now section 6 of the UPA. The appellants alleged that the WTBTS Ban and the Deregistration Order violated Article 15(1). They argued that the Deregistration Order was wrong to claim that the JWs threatened national security because the JWs were law-abiding and respectable citizens. As such, the Order was ‘irrational, oppressive, unreasonable, overboard [and] a violation of [Article 15]’.

The HC’s rejection of the argument bears the hallmarks of Singapore’s communitarian approach to rights: non-inquiry into whether the WTBTS Ban and Deregistration Order were proportionate, and justifying them in the name of not just a social interest, but the national interest. The HC first dismissed as irrelevant the appellants’ argument that the Jehovah’s Witnesses were law-abiding citizens:

> [the] issue at hand was simply their belief which prohibits any form of military or national service, which is a fundamental tenet in Singapore. Anything which detracts from this should not and cannot be upheld.

For the communitarian-minded HC, national service is a tenet even more fundamental than the appellants’ fundamental right to religious freedom. The primacy that it accorded to national service corresponds to the lack of importance that it placed on Article 15(1). The HC’s holding that the WTBTS Ban and Deregistration Order were justified pursuant to the ‘inherent

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89 Singapore Parliamentary Debates, 23 February 1990, vol 54, col 1181.

90 *Colin Chan v PP* (n 84).

91 ibid [54].

92 ibid [37].
limitations’ of Article 15(1) illustrates the second distinguishing feature of the courts’ constitutional adjudication: a lack of analysis as to whether the restricting measures are proportionate or necessary, and hence, arguably, a sweeping endorsement of the government’s restriction of the right. For the HC, the only issue at hand was whether the JWs’ refusal to do national service threatened public order. It held that Article 15(1) is subject to the ‘public order’ exception in Article 15(4) which ‘clearly envisages that the right of freedom of religion [is] not an absolute and unqualified right’. In a sweeping *ratio*, the HC stated that freedom of religion must be reconciled with the “right of the State to employ the sovereign power to ensure peace, security and orderly living without which constitutional guarantee of civil liberty would be a mockery” (*Commissioner, HRE v LT Swamiar* AIR 1954 SC 282). The sovereignty, integrity and unity of Singapore are undoubtedly the paramount mandate of the Constitution and anything, including religious beliefs and practices, which tend to run counter to these objectives must be restrained.

The HC’s desire to safeguard the national interest is palpable, and its assertion in italics suggests that the exercise of rights by the Jehovah’s Witnesses threatens Singapore’s sovereignty, integrity and unity. Hence, in addressing the issue of whether the Witnesses’ refusal to do national service threatened public order and so whether the WTBTS Ban and Deregistration Order satisfied Article 15(4)’s public order exception, the HC did not consider the proportionality or necessity of the WTBTS Ban and Deregistration Order. Unlike the ECtHR’s decision in *Bayatyan*, a case involving Armenia’s denial of a Jehovah’s Witness’ conscientious objection to compulsory military service, questions such as whether the interference with the applicant’s right to religious freedom ‘corresponds to a “pressing social need”’ did not arise. Instead, the HC accepted the government’s determination that the Jehovah’s Witnesses’ very existence threatened public order, stating that ‘it was not for this court to substitute its view for the Minister’s as to whether the [JWs] constituted a threat to national security’. The Minister’s view that ‘the continued existence of a group which preached … that military service was forbidden was contrary to public peace, welfare and good

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93 ibid [63].
94 ibid [64] (emphasis added). Note that the words ‘sovereignty, integrity and unity of Singapore’ do not appear anywhere in the Constitution.
95 *Bayatyan* (n 88).
96 ibid [123].
97 *Colin Chan v PP* (n 84) [68].
order”\(^98\) was sufficient to dispose of the constitutional question—which reveals a broad interpretation of the public order exception. This conclusion was, of course, easy for the HC to reach if the issue had been framed as one of national security from the very outset, when the HC ought to perhaps have interrogated this framing. Accordingly, the Deregistration Order and the WTBTS Ban did not violate Article 15(1).

When the courts did consider the proportionality of the blanket IBSA Ban, as the HC did in \textit{Chan Hiang Leng Colin and others v Minister for Information and the Arts},\(^99\) it was because the plaintiffs had argued that the IBSA Ban was so wide that it ‘[exceeded] the restrictions that may be permissibly imposed under Art 15(4)’ as it included ‘many publications about which the Minister could not have formed the opinion that they were contrary to public interest, \textit{eg} the King James edition of the Bible’.\(^100\) Following \textit{Colin Chan v PP}, the HC rejected the argument and held that Article 15(1) is subject to ‘a general law which deals with, or is invoked to preserve, public order, public health or morality’.\(^101\) The burden of proof was on the plaintiffs to show that there is an arguable case that an executive action, such as the IBSA Ban, was not made for those purposes—and the plaintiffs could not show it because the Deregistration Order had banned the SCJW. As held in \textit{Colin Chan v PP}, this order was made according to the government’s determination that the Jehovah’s Witnesses threatened public order—a determination that the courts could not disturb, thereby rendering the Deregistration Order constitutional. Given that the SCJW was banned, it would be unlawful to propagate its beliefs, whether by word of mouth or by printed materials; and so ‘[it] is logically not possible to assert … a legal right to distribute or possess unlawful material’,\(^102\) such as the publications caught by the IBSA Ban.

On appeal, the CA affirmed the principle that executive decisions concerning national security are ‘not justiciable’,\(^103\) and so the government’s determination that the Witnesses’

\(^{98}\) ibid.

\(^{99}\) \textit{Chan Hiang Leng Colin and others v Minister for Information and the Arts} [1995] 2 SLR(R) 627.

\(^{100}\) ibid [23].

\(^{101}\) ibid [27].

\(^{102}\) ibid [29].

\(^{103}\) \textit{Chan Hiang Leng Colin and others v Minister for Information and the Arts} [1996] 1 SLR(R) 294 [36].
objection to military service *per se* threatened national security established the ‘factual basis that issues of national security are involved’\(^{104}\) and could not be scrutinised by the courts:

> It is not for the courts to say how many men must refuse to do National Service before the Government can legitimately consider that the refusal constitutes a threat to national security. Nor is it for the courts to say what effect allowing even only a handful of conscientious objectors exemption from National Service will have on the morale of those doing National Service or whether it will encourage others to refuse to do National Service. Such issues can only be judged by those on whom the responsibility for national security lies. A refusal to do National Service which is required by law is disruptive of the national ethos and is unquestionably a matter in “the public interest” and relating to “public order.”\(^{105}\)

These decisions illustrate the communitarian flavour of the courts’ adjudication in the following ways. First, the courts did not scrutinise the proportionality or necessity of the bans on the SCJW and their religious materials, and accepted the government’s determination that they are necessary to safeguard public order and national security. Second, there is an overwhelming concern for not just the general social interest, but the *national* interest. These two factors are evident in the CA’s endorsement of the blanket bans in *Colin Chan v MITA (CA)* despite the fact that the CA was ‘prepared to accept that there could well be other less restrictive methods which the Minister could conceivably adopt’.\(^{106}\) What appears to be the CA’s primary concern is the importance of safeguarding national service and its smooth operation. As such, the CA was not prepared to hold that the IBSA Ban contravened the test for irrationality, i.e. no reasonable Minister would have issued the IBSA Ban. Even though the CA accepted that the IBSA Ban ‘deprives Jehovah’s Witnesses who are women or senior citizens, and who are not required to do National Service, of literature which are necessary’\(^{107}\) for their beliefs, the burden imposed on this group of people was justified. In the CA’s view, it was reasonable for the Minister to ‘consider that although there are women and other members of the Jehovah’s Witnesses faith who do not have to do National Service, they may have some influence on male members who do have to do National Service or even on male citizens who are not members of the faith’.\(^{108}\)

\(^{104}\) ibid [35].

\(^{105}\) ibid [36] (emphasis added).

\(^{106}\) ibid [45].

\(^{107}\) ibid.

\(^{108}\) ibid [47].
It is worth noting, too, that the breadth of the IBSA Ban was justified on an ancillary ground by the HC in Colin Chan v MITA (HC) and Liong Kok Keng v Public Prosecutor.\textsuperscript{109} administrative efficiency. In Colin Chan v MITA (HC), the HC stated that

the width of the ban did not make it unreasonable \textit{per se} since the Minister’s actions were clearly to stop the dissemination and propagation of beliefs of the Jehovah’s Witnesses and this would of necessity include every publication by IBSA. \textit{Any order other than a total blanket order would have been impossible to monitor administratively.}\textsuperscript{110}

In Liong Kok Keng, the Jehovah’s Witness appellant was charged under the UPA for possessing materials that violated the WTBTS and IBSA Bans, and unsuccessfully challenged the constitutionality of these bans. Apart from the questions already settled in Colin Chan v PP and Colin Chan v MITA (CA) of whether the two Bans contravened Article 15(1), the HC also considered whether they were too wide and therefore ran afoul of Article 15(4). The HC answered the question negatively and reiterated the decision in Colin Chan v PP:

[\textit{Any} order other than a total blanket order would be administratively inconvenient. It would be absurd to expect every published material to be vetted. Hence a total blanket order was the only possible administrative solution.}\textsuperscript{111}

Whereas the ECtHR in Bayatyan ruled that a system which fails to allow conscience-based exceptions to military service ‘\textit{fails} to strike a fair balance between the interests of society as a whole and those of the applicant’,\textsuperscript{112} under Singapore’s communitarian approach, the collective interest in safeguarding national service is paramount and justifies a sweeping and overly restrictive ban on the congregation and religious materials of a religious minority. What is at stake here, according to the courts, is not only society’s interests as a whole, but the \textit{national} interest too: national security and the national ethos. The overriding importance of these collective interests means that the Witnesses’ Article 15(1) right can be restricted even for administrative efficiency, a standard below ‘a pressing social need’. Once again, this reveals a broad interpretation of Article 15(4)’s public order exception, one that conflicts with elevated status of Article 15(1).

\textsuperscript{109} [1996] 2 SLR(R) 683.
\textsuperscript{110} Colin Chan v MITA (HC) (n 99) [32] (emphasis added).
\textsuperscript{111} Liong Kok Keng (n 109) [27].
\textsuperscript{112} Bayatyan (n 88) [124].
A possible argument in Singapore’s defence is that the Jehovah’s Witnesses are not denied the right to hold their religious beliefs, for it is ‘not illegal to profess the beliefs of Jehovah’s Witnesses per se, nor is it an offence to be a Jehovah’s Witness’.\textsuperscript{113} All that Singapore’s communitarian solution mandates is that, in professing their religious beliefs, the Witnesses ‘may not be a member of the SCJW … and they may not have access to the prohibited publications’\textsuperscript{114}—in other words, they do not have the right to manifest their religious beliefs. The distinction between the right to hold and right to manifest is similarly recognised by other courts, such as the UK House of Lords (UKHL) in \textit{R v Williamson}: the right to hold a religious belief is absolute, but the right to manifest is qualified.\textsuperscript{115}

However, what distinguishes Singapore’s approach is that scant protection is given to the right to manifest when it clashes with the collective interest in national security and national service. In contrast, the UKHL in \textit{Williamson} laid down three criteria to determine whether the right to manifest is protected, namely: whether the belief is consistent with the standards of human dignity; whether the belief relates to more than trivial matters and is adequately serious and important; and whether it is capable of being understood.\textsuperscript{116} What is telling is that the activities that Singapore banned—being a member of the SCJW and accessing the banned publications—are ‘intimately linked to the belief’,\textsuperscript{117} such that the restriction on the Jehovah’s Witnesses’ right to manifest arguably encroaches into their right to profess these beliefs. It is likely that, for the deeply devout, having access to the relevant religious texts and being able to gather with like-minded individuals to worship and practise their religion is inextricable from professing that religion; that it is impossible to separate, in the manner that Singapore’s communitarian approach has done, the profession from the practice. Unsurprisingly, the Witnesses continued to congregate and worship decades after the Deregistration Order. In \textit{Chan Cheow Khiang v Public Prosecutor},\textsuperscript{118} the Jehovah’s Witness appellant was convicted under the Societies Act for being a member of the unlawful SCJW. In \textit{Kok Hoong Tan Dennis and }

\begin{flushright}
113 \textit{Colin Chan v MITA (CA)} (n 103) 18.
114 ibid [18].
115 \textit{Regina v Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others} [2005] 2 AC 246 [16].
116 ibid [23].
117 ibid [32].
118 \textit{Chan Cheow Khiang v Public Prosecutor} [1996] 2 SLR(R) 620.
\end{flushright}
others v Public Prosecutor, the appellants were convicted under the Societies Act for attending a SCJW meeting held at one of the appellant’s premises. Furthermore, Singapore’s failure to recognise a right to conscientious objection has also caused Jehovah’s Witnesses who persistently fail to perform their state-mandated military duties to be court-martialled.

Singapore’s communitarian approach to the issue at hand is evident in its explicitly restricting Article 15(1) to safeguard national security by adopting a broad interpretation of Article 15(4), resulting in the sweeping and arguably disproportionate bans on the SCJW and their religious materials. The broadness of the restrictions on Article 15(1) demonstrates little appreciation for the right’s elevated status, thus weakening the right.

b. Religious Freedom vs. National Unity

The Witnesses’ right to religious freedom has also been trumped by the collective interest in national unity. In Nappalli Peter Williams v Institute of Technical Education, the Jehovah’s Witness appellant failed in his wrongful dismissal claim against the Institute of Technical Education (ITE) when he was dismissed from his teaching position for refusing to conform to one manifestation of this national unity. The ITE, pursuant to a mandatory Ministry of Education (MOE) policy, required its teaching staff to take the National Pledge, which involves placing one’s right fist over the heart, and sing the National Anthem during daily flag-raising morning assembly. Although Nappalli was present at morning assembly, he conspicuously did not take part in the pledge and anthem ceremony as his ‘right fist was not raised when the pledge was taken’. For Nappalli, the pledge and anthem ceremony violated his religious convictions: it amounted to an act of worship that ‘should be reserved exclusively for God and not for country’. The ITE dismissed him for breaching his employment contract.

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119 Kok Hoong Tan Dennis and others v Public Prosecutor [1996] 3 SLR(R) 570.
120 E.g. PTE Chai Tshun Chieh v Chief Military Prosecutor [1998] SGMCA 3. The Singapore Military Court of Appeal applied the Colin Chan decisions.
121 I argue this point more fully in Chapter Five, Part II(a)(i), 224–227.
122 [1999] 2 SLR(R) 529.
123 ibid [3].
124 ibid.
For the HC, even though Nappalli’s Article 15 right ‘must be jealously guarded’, it must also be viewed in the light of his employment contract with the ITE ‘which he willingly entered into’, knowing full well that he was required to participate in the pledge and anthem ceremony.\footnote{125}{Peter Williams Nappalli v Institute of Technical Education [1998] SGHC 351 [35].} Hence,

it follows that as the plaintiff voluntarily entered into his contract of employment … with the knowledge that he had to take the National Pledge and sing the National Anthem during the ITE assembly, he cannot say that he has a constitutional right to refuse to take the National Pledge or sing the National Anthem during the ITE assembly.\footnote{126}{ibid [37].}

The HC’s reasoning finds some consonance in a UKHL case. In \textit{Begum, R (on the application of) v Headteacher and Governors of Denbigh High School},\footnote{127}{[2007] 1 AC 100.} the UKHL rejected the applicant’s claim that her right to religious freedom had been violated by her school’s refusal to exempt her from its uniform policy and allow her to wear the jilbab. The UKHL reasoned, based on the ECtHR’s previous jurisprudence, that ‘where a person has voluntarily accepted an employment or role which does not accommodate [his/her religious] practice or observance and there are other means open to the person to practise or observe his or her religion without undue hardship or inconvenience’,\footnote{128}{ibid [23].} it cannot be said that his/her right to religious freedom has been violated. \textit{Begum}, however, is outdated: the subsequent \textit{Bull and another (Appellants) v Hall and another (Respondents)}\footnote{129}{[2014] 1 WLR 3741.} followed the ECtHR’s decision in \textit{Eweida v UK}. The ECtHR revised its previous jurisprudence on which \textit{Begum} was based as follows:

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion on the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.\footnote{130}{Case of Eweida and others v The United Kingdom App no. 48420/10, 59842/10, 51671/10 and 36516/10 (ECtHR, 15 January 2013) [83].}
Hence, the HC’s freedom of contract approach to Nappalli’s claim is consonant only with the outdated UKHL approach in that it treated Nappalli’s voluntariness in entering into an employment contract with the ITE as dispositive of the constitutional issue. Furthermore, the Singapore courts’ lack of a proportionality analysis means that the ECtHR’s Eweida approach is not one that they would undertake explicitly. More importantly, the HC identified an additional issue—and this marks out the distinguishing, and communitarian, feature of its decision. This is whether in the special circumstances of Singapore, an educational institution is entitled to insist that its teachers encourage students to be good and useful citizens by complying with an implied term in their contracts of employment requiring them to lead their students in the taking of the National Pledge and the singing of the National Anthem… With no natural resources of its own, Singapore’s success depends on, among other things, the unity of its multi-racial and multi-cultural population … Surely the Ministry of Education is entitled to take reasonable steps to ensure that the future generations of Singaporeans understand the importance of preserving the sovereignty, integrity and unity of Singapore.131

The need to foster national unity is thus an additional ground—on top of voluntariness of contract—on which the HC held that Nappalli’s Article 15 right was not violated. This collective interest in fostering national unity through the education system is so important that, although the HC acknowledged that ‘the Constitution should be given a generous interpretation … so as to give individuals the full measure of their constitutional rights’, in this case, ‘the interest of the State in the education system must prevail over those of the individual’.132

For the CA, however, in dismissing Nappalli’s appeal against the HC’s decision, there was no question whatsoever of a clash between fostering national unity and Article 15. In sharp contrast to Williamson where the UKHL noted that ‘it is not for the court to embark on an inquiry into the asserted belief and judge its “validity” by some objective standard’,133 the ‘enforcing theologian’134 CA denied that Article 15 was engaged at all. This was one of the few instances where the courts explicitly denied that a claimed right was applicable at all. The

131 Peter Williams Nappalli (n 125) [46], citing Colin Chan v PP (n 84).
132 Peter Williams Nappalli (n 125) [53].
133 Williamson (n 115) [22].
CA asserted that ‘there was no valid religious belief protected by the Constitution’\textsuperscript{135} because Nappalli’s interpretation of the pledge and anthem ceremony as a religious one was a ‘philosophical choice’, a ‘distortion of secular fact into religious belief [and is] not accepted as a religious belief’.\textsuperscript{136} If ‘Article 15 as a whole demonstrates that the paramount concern of the Constitution is a statement of citizen’s rights framed in a wider social context of maintaining unity as one nation’,\textsuperscript{137} then beliefs, such as Nappalli’s refusal to participate in the pledge and anthem ceremony, that appear to undermine this national unity cannot be protected. Here, the CA placed overwhelming emphasis on the collective interest in national unity and denied that Nappalli had a valid constitutional claim at all.

In a rather confused few paragraphs, the CA rejected the suggestion that ‘religion’ in Article 15 refers to a system of belief in one’s own country and opined that ‘religion’ refers to ‘a citizen’s faith in a personal God’. Hence, ‘[the] State commands no supernatural existence in a citizen’s personal belief system’.\textsuperscript{138} Given this definition of ‘religion’, the CA went on to hold that ‘not every conviction or belief … qualifies as a religious belief’.\textsuperscript{139} Nappalli’s understanding of the pledge and anthem ceremony as ‘[demanding] worship of the flag as a symbol’ is thus a ‘philosophical choice’\textsuperscript{140} and not protected under Article 15. To accept otherwise, the CA asserted, ‘would rob the Constitution of any operative effect’, for it could not guarantee religious freedom by simultaneously coercing citizens to participate in a religious ceremony when asking citizens to pledge their allegiance to country.\textsuperscript{141}

The CA’s decision is confusing. It seems unnecessary for the CA to hold that Nappalli did not have a valid religious belief, for it could have simply held, like the HC did, that he could not claim a breach of Article 15 if he had voluntarily entered into the employment contract with the ITE. But the CA’s fervour in denying that Article 15 was applicable illustrates its communitarian impulse. The CA could not accept that the pledge and anthem ceremony had any religious significance, for that would undermine the ceremony’s legitimacy as a secular form of nation-building in multireligious Singapore. The purpose of the ceremony is to

\textsuperscript{135} \textit{Nappalli Peter Williams} (n 122) [29].
\textsuperscript{136} ibid [28].
\textsuperscript{137} ibid [26].
\textsuperscript{138} ibid.
\textsuperscript{139} ibid [28].
\textsuperscript{140} ibid.
\textsuperscript{141} ibid [29].
‘encourage and instil a student’s allegiance to the nation’. If the ceremony were to be seen as a religious one, then it could be objected to by others on religious grounds, like Nappalli did, thereby potentially undermining its legitimacy. Once again, the communitarian element of the CA’s decision consists in an overarching concern for the national interest; in this case, the maintenance of a pledge and anthem ceremony designed to instil allegiance to the nation. In contrast, it was denied outright that Nappalli had a valid Article 15 claim. This illustrates the overwhelming primacy that Singapore’s communitarian approach to rights accords to the collective interest, one that overrides the elevated status of the claimed constitutional right.

II. EQUALITY, SEXUAL ORIENTATION AND PUBLIC MORALITY

Singapore’s communitarian approach is similarly evident in a series of cases involving an unsuccessful constitutional challenge to section 377A of the Penal Code which criminalises sexual conduct between men. No other forms of sexual conduct between consenting adults are criminalised. 377A has been challenged for violating the Article 9(1) right to life and liberty, ibid [24].

Article 9 provides:

1. No person shall be deprived of his life or personal liberty save in accordance with law.
2. Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.
3. Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
4. Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate, in person or by way of video-conferencing link (or other similar technology) in accordance with law, and shall not be further detained in custody without the Magistrate’s authority.
5. Clauses (3) and (4) shall not apply to an enemy alien or to any person arrested for contempt of Parliament pursuant to a warrant issued under the hand of the Speaker.
6. Nothing in this Article shall invalidate any law —
   a. in force before the commencement of this Constitution which authorises the arrest and detention of any person in the interests of public safety, peace and good order; or
   b. relating to the misuse of drugs or intoxicating substances which authorises the arrest and detention of any person for the purpose of treatment and rehabilitation, by reason of such law being inconsistent with clauses (3) and (4), and, in particular, nothing in this Article shall affect the validity or operation of any such law before 10th March 1978.
and Article 12(1), the right to equal protection. These two failed challenges will be considered in turn.

a. **No Substantive Right to Liberty**

It is trite law in Singapore that ‘liberty’ in Article 9(1) is a procedural right that protects individuals against ‘unlawful incarceration or detention’ only. A plain reading of Article 9 has allowed the courts to conclude that, because the rest of Article 9 contains procedural rights, Article 9(1) is only a procedural right. The courts have repeatedly rejected attempts by litigants to claim a substantive liberty right; and so not only does Article 9(1) not refer to a ‘right of personal liberty to contract’, but it does not contain a right to privacy and personal autonomy either.

The latter expansion of Article 9(1) was decisively rejected by the CA in *Lim Meng Suang*. The applicants, three gay men, argued that 377A violated Article 9(1) because it does not ‘[allow] a person to enjoy and express affection and love towards another human being’—an argument based on a substantive conception of liberty and a reading of Article 9(1) to include a right to personal autonomy. The CA rejected this argument for three reasons, the first two of which demonstrate a plain, narrow reading of Article 9(1). First, the CA reiterated that ‘liberty’ in Article 9(1) refers only to a right against unlawful incarceration or detention. Second, in the context of the rest of Article 9 which provides procedural safeguards against unlawful incarceration or detention, ‘it is clear that the phrase “life or personal liberty”…refers only to a person’s freedom from an unlawful deprivation of life and unlawful detention or incarceration’. Third, the CA referred to Article 21 of the Indian Constitution from which Article 9(1) was derived, and noted that Article 21 intends only to

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144 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754 [6].
145 *Lim Meng Suang* (n 6) [46].
146 *Lo Pui Sang* (n 144) [6].
147 *Lim Meng Suang* (n 6).
148 ibid [43].
149 Affirming *Lo Pui Sang* and *Tan Eng Hong v Attorney-General* (n 1) [120].
150 *Lim Meng Suang v Attorney-General* (n 6) [46].
protect Indians from unlawful detention. Since Article 9(1) confers only a right against unlawful detention and incarceration, a law that criminalises male homosexual conduct does not violate it.

The communitarian flavour of the CA’s judgment is in its remarks on the right to privacy. Asserting that the applicants’ claimed constitutional right to privacy ‘ought … to be developed by way of the private law on privacy instead’, the applicants could not ‘obtain by the (constitutional) backdoor what they cannot obtain by the (private) law front door’. More illuminatingly, the CA saw in this right ‘the seeds of an unlimited right’:

Put simply, such a right could be interpreted to encompass as well as legalise all manner of subjective expressions of love and affection, which could (in turn) embody content that may be wholly unacceptable from the perspective of broader societal policy.

Resistance to treating the rights of sexual minorities as a privacy issue is not unique to Singapore. The South Africa Constitutional Court (SACC), for instance, in National Coalition for Gay and Lesbian Equality v Minister of Justice cited Edwin Cameron’s argument against using the right to privacy to protect sexual minorities. It wrongly suggests, Cameron argues, that ‘discrimination against gays and lesbians is confined to prohibiting conduct between adults in the privacy of the bedroom’, which ‘may subtly reinforce the idea that homosexual intimacy is shameful or improper: that it is tolerable so long as it is confined to the bedroom’.

The SACC acknowledged that Cameron’s concerns are valid insofar as the issue were to be treated as one of privacy only; but since the SACC found that the South African equivalent of 377A violated the rights to dignity, equality and privacy, the inadequacy of the privacy argument was ameliorated.

It is apparent that the CA’s contrasting approach was motivated by society’s general interest: whereas the SACC recognised that the right to privacy alone could not adequately protect the rights of homosexuals, the CA took the opposite view and expressed concern that recognising a right to privacy would afford too much protection not just to homosexuals, but

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151 ibid [47]. But note that the Indian Supreme Court has recognised the right to privacy as a fundamental right under Article 21: Justice K.S. Puttaswamy (Retd) v Union of India [2017] 10 SCC 1.
152 Lim Meng Suang v (n 6) [49].
153 National Coalition (n 7).
154 Quoted in ibid at [29].
155 ibid [30].
to other forms of expressions of love which society may find unacceptable. The communitarian quality of the CA’s comments is thus apparent in its circumspection that expanding Article 9(1) to include the right to privacy/autonomy, plausible given the open-ended nature of the text, might impinge on broader societal policy, including, perhaps, Singapore’s policy of maintaining the collective interest in the traditional one-man-one-woman family unit. That the CA placed overwhelming weight on this particular collective interest is evident in the scant attention that it paid to the value of a right to personal autonomy and privacy to the individual; indeed, the CA said nothing about this issue. The CA’s denial of a general right to personal autonomy and/or privacy is communitarian because it expresses the anxiety that the exercise of this general right might conflict with the collective’s interest in maintaining the traditional heterosexual family unit. By suggesting that societal disapproval of certain forms of conduct could be reason enough to foreclose a general right to personal autonomy/privacy, the CA is indirectly allowing public morality and the vagaries of public opinion to delimit the scope of a constitutional right, which arguably does not recognise the elevated status of rights.

b. Maintaining a Conservative Society

The more problematic aspect of Lim Meng Suang is the CA’s Article 12 decision. In the battle between the individual and the collective, Singapore’s communitarian approach to rights has downgraded gay men’s constitutional right to equality to a triviality easily sacrificed for the collective interest in maintaining a conservative society—and the CA has vindicated this

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156 See section (b) below.
157 Article 12 provides:

(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3) This Article does not invalidate or prohibit —

(a) any provision regulating personal law; or

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion.
balance by deciding the constitutional question on a purely doctrinal basis. The doctrinal tool that the courts use to adjudicate Article 12 cases is the reasonable classification test which consists of two limbs. First, the statute’s prescribed classification must be based on an intelligible differentia, i.e. a classification that makes logical sense. Second, the differentia must bear a rational relation to the statutory purpose.

The CA held that 377A does not violate the right to equality because it satisfies the reasonable classification test. The differentia that 377A prescribes, men who have sex with other men, is intelligible because we can understand logically what it means, and is neither extremely illogical and/or incoherent as such, the differentia satisfies limb (a). Next, as 377A’s purpose is to criminalise sex between men, there is a rational relation between limbs (a) and (b). Therefore, 377A does not violate gay men’s right to equality.

This was the entirety of the CA’s ratio. Whereas the HC recognised a third limb—whether the purpose of the statute is legitimate—the CA rejected this test. The CA asserted that a test of legitimacy would impermissibly breach the separation of powers because there are no legal standards to determine legitimacy. Hence, absent an ‘extreme provision’ enacted by an ‘[unreasonable] Parliament,’ the courts will refrain from declaring that ‘Parliament should defer to the views of the court’ on issues of ‘morality and societal values’.

Substantive moral issues such as whether it is legitimate for the criminal law to enforce public morality were deemed ‘extra-legal’ and beyond the CA’s jurisdiction because the courts are not ‘mini-legislatures’.

A few things are distinctive about the CA’s judgment. First, the CA’s reasoning exemplifies the lack of proportionality/necessity/legitimacy analysis in its constitutional adjudication which other courts undertake. For instance, the ECtHR in Dudgeon v United Kingdom held that Northern Ireland’s retention of its 377A equivalent violated the right to

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158 Lim Meng Suang (n 6) [60].
159 ibid [67], [86]. This is the substantial element that the CA introduced to the rational classification test: a differentia that is extremely illogical and/or incoherent will not pass constitutional muster.
160 Lim Meng Suang v Attorney-General [2013] 3 SLR 118 [113].
161 ibid [85].
162 Lim Meng Suang (n 6) [114].
163 Tan Eng Hong v Attorney-General [2013] 4 SLR 1059 [94].
164 Lim Meng Suang (n 6) [162]–[175].
165 ibid [77], [82], [84], [92], [93], [101], [154], [173], [189].
privacy because there was no pressing social need to criminalise sexual conduct between men, and so the justifications for the law were outweighed by the harm that the law could cause to homosexuals.\textsuperscript{166} In \textit{Navtej Singh Johar v Union of India},\textsuperscript{167} the Indian Supreme Court held that the Indian equivalent of 377A violated the Indian Article 14 right to equality because it is manifestly arbitrary: it ‘fails to make a distinction between consensual and non-consensual sexual acts between competent adults’, thereby failing to consider that ‘consensual sexual acts between adults in private space are neither harmful nor contagious’ to society.\textsuperscript{168} In \textit{Lawrence v Texas}, Justice Sandra Day O’Connor opined that moral disapproval of homosexuality was not a legitimate state interest to justify a law that bans only homosexual sodomy and hence such a law violates the right to equality.\textsuperscript{169}

Having said that, it appears from the HC’s judgment that, even if there were a test of legitimacy of purpose, Singapore’s communitarian approach to rights would uphold 377A’s constitutionality anyway, as the HC concluded. In arguing for a test of legitimacy, the HC asserted that

If the legislation in question is truly discriminating arbitrarily and without a legitimate purpose, the court cannot … do nothing. Parliament cannot introduce arbitrary and unjustified discrimination by simply hiding behind the curtain of words and language used in impugned legislation, or behind statements in Parliamentary debates which will yield an apparent purpose of the legislation … that invariably relates rationally to the differentia underlying the classification… The courts can, and will, critically examine and test such legislation where necessary and appropriate.\textsuperscript{170}

However, in contrast with the approaches taken by other courts outlined above, the HC went on to hold that 377A’s purpose (i.e. to criminalise male homosexual conduct) was not illegitimate. The relevant reason here is that ‘some portions of Singapore society today still hold certain deep seated feelings with regard to procreation and family lineage’ and these views cannot be readily dismissed by the courts in favour of some other views prevailing in society—especially when ‘Parliament has made clear its position on the matter’.\textsuperscript{171} This portion of the

\begin{itemize}
  \item \textsuperscript{166} \textit{Dudgeon} (n 6) [60].
  \item \textsuperscript{167} \textit{Navtej} (n 6).
  \item \textsuperscript{168} ibid, page 148, [239].
  \item \textsuperscript{169} \textit{Lawrence} (n 6) 583.
  \item \textsuperscript{170} \textit{Lim Meng Suang (HC)} (n 160) [114].
  \item \textsuperscript{171} ibid [127].
\end{itemize}
HC’s judgment is communitarian because it affords overwhelming weight to prevailing views in society, and comparatively little to the right to equality.

More crucial, however, is that the HC deferred to Parliament’s position on the matter—a position that favours the conservative, anti-homosexuality views in Singapore society. In the same vein, the CA’s rejection of a test of legitimacy is arguably a vindication of Parliament’s reasons for retaining 377A. The HC pointed out that, when a possible 377A repeal was debated in Parliament in 2007,

[the] majority of the MPs were of the view that … repealing [377A] would result in the loss of a moral signpost and would not reflect the views of a vast majority of society who were not ready to accept homosexuality as part of our mainstream way of life. The majority were against putting homosexual couples on par with normal heterosexual couples who conceived children and formed the basic building blocks of families in our society.¹⁷²

Hence, even though 377A ‘arguably violates the Art 12(1) rights’¹⁷³ of gay men because ‘it is arguable that there is no social objective that can be furthered by criminalising male but not female homosexual intercourse’,¹⁷⁴ Parliament chose to retain 377A because of conservative Singapore’s opprobrium against homosexuality. The ‘majority’ of Singapore society ‘found homosexual behaviour offensive and unacceptable’,¹⁷⁵ which, in turn, was a reflection of Singapore society’s conservativeness:

Singapore is basically a conservative society. The family is the basic building block of our society. It has been so and, by policy, we have reinforced this and we want to keep it so. And by ‘family’ in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit.¹⁷⁶

¹⁷² ibid [84].
¹⁷³ Tan Eng Hong (n 1) [126]. This case involved whether the applicant had standing to constitutionally challenge section 377A, given that his original charge under 377A (for engaging in oral sex with another man in a public toilet) was amended to public indecency. The CA was not tasked to decide 377A’s constitutionality.
¹⁷⁴ Tan Eng Hong v Attorney-General [2011] 3 SLR 320 [16].
¹⁷⁵ Lim Meng Suang HC (n 160) [81].
¹⁷⁶ Singapore Parliamentary Debates, 23 October 2007, vol 83, col 2397. This reasoning is consistent with the White Paper’s second value, family as the basic unit of society.
It should be pointed out that Parliament has stated that it will not ‘proactively enforce [377A]’\(^{177}\) as a compromise between sharply divergent views: it would uphold a stable society with traditional heterosexual family values and, simultaneously, allow homosexuals to live their lives and contribute to society.\(^{178}\) Parliament thought it important to keep the status quo and retain 377A instead of ‘[forcing] the issue and [settling] the matter definitively’\(^{179}\) which would ‘divide and polarise our society’.\(^{180}\)

While it may seem that 377A has only symbolic value, the CA’s affirmation of its constitutionality nevertheless fails to recognise the elevated status of the right to equality. This is especially apparent given that 377A’s constitutionality was affirmed on arguably flimsy grounds; that is, if the CA had acknowledged the elevated status of Article 12(1), it would have upheld 377A on a firmer basis. One example might be that 377A is necessary for the protection of morals, which is an arguably more substantive\(^{181}\) basis than the technical and legalistic reasonable classification test. But perhaps this argument was not open to the CA anyway. Quite apart from how it had followed the established Article 12 jurisprudence, Parliament’s non-enforcement policy shows that 377A only has symbolic value when it comes to protecting the public interest, which then prevents the CA from upholding it on a protection of morals ground. As the United Nations Human Rights Committee in Toonen v Australia said of Tasmania’s non-enforcement of its 377A equivalent, it implies that ‘[the laws] are not deemed essential to the protection of morals in Tasmania’.\(^{182}\) Seen in this light, the constitutional right to equality has been negated for reasons that have nothing to do with preventing harm to the public interest. Indeed, the CA’s affirmation of 377A indirectly justifies Parliament’s purpose of retaining it to maintain a certain type of conservative society, thereby demonstrating that, when pitted against the collective interest in this type of society, the elevated status of the right to equality is nugatory.

\(^{177}\) ibid col 2401.

\(^{178}\) ibid cols 2399–2400.

\(^{179}\) ibid col 2405.

\(^{180}\) ibid.

\(^{181}\) But unpersuasive; see discussion in Chapter Five, Part II(a)(ii), 231–233.

III. FREEDOM OF EXPRESSION, MULTIRACIALISM AND POLITICAL PROTEST

Singapore’s communitarian approach to rights is particularly unforgiving when it comes to the Article 14 right to freedom of expression. A plain reading of the Article reveals that the ‘collective over individual’ essence of Singapore’s communitarian approach to rights is built into Article 14 itself. All that Parliament needs to show, pursuant to Article 14(2), is that a restriction of Article 14(1) is ‘necessary or expedient’ in the interest of national security and public order.

The courts have adhered to a plain reading of Article 14 in their adjudication of the clash between an exercise of an Article 14(1) right and the relevant competing collective interest—and the broadness of the Article 14(2) limits means that, very often, the courts need only adopt a plain reading of the text to reach the conclusion that the individual right is trumped by the competing collective interest. Despite this, in some cases, the courts have brought in ‘communitarian values, particularly, the importance of social harmony and public order’ in their decisions. Even though, unlike Articles 9, 12 and 15, Article 14’s structure leaves the courts very little room to manoeuvre, these cases illustrate the courts’ communitarian approach to rights, and so they will be discussed here.

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183 Article 14 provides:

(1) Subject to clauses (2) and (3) —
   (a) every citizen of Singapore has the right to freedom of speech and expression;
   (b) all citizens of Singapore have the right to assemble peaceably and without arms; and
   (c) all citizens of Singapore have the right to form associations.

(2) Parliament may by law impose —
   (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
   (b) on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and
   (c) on the right conferred by clause (1)(c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by clause (1)(c) may also be imposed by any law relating to labour or education.

184 Thio, A Treatise on Singapore Constitutional Law (n 16) 756.
a. Multiracialism and Sedition

Singapore’s multiracial and multireligious\(^\text{185}\) population has been used as the *raison d’être* for strict laws that prohibit speech and other modes of expression that may threaten Singapore’s racial and religious harmony. Hence, the collective interest in maintaining racial and religious harmony *a priori* outweighs the competing individual Article 14 right to freedom of speech and expression, and the Article 15 freedom of religion. This balance between the two is codified in a number of statutes,\(^\text{186}\) the most pertinent being the Sedition Act (SA).\(^\text{187}\) When convicting individuals under the SA, the courts’ reasons are heavily communitarian.

The SA defines a seditious tendency as a tendency to ‘promote feelings of ill-will and hostility between different races or classes of the population of Singapore’.\(^\text{188}\) The relatively low threshold of mere *promotion of feelings* of ill-will and hostility, compared to the higher requirement of, for instance, ‘threatening, abusive or insulting words’ intended to ‘stir up racial

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\(^\text{185}\) I will use ‘multiracial’ as a shorthand to include ‘multireligious’. In Singapore, race and religion are closely related, and the terms ‘multiracial’, ‘multireligious’ and ‘multicultural’ tend to be used interchangeably. Hence, subsequent uses of ‘multiracial’ should be understood to include ‘multireligious’.

\(^\text{186}\) Another noteworthy provision is section 298 of the Penal Code which punishes the ‘deliberate intention of wounding the religious or racial feelings of any person’, effectively creating a legal right not to be racially or religiously offended. This section was used against Amos Yee, a teenager who gained infamy in 2015 when he insulted the late Lee Kuan Yew in a YouTube video shortly after Lee’s death. He was charged and convicted under section 298 (among others) for a few insulting remarks against Christianity. See *Public Prosecutor v Amos Yee Pang Sang* (MAC Nos 902694 & 902695 of 2015). Yee has since left Singapore and attained asylum in the United States, who considered him a political prisoner; see *In the Matter of Amos Pang Sang Yee* (United States Department of Justice, Executive for Immigration Review, Immigration Court, Chicago, Illinois), March 24 2017, 11: ‘So, though Yee’s prosecutions may have been legal under Singapore law, they clearly served a “nefarious purpose,” namely, to stifle political dissent.’ Regardless of the real motivation behind his prosecution, his case highlights the zeallosness of Singapore’s communitarian approach to rights to maintain religious harmony even at the cost of prosecuting an immature 16-year-old.


\(^\text{188}\) ibid section 3(1)(e). Sedition is punishable under section 4 of the Act, and punishable offences include doing or conspiring to do an act that would have a seditious tendency (section 4(1)(a)); uttering seditious words (section 4(1)(b)); printing, distributing, publishing etc seditious publications (section 4(1)(c)); and importing any seditious publication (section 4(1)(d)). These offences attract a maximum fine of $5,000 and/or a maximum jail term of 3 years for first-time offenders, and a maximum jail term of 5 years for subsequent offenders.
hatred\textsuperscript{189} in the UK Public Order Act 1986, demonstrates that preserving racial and religious harmony is paramount in Singapore, such that any threat to this harmony is seen as sedition—that is, \textit{existential} threat against Singapore. Hence, protecting racial harmony safeguards not just the dignity of each individual, but also Singapore’s multiracial social fabric. Given such an important collective interest, there is no requirement, as there is in the UK, of a higher standard of stirring up racial hatred to curtail the freedom of expression on race and religious matters; all that is required is the promotion of feelings of ill-will and hostility.

This rationale has underpinned the courts’ sentencing judgments in two cases where individuals were charged under the SA. Note, though, that it was not claimed in the two cases that the accused’s rights were infringed. Nonetheless, the courts’ remarks reveal a strong communitarian element that illustrates the overwhelming importance that Singapore’s communitarian approach gives to the collective interest. This also suggests that, had it been claimed that the SA infringed upon Articles 14 and 15, the claims would have been rejected.

In \textit{Public Prosecutor v Benjamin Koh},\textsuperscript{190} the two accused, Benjamin Koh and Nicholas Lim, were convicted under the SA and given deterrent custodial sentences for posting anti-Malay and anti-Muslim remarks online. Koh had ‘parodied the halal logo and placed it next to a pig’s head, spewed vulgarities at the Muslim community, derided and mocked their customs and beliefs and … even compared their religion to Satanism’ on his website,\textsuperscript{191} and Lim had posted his racist remarks in a discussion forum. In \textit{Public Prosecutor v Ong Kian Cheong},\textsuperscript{192} a Christian evangelical couple was convicted under the SA for distributing evangelical tracts that promoted their version of Christianity partly by denigrating other religions, including Islam and Catholicism. Despite the fact that they had distributed tracts which were, for a time, ‘freely available for sale to the public’\textsuperscript{193} which reasonably created the impression that the tracts were

\textsuperscript{189} UK POA section 18(1)(a). Jeremy Waldron provided a concise summary of hate speech legislation in Canada, Denmark, Germany, New Zealand and the UK, and stated that ‘all of them are concerned with the use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them’: Jeremy Waldron, \textit{The Harm in Hate Speech} (Harvard University Press 2014) 8–9. Singapore’s much lower threshold of ‘stirring up of feelings of ill-will and hostility’ is thus even more marked in this light.

\textsuperscript{190} \textit{Public Prosecutor v Koh Song Huat Benjamin and Another Case} [2005] SGDC 272.

\textsuperscript{191} ibid [11]. The judgment does not contain details of Nicholas Lim’s comments.

\textsuperscript{192} \textit{Public Prosecutor v Ong Kian Cheong and Another} [2009] SGDC 163.

\textsuperscript{193} ibid [67].
not legally objectionable, the couple was given deterrent sentences of eight weeks’ imprisonment each.

Two aspects of these cases demonstrate Singapore’s communitarian approach to rights. First, the facts concretely illustrate that any infraction against racial and religious harmony is treated as serious enough to constitute an existential attack on Singapore. This is especially so if we compare the facts of these cases with cases that have arisen under the racial hatred provisions of the UK POA, such as R v Sheppard & Whittle: 194 the two accused variously distributed and wrote pamphlets and articles doubting the Holocaust, denigrating Jewish and black people, and managed 15 websites (including nazi.org and whitepower.co.uk) where these articles and pamphlets were published. 195 While it might be 196 that Benjamin Koh’s actions and the ‘virulent response’ that it provoked 197 were as grave as the actions of the accused in Sheppard, it is less clear whether the actions of the evangelists were as grave and whether they deserved imprisonment. More importantly, Singapore’s materially different conception of two similar crimes instructively demonstrates the communitarian impulse of the SA and the courts’ approach to it: what is of utmost importance is the preservation of racial and religious harmony because Singapore’s existence depends on it; and so racist speech that might not attract penal sanctions in other jurisdictions are punishable as sedition in communitarian Singapore. As such, too, the offence’s evidentiary requirement is not particularly robust. In Ong Kian Cheong, the District Court (DC) relied on the subjective feelings of anger of the Muslims who received the offending tracts to ‘clearly [prove]’ that the tracts had a seditious tendency 198—even if ‘the distributed tracts did not spark off a widespread and virulent response’. 199 It is also ‘deemed to be irrelevant’ 200 whether the offenders had the intention to promote feelings of ill-will and hostility by distributing the offending tracts.

Second, the courts’ reasons for imposing deterrent sentences also reveal their communitarian impulse. In Benjamin Koh, the DC stated that the seditious tendency of

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195 ibid [7]–[15].
196 The sentencing judgment did not give details of his posts.
197 Benjamin Koh (n 190) [11]: ‘They sparked off more than 200 comments, some of which involved the slinging of racial slurs at Chinese and Malays.’
198 Ong Kian Cheong (n 192) [59].
199 ibid [71].
200 Sedition Act (n 187), section 3(3).
promoting hostility and ill-will between races and religious groups warrants a deterrent sentence because it is ‘mala per se [sic]’, and because of the ‘especial sensitivity of racial and religious issues in our multi-cultural society, particularly given our history of the Maria Hertogh incident in the 1950s and the July and September 1964 race riots’.\textsuperscript{201} It is so important to maintain racial and religious harmony that a deterrent sentence is necessary to remind Singaporeans that ‘callous and reckless remarks on racial or religious subjects have the potential to cause social disorder’.\textsuperscript{202} As such, the freedom of expression must always be balanced by the right of another’s freedom from offence, and tampered [sic] by wider public interest considerations. It is only appropriate social behaviour, independent of any legal duty, of every Singapore citizen … to respect the other races in … our multi-racial society. Each individual living here irrespective of his racial origin owes it to himself and to the country to see that nothing is said or done which might … plunge the country into racial strife and violence. … [The] Sedition Act statutorily delineates this redline on the ground in the subject at hand. Otherwise, the resultant harm is not only to one racial group but to the very fabric of our society.\textsuperscript{203}

The DC’s communitarian impulse is evident in the strong consideration given to the need to maintain racial and religious harmony which, if undermined, would threaten Singapore society as a whole. Further, the national interest is at stake as well, as suggested by the DC’s invocation of a duty to country. What is striking about this decision, and Singapore’s general approach to the balance between freedom of expression and racial/religious harmony, is that there is an overwhelming concern with the preservation of the Singaporean nation or society, and not the protection of the individual’s dignity as a member of the targeted race. Instead, the latter is an incidental benefit that the individual derives from Singapore’s communitarian motivation to preserve racial/religious harmony for the collective’s sake.

\textsuperscript{201} There were two separate clashes between the Malays and Chinese in 1964. The first occurred in 21 July during a Muslim procession to celebrate the Prophet’s birthday; 23 people died and 454 were injured. The second occurred on 2 September when a Malay trishaw driver was killed, resulting in 13 deaths and 106 injuries. See National Library Board, ‘Communal Riots of 1964’ (Singapore Infopedia) <http://eresources.nlb.gov.sg/infopedia/articles/SIP_45_2005-01-06.html> accessed 3 September 2019.

\textsuperscript{202} Benjamin Koh (n 190) [7].

\textsuperscript{203} ibid [8] (emphasis added).
Similarly, in *Ong Kian Cheong*, the DC cited the *Benjamin Koh* remarks above and said that it applied equally to ‘insensitive and denigrating remarks about religion or religious beliefs’ because

>[i]n our multi-racial and multi-religious society, distributing tracts with callous, denigratory [sic], offensive and insensitive statements on religion with aspersions on race do have a tendency to cause social unrest thereby jeopardizing racial and religious harmony.\(^{204}\)

The DC went on to suggest that, in line with *Benjamin Koh*’s notion of ‘duty to country’, the accused had a responsibility to ensure that the evangelical tracts were suitable for distribution before distributing them. ‘As citizens of Singapore,’ the DC opined,

>the accused cannot claim to be ignorant of the sensitivity of race and religion … [By] distributing the seditious … tracts to Muslims [the accused demonstrated] their intolerance, insensitivity and ignorance of delicate issues concerning race and religion … They both acted on their own accord without ensuring that the tracts were suitable for distribution to the general public.\(^{205}\)

These cases illustrate the courts’ communitarian approach to safeguarding racial/religious harmony in multiracial and multireligious Singapore: as it implicates Singapore’s very existence, any exercise of a right that might undermine it must be curtailed, and offenders given a custodial deterrent sentence. The DC’s remarks on the balance between freedom of expression and the collective interest in racial and religious harmony demonstrates that, had it been alleged that Articles 14 and 15 were violated, their elevated status would have been overlooked in favour of the collective interest.

\(b\). **Political Protest and Public Order**

Political protest and public assembly are strictly controlled in Singapore. Before they were amended,\(^{206}\) the Miscellaneous Offences (Public Order and Nuisance) Act (MOA), particularly section 5 and rules 2(1) and 5 of its subsidiary legislation, the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Procession) Rules (MOR), were used against protesters

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\(^{204}\) *Ong Kian Cheong* (n 192) [31].

\(^{205}\) ibid [82].

\(^{206}\) Public assemblies and processions are now regulated by Part II of the Public Order Act, Cap 257A (2012 rev ed).
who publicly objected to perceived government misconduct. Section 5 of the MOA regulated public assembles of five or more persons. Rule 2(1) of the MOR provided that the MOR ‘shall apply to any assembly or procession of 5 or more persons in any public road, public place or place of public resort’ intended to support or oppose the views or actions of any person; to publicise a cause or campaign; or to commemorate an event. Rule 5 made it an offence for any person who participates in a public assembly or procession when he knows, or ought reasonably to have known, that the assembly or procession is held without a permit. The police has the discretion to grant or reject an application for a permit.

This legislative framework was challenged for violating Article 14 in a few cases, most notably in *Chee Siok Chin and others v Minister for Home Affairs and others*.207 The applicants staged a peaceful four-person political protest outside the Central Provident Fund (CPF) Building. They wore t-shirts bearing various political slogans such as ‘Be Transparent Now’ and stood in a row along the walkway leading to the CPF Building. The police ordered them to disperse, stating that their protest ‘was one of public nuisance under the MOA’.210 In particular, section 13A criminalised ‘[intentional] harassment, alarm or distress’ by using ‘threatening, abusive or insulting words or behaviour’, or displaying any sort of ‘visible representation’ that is ‘threatening, abusive or insulting’. Section 13B made it an offence to take the aforementioned action that is *likely* to cause harassment, alarm or distress. The police’s order for their dispersal was thus made on the basis that their protest fell within sections 13A and 13B.

The applicants alleged that the order for them to disperse violated their Article 14(1)(b) right because the police had exceeded their powers. Article 14(1), read with section 5 of the MOA and Rule 2(1) of the MOR, permitted peaceful assemblies ‘four or less persons’.211 The main issue before the HC was ‘what the Constitution … considers “necessary or expedient” so

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207 *Chee Siok Chin and others v Minister for Home Affairs and others* [2006] 1 SLR(R) 582. Note, however, that the applicants clarified in court that they did not contest the constitutionality of the MOA, only that the police had exceeded its powers in ordering them to disperse: [57]. The HC nonetheless discussed, and affirmed, the MOA’s constitutionality.

208 Singapore’s compulsory national savings scheme.

209 An allusion to rumours, rife at the time, of corruption in the CPF.

210 *Chee Siok Chin* (n 207) [13].

211 ibid [107].
as to strike a balance between the exercise of certain individual rights on the one hand and the perceived wider public interest on the other hand’. 212

In striking out the applicants’ motion, the HC made several communitarian remarks. It held that the police had not exceeded its powers because ‘it would be reasonable for any police officer at the scene [of the protest] to conclude … that the [protestors’] words were “insulting” and/or “abusive” apropos those responsible for managing the [impugned] institutions’. 213 It was also reasonable for a police officer to conclude that the protest was intended to ‘harass’ those responsible for the institutions, particularly the CPF Board, given that the protest was in front of the CPF Building. 214 Hence, the police had not acted unconstitutionally in ordering the protestors to disperse.

The HC’s affirmation of the MOA’s constitutionality helped it to reach this conclusion. It held that the phrase ““necessary or expedient” [in Article 14(2)] confers on Parliament an extremely wide discretionary power … that permits a multifarious and multifaceted approach,’ 215 to legislate in the interest of security and public order. The hallmark of constitutionality is solely ‘whether the impugned legislation can be fairly considered “necessary or expedient”’; there is no further requirement of reasonableness such as that contained in the Indian Constitution’s Article 14 equivalent. 216 There is also no further requirement of proportionality, 217 and so an impugned legislation is constitutional as long as a nexus is established between its object and one of the permissible restrictions contained in Article 14(2). Article 14(2)’s authorisation of merely expedient restrictions sets a lower threshold than Articles 10(2) and 11(2) of the ECHR which allow for restrictions on freedom of expression, assembly and association that are ‘necessary in a democratic society’ only.

212 ibid [2].
213 ibid [123].
214 ibid.
215 ibid [49].
216 The limiting Articles 19(2)–(6) of the Indian Constitution authorise ‘reasonable restrictions’ to be placed on the freedoms of speech, assembly, association, etc.
217 Chee Siok Chin (n 207) [87]: ‘Proportionality is a more exacting requirement than reasonableness and requires, in some cases, the court to substitute its own judgment for that of the proper authority. Needless to say, proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or administrative power or discretion. Nor has it ever been part of Singapore law.’
This lower threshold allows Parliament to restrict Article 14(1) in the interest of public order, not what is required by the maintenance of public order. The HC pointed out that this is ‘a much wider legislative remit that allows Parliament to take a prophylactic approach in the maintenance of public order’. It is also perfectly usual for Parliament to have the ‘right to limit the right of assembly or freedom of speech’ to resolve the tension between the individual right and the collective interest in security and public order. This involves ‘a delicate balancing exercise involving several imponderables and factors such as societal values, pluralism, prevailing social and economic considerations as well as the common good of the community’. The HC went on to say:

The right of assembly can never be absolute and may be subordinated to public convenience and good order for the protection of the general welfare whenever it is “necessary or expedient”. From time to time, for the common welfare and good, individual interests have to be subordinated to the wider community’s interests.

The HC held that the MOA is a permissible restriction on Article 14(1) given the nexus between its object and the ‘public order’ exception in Article 14(2)(b). The MOA’s long title declares that it is an ‘Act relating to offences against public order, nuisance and property’, and the relevant Parliamentary debates reveal that the MOA was enacted to maintain public order. Hence, the MOA is intended to restrict freedom of speech and/or assembly when it is ‘necessary or expedient’ to ensure public order in certain situations; as such, ‘there can be no challenge … to the constitutionality of the MOA’. In other words, the ‘public order’ exception in Article 14(2)(b), and the lack of a proportionality analysis, means that the MOA, being enacted by Parliament to safeguard public order, passes constitutional muster.

The HC’s holding bears the hallmark of the Singapore judiciary’s broad interpretation of the permissible restrictions on rights. The relative unimportance that the HC gave to the rights in Article 14(1) viz. the importance of the collective interest can be gleaned from the rather circular reasoning with which the MOA’s constitutionality was affirmed. If the test of

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218 ibid [50].
219 ibid [51].
220 ibid [52].
221 ibid [53].
222 ibid [55] (emphasis in judgment).
223 ibid [56]. This was affirmed, at [21], by the subsequent Yap Keng Ho and others v Public Prosecutor [2011] 3 SLR 32.
constitutionality is whether the impugned law is enacted in the interest of public order, then the MOA’s constitutionality is already assumed by its self-proclaimed object of upholding public order. Even though the HC stated that ‘the Government must satisfy the court that there is a factual basis on which Parliament has considered it “necessary or expedient”’\(^\text{224}\) to enact the impugned legislation, the HC seemed to have overlooked this requirement in accepting that the MOA was enacted in the interest of public order without considering whether, and how, the ‘necessary or expedient’ requirement has been satisfied.

Article 14(1)’s relative unimportance can also be gleaned from the fact that the HC did not say very much about the value of the freedom of speech and assembly. Pointing out that Article 14(1) is subject to the inherent limits in Article 14(2), the HC commented that Articles 14(1)(a) and (b) ‘can be restricted in the wider interests of … public order so that they do not impinge on or affect the rights of others [in order to protect] the wider and larger interests of the community and country’.\(^\text{225}\) It is in its elaboration of these ‘larger interests of the community and country’ that the HC’s judgment is most communitarian. In its concluding dicta, it asserted that the applicants’ protest was detrimental to the national interest. The HC claimed that the applicants’ constitutional challenge was ‘not in effect about the freedom of speech’, but about ‘an unfettered right to undermine the legitimacy of public institutions without being held accountable for the consequences of their conduct’.\(^\text{226}\) The protest against the public institutions was ‘a grave attack on the financial integrity of key public institutions’ for which ‘[not] even a modicum of effort has been made in the present proceedings to justify the attacks’.\(^\text{227}\) The HC then went on to say that

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\text{[different] countries have differing thresholds for what is perceived as acceptable public conduct; differing standards have also been established when it comes to the protection of public institutions and figures from abrasive or insulting conduct. … Standards set down in one country cannot be blindly … adopted … without a proper appreciation of the context in another.}\(^\text{228}\)
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\(^{224}\) *Chee Siok Chin* (n 207) [49].

\(^{225}\) ibid [54].

\(^{226}\) ibid [131].

\(^{227}\) ibid.

\(^{228}\) ibid [132].
In Singapore’s context, the applicants’ allegedly irresponsible undermining of the integrity of these public institutions ‘without any justification … can hardly be described as a “peaceful protest”’,\(^{229}\) and so, presumably, cannot be an exercise of Article 14(1). This is because of the importance of the collective interest that it threatens:

The integrity of public institutions … forms an integral part of the foundation that grounds Singapore. It accounts in no small measure for the singularly able and upright stature that Singapore has managed to uphold. … Domestically as well as internationally, public governance in Singapore has been equated with integrity. To spuriously cast doubt on that would be to improperly undermine both a hard-won national dignity and a reputable international identity.\(^{230}\)

This passage demonstrates Singapore’s distinctively communitarian approach to rights. The HC was concerned with how the freedom of speech and assembly would impact both public order and the nation, including a national identity partly constituted by the integrity of public institutions. As such, Singapore’s communitarian approach to the tension between Article 14(1) and Article 14(2) resolves it in favour of the broad restrictions in Article 14(2). In this regard, Article 14 is unique in that Article 14(1) begins with an express limitation that weakens the rights from the very outset. Hence, for Article 14(1), it is unclear whether it enjoys any elevated status at all—which only goes to show the ‘premium’ that Singapore has placed on ‘public order, accountability and personal responsibility’.\(^{231}\)

### IV. THE DEATH PENALTY AND DRUG TRAFFICKING

The most controversial manifestation of Singapore’s communitarian approach to rights is the death penalty for drug trafficking. As will be shown, the collective interest in combating drug trafficking to safeguard society from its harm has prevailed over the individual drug trafficker’s various rights, especially the right to life. Before 2012, the death penalty was mandatory for anyone found guilty of drug trafficking; this will be discussed in section (a). In 2012, a limited sentencing discretion was introduced, to be discussed in section (b). The ensuing analysis will demonstrate that the courts’ communitarian approach focuses heavily on the threat that drug

\(^{229}\) ibid [133].

\(^{230}\) ibid (emphasis added).

\(^{231}\) ibid [135].
trafficking allegedly poses to society, and the supposed need to have a strong regime to combat
drug trafficking and protect society from these threats, rather than punishing the individual
offender or protecting individuals from drug abuse. The death penalty for drug trafficking thus
demonstrates the paramount importance that Singapore’s communitarian approach places on
the collective interest in protecting society from drug trafficking. When faced with such an
important interest, the elevated status of constitutional rights becomes a mere formality.

a. The Mandatory Death Penalty

The Misuse of Drugs Act\textsuperscript{232} (MDA) was amended in 1975 to provide for the mandatory death
penalty to deter drug trafficking after Parliament noted an ‘almost 112 times’ increase in heroin
abuse in 12 months, suggesting that existing penalties for drug trafficking did not adequately
deter traffickers.\textsuperscript{233} Parliament viewed drug abuse as a serious problem that would undermine
‘national security and viability’: if young men became addicted to drugs, it would compromise
‘vital and sensitive institutions of the State, like the Police and Armed Forces’, which would
‘strike at the very foundations of our social fabric and undermine our economy’.\textsuperscript{234} This
deterrence-based sentencing rationale feeds into communitarian Singapore’s overall policy of
deterrence: a ‘balancing of communitarian values and concerns against individual interests’\textsuperscript{235}
supposedly justifies adopting a deterrence-based approach to crime control.

As the various collective interests were allegedly under threat, the mandatory death
penalty was introduced for anyone found guilty of trafficking (section 5), manufacturing
(section 6) or importing and exporting (section 7) a certain amount of a controlled drug.\textsuperscript{236}
Section 2 of the MDA defines ‘traffic’ as ‘to sell, give, administer, transport, send, deliver or
distribute’ or offer to do the same. The seriousness with which Singapore views drug offences
is also reflected in the MDA’s reversal of a cardinal criminal law principle, the presumption of
innocence: section 17 provides that, if an accused were found with drugs above the statutory

\begin{itemize}
\item \textsuperscript{232} Cap 185 (2008 rev ed).
\item \textsuperscript{233} Singapore Parliamentary Debates, 20 November 1975, vol 34, cols 1379–1385.
\item \textsuperscript{234} ibid.
\item \textsuperscript{235} Public Prosecutor v Law Aik Meng [2007] 2 SLR(R) 814 [19].
\item \textsuperscript{236} These are set out in the Second Schedule of the MDA and include more than 15 grams of heroin; more than 30
grams of cocaine; and more than 500 grams of pure cannabis.
\end{itemize}
threshold,\textsuperscript{237} he ‘shall be presumed to have had that drug in possession for the purpose of trafficking unless it is proved that his possession of that drug was not for that purpose’.

\textit{i. The Lawfulness of the Mandatory Death Penalty}

The mandatory death penalty has been challenged for violating two constitutional rights: Article 9’s right to life, and Article 12’s right to equal protection. It was argued in \textit{Yong Vui Kong v Public Prosecutor}\textsuperscript{238} that the MDA, by providing for the mandatory death penalty, violated Article 9(1) because the mandatory death penalty is an inhuman punishment and therefore not ‘law’ according to which life can be deprived. However, the CA rejected the argument that ‘law’ should be read as ‘[excluding] a law that provides for an inhuman punishment [e.g. the mandatory death penalty]’\textsuperscript{239} essentially because there is no constitutional right against torture and/or inhuman punishment. Since Parliament expressly rejected this prohibition in 1969, the CA asserted that it is ‘not legitimate for this court to read into Art 9(1) a constitutional right which was decisively rejected’\textsuperscript{240} because the courts would be ‘acting as legislators in the guise of interpreters of the Singapore Constitution’.\textsuperscript{241} It follows from Parliament’s rejection that ‘the right to freedom from inhuman punishment was not elevated to a constitutional right’, and so ‘there is no legitimate basis for this court to now expand … the scope of Art 9(1) so as to include a prohibition against inhuman punishment’.\textsuperscript{242} In fact, because Parliament’s rejection of this proposed right ‘was unambiguous, \textit{whatever the reasons for such rejection were}',\textsuperscript{243} it forecloses an interpretation of Article 9(1) as excluding inhuman punishment from the meaning of ‘law’.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{237} For example, more than 2 grams of heroin; more than 3 grams of cocaine; and more than 15 grams of pure cannabis.
\item \textsuperscript{238} \textit{Yong Vui Kong v Public Prosecutor} [2010] 3 SLR 489.
\item \textsuperscript{239} ibid [52].
\item \textsuperscript{240} ibid [72].
\item \textsuperscript{241} ibid [92].
\item \textsuperscript{242} ibid [74].
\item \textsuperscript{243} ibid [72] (emphasis added). Parliament gave no reasons for rejecting this proposal; in fact, the matter was not debated.
\end{itemize}
\end{footnotesize}
Ultimately, ‘the plain wording of Art 9(1) does not support the conclusion that Parliament cannot make the death penalty mandatory’.[244] Since the mandatory death penalty ‘is provided by law’ under the MDA, and since Article 9(1) provides for the deprivation of life in accordance with law,[245] the mandatory death penalty does not violate the right to life. The CA came to this conclusion despite Article 9(1)’s arguably open-ended nature due to the contested meaning of the word ‘law’. Article 2(1) of the Constitution defines ‘law’ non-exhaustively as including ‘written law and any legislation of the United Kingdom … which is in operation in Singapore and the common law in so far as it is in operation in Singapore and any custom or usage having the force of law in Singapore’. A court more willing to adopt a substantive interpretation of Article 9(1) might have accepted the appellant’s argument that ‘law’ precludes inhuman punishment such as the mandatory death penalty. If the courts had read into Article 9(1) a right against inhuman punishment, they might have agreed with the Privy Council in Reyes v The Queen,[246] where it was held that the mandatory death penalty violated section 7 of the Constitution of Belize 1981:[247]

To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that … to condemn him to death would be disproportionate … is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect.[248]

But in developing ‘[the] common law of Singapore … for the common good’, the courts have avoided a substantive, unavoidably moral reading of the word ‘law’ as precluding inhuman punishment such as the mandatory death penalty. Instead, they have adhered to a plain reading of the constitutional text and their self-imposed circumscribed role in the separation of powers, and distinguished decisions like Reyes on the basis that the Singapore Constitution does not contain a right against inhuman punishment. In so upholding the constitutionality of the mandatory death penalty, the courts have also vindicated Parliament’s communitarian approach to drug trafficking, i.e. using the death penalty to deter drug trafficking in order to

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[244] ibid [82].
[245] ibid [84].
[247] Section 7 reads: ‘No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.’
[248] Reyes (n 246) [43].
[249] Nguyen Tuong Van v Public Prosecutor [2005] 1 SLR(R) 103 [88].
safeguard society from its dangers, even at the expense of individual traffickers’ right to life. The outcome of Singapore’s communitarian approach to the issue is that the elevated status of Article 9(1), when weighed against the collective interest in combating drug trafficking, has no practical force.

ii. The Reasonableness of the Mandatory Death Penalty Classification

Article 12(1) challenges to the mandatory death penalty have also failed, partly due to the Privy Council *Ong Ah Chuan v Public Prosecutor*\(^{250}\) precedent. In this case, the appellants were convicted of trafficking more than the statutory threshold of 15g of heroin that attracted the mandatory death penalty (the 15g Differentia) and sentenced to death. The Council had to consider whether the 15g Differentia violated Article 12(1) by ‘debarring the court in punishing offenders from discriminating between them according to their individual blameworthiness’.\(^{251}\) In holding that Article 12(1) was not violated, the Council stated that Article 12(1) required only that ‘like should be compared with like’:

> What Art 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits laws which require that some individuals within a single class should be [punished] more harshly than others; it does not forbid discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.\(^{252}\)

This was so even if this ‘difference in the circumstances of the offence’ is merely the amount of drugs trafficked, because the question of whether such dissimilarity is enough to justify the statutory classification is a social policy matter for the legislature to decide. Given that the MDA seeks to stamp out the illicit drug trade, it was not unreasonable for Parliament to prescribe this classification—that is, the 15g Differentia. Even if it may be that the mandatory death penalty may not sufficiently account for different moral blameworthiness between offenders with the same legal guilt, it nevertheless does not violate Article 12(1) which

\(^{250}\) *Ong Ah Chuan v Public Prosecutor* [1981] AC 648.

\(^{251}\) ibid [32].

\(^{252}\) ibid [35].
is ‘not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt’.253

The Privy Council has distanced itself from Ong Ah Chuan in subsequent cases. In Watson v The Queen (Attorney General for Jamaica intervening),254 Lord Hope of Craighead stated, ‘It is no longer … possible to say, as Lord Diplock did … in [Ong Ah Chuan], that there is nothing unusual in a death sentence being mandatory.’255 In contrast, Ong Ah Chuan has been affirmed by the Singapore courts in Article 12(1) challenges to the mandatory death penalty,256 the most salient case being the just-discussed Yong Vui Kong where the 15g Differentia was also challenged under Article 12(1). The appellant argued before the CA that the 15g Differentia was arbitrary and bore no rational relation to the MDA’s purpose because, inter alia,257 the death penalty would be mandatory where an offender trafficked in, for instance, 15.01g of heroin, but not when the offender trafficked in 14.99g of heroin. This is illogical because the distinction between the two situations is so miniscule that ‘the courts cannot take the view that so long as the 15g differentia goes some distance towards advancing the social object of the MDA, a rational relation will be found’.258 Even though the CA ‘[agreed] that the difference between the punishment [in the two situations] is stark’,259 it rejected the appellant’s Article 12(1) challenge on two grounds: Ong Ah Chuan as binding precedent, and the reasonable classification test. With regard to the latter, the CA reasoned:

We would also add that the quantity of addictive drugs trafficked is not only broadly proportionate to the quantity of addictive drugs brought onto the illicit market, but also broadly proportionate to the scale of operations of the drug dealer and, hence, broadly proportionate to the harm likely to be posed to society by the offender’s crime.260

253 ibid [39].
255 ibid [29].
256 One such case was Nguyen Tuong Van (n 249). I will not discuss this case as the CA mostly reiterated the ruling in Ong Ah Chuan (n 250).
257 Yong Vui Kong (n 238) [103]–[108].
258 ibid [111].
259 ibid. But, the CA, noted, it was not arbitrary.
260 ibid [112] (emphasis added). One wonders, however, and pursuant to the CA’s circumscribed view of its role in the separation of powers, what legal standards the CA used to determine that the 15g Differentia was ‘broadly proportionate’ to the MDA’s object.
The italicised words demonstrate the courts’ communitarian approach: the harm posed to society, and so the collective interest in preventing this harm, is an overt consideration for the CA to hold that the 15g Differentia satisfied the reasonable classification test—and accordingly, that the MDA’s mandatory death penalty did not violate Article 12(1). The CA reached this conclusion despite acknowledging that ‘a differentia which takes into account something more than merely the quantity of controlled drugs trafficked may be a better differentia’. For the CA, however, ‘what is a better differentia is a matter on which reasonable people may well disagree’ and is ‘a question of social policy [that] lies within the province of the Legislature’. Adhering to its circumscribed role in the separation of powers, the CA concluded that the judiciary ‘will only act to ensure that [the 15g Threshold] bears a rational relation to the social object of [the MDA]’. For reasons set out in the quotation above, the CA held that such a rational relation exists. In other words, even though the 15g Differentia—which attracts the mandatory death penalty—is not the best differentia to further the MDA’s objectives, it does not violate Article 12(1) because it was ‘broadly proportionate’ to the harm caused to society—and in Singapore’s communitarian paradigm, the collective interest in preventing this harm must prevail. In contrast to the CA’s emphasis on the collective interests that the MDA protects, there is no mention of the importance of Article 12(1) and the interests that it protects.

We can glean two things from the CA’s decision. First, the reasonable classification test is loose enough that the second limb—the rational relation between the classification and the social object of the impugned statute—can justify virtually any social object as long as it is not plainly absurd. Since statutes are usually enacted to serve a social purpose in which the collective has an interest, the looseness of the test would easily serve the collective interest. This is because it is tautological that the classification in limb (1) will have a rational relation to the purpose in limb (2): ‘A statute’s classifications will be rationally related to [its] purpose because the reach of the purpose has been derived from the classifications themselves.’ The test, then, is particularly amenable to Singapore’s communitarian approach to rights. In the present case, without a more demanding classification than the quantity of drugs trafficked, the communitarian aspect of the CA’s decision demonstrates that the collective interest in preventing the harm posed by drug trafficking to society is so paramount that the statutory

\[^{261}\text{ibid [113].}\]

\[^{262}\text{Robert Nagel, ‘Legislative Purpose, Rationality, and Equal Protection’ (1972) 82 Yale Law Journal 123, 128.}\]
classification of which offenders would be mandatorily sentenced to death need only be ‘broadly proportionate’ to the harm caused. Once again, the courts’ failure to demand a more exacting relationship between the differentia and the object of the MDA, and their endorsement of a merely ‘reasonable’ classification to ascertain which offenders will be sentenced to death, does not account for Article 12’s elevated status.

Second, one might come to the CA’s defence and say that the CA was merely adhering to its narrow conception of the separation of powers: since Parliament has decided that the 15g Differentia determines when the mandatory death penalty applies, the CA cannot interfere, and could only apply the reasonable classification test. But this response overlooks the inherent malleability of the test which could have allowed the CA to reach a different outcome. The looseness of the reasonable classification test is a double-edged sword: it is as capable of allowing the CA to reach the decision that it did as it is of allowing the CA to reach the opposite conclusion. That is: simply classifying the severity of trafficking crimes according to the quantity of drugs trafficked does not further the MDA’s purpose of preventing harm to society because it is not targeted enough at the sort of criminals whose activities would harm society. The statutory classification can only achieve this specific targeting by taking into account more than the quantity of drugs trafficked, such as the offender’s position in the drug syndicate, whether he intends to sell the drugs in Singapore, whether he has previous drug-related antecedents, etc. Granted, the 15g Differentia could be defended on the basis that it errs on the side of caution by casting a wide enough net to include all kinds of trafficking activities that could have a harmful effect on society. But this wide net is problematic because it is so broad that it cannot take into account the mitigating circumstances of the individual trafficker, and thus it does not take seriously enough the severity of the individual life that is at stake. It therefore overlooks, inappropriately, the elevated status of the rights to life and equal protection.

b. The Discretionary Death Penalty Regime under the MDA

In 2012, Parliament amended the MDA and gave the courts a narrow sentencing discretion in specific situations. Under section 33B(2), the courts have the discretion to impose life imprisonment and not less than 15 strokes of the cane in lieu of death after two conditions are satisfied. First, the accused has to prove, on a balance of probabilities, that he acted as a drug
courier in the criminal enterprise (the Drug Courier Requirement). Second, upon meeting the first condition, the Public Prosecutor (Prosecutor) must issue him a certificate of substantive assistance as proof that he ‘has substantively assisted the Central Narcotics Bureau [CNB] in disrupting drug trafficking activities within or outside Singapore’ (the Substantive Assistance Requirement). Section 33B(3)(b) provides that, if the accused meets the Drug Courier Requirement and proves, on a balance of probabilities, that he suffered from an abnormality of mind which ‘substantially impaired his mental responsibility’ for his acts, the courts must sentence the accused to life imprisonment in lieu of the death penalty. Section 33B(4) allows for the Prosecutor’s decision to be challenged on grounds of bad faith and/or malice only; otherwise, the Prosecutor has the ‘sole discretion’ to determine whether substantive assistance has been rendered.

While the discretionary regime appears to be a concession to the accused person’s right to life, its dominant purpose is still to combat drug trafficking and protect society against its dangers. Any ameliorating effect that the discretionary regime might have on the individual is incidental at best. As the Minister for Law stated during parliamentary debates on the proposed amendment, the amendment seeks to enhance the CNB’s operational effectiveness:

The issue is not what we can do to help couriers avoid capital punishment. It is about what we can do to enhance the effectiveness of the [MDA] in a non-capricious and fair way without affecting our underlying fight against drugs. Discretionary sentencing for those who offer substantive assistance is the approach we have taken. For those who cannot offer substantive assistance, then the position is as it is now.

i. The Lawfulness of the Discretionary Death Penalty

The MDA amendments have been challenged for violating Article 9(1)—and the courts’ decisions are communitarian to a large degree, mostly by affirming Parliament’s intention for the amendment. In Prabagaran a/l Srivijayan v Public Prosecutor, the CA held that section 33B(2) did not breach Article 9(1). The appellants in the case, who were convicted of drug

263 MDA (n 232) section 33B(2)(a).
264 ibid, section 33B(2)(b).
265 ibid, sections 33B(3)(a) and 33B(3)(b).
266 Singapore Parliamentary Debates, 14 November 2012, vol 89.
267 Prabagaran a/l Srivijayan v Public Prosecutor and other matters [2017] 1 SLR 173.
trafficking and sentenced to death, raised three arguments, two of which will be canvassed here. 268 First, the Substantive Assistance Requirement breached the fundamental rules of natural justice: the Prosecutor’s determination of whether the appellants fulfilled Substantive Assistance Requirement is ‘opaque’ because the appellants had no notice of the factual allegations on which the determination was made and could not challenge the decision, save for the narrow one in section 33B(4); resultingly, the Substantive Assistance Requirement breached the hearing rule. The CA rejected this argument and affirmed its earlier decision 269 on a similar issue: it is the Prosecutor, and not the courts, who has the unique competence to determine whether an accused has provided substantive assistance because of the ‘express stipulation in s 33B(2)(b) and the fact that it would seriously undermine the operational capability of the CNB and jeopardise our war on drugs’ 270 if the issue were to be determined by the courts. Given this, the CA saw no reason ‘why the hearing rule requires that an offender be given a chance to address the [Prosecutor] on extra-legal factors which the offender would be in no position to comment on’. 271

The appellants’ second argument is that the Substantive Assistance Requirement ‘is so absurd and arbitrary in nature that it cannot constitute “law” 272 and hence violates Article 9(1) for the following reasons, among others. First, the fact that the Prosecutor does not have to give reasons for not issuing the certificate makes it impossible to challenge the decision. Second, couriers are usually at the lower levels of a syndicate and are unlikely to be able to provide substantive assistance. Third, the requirement of an actual disruption to drug trafficking activities may lead to the absurd result that a courier is sentenced more severely than an offender who is higher up in the hierarchy and is therefore more likely to be able to provide substantive assistance. Once again, the CA rejected this argument, holding that, where it is alleged that a law is arbitrary and in breach of Article 9(1), ‘the assessment is directed at the purpose of the law’. 273 In affirming Parliament’s intention for amending the MDA, the CA’s reasoning is communitarian for valorising the collective interest in combating drug trafficking.

268 The third argument is that the Substantive Assistance Requirement is contrary to the rule of law.
269 Muhammad Ridzuan bin Mohd Ali v Attorney-General [2015] 5 SLR 1222. This case will be addressed in greater detail in subsection (ii) below.
270 Prabagaran (n 267) [52].
271 ibid [86].
272 ibid [91].
273 ibid [93].
and enhancing the CNB’s operational effectiveness over the constitutional right to life. First, it stated that the Substantive Assistance Requirement has a ‘clear purpose … targeted at enhancing law enforcement capabilities in the war against drugs’.\(^{274}\) It then cited with approval the reasons given by the Minister for Law for why assistance rendered by an offender must enhance enforcement effectiveness:

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\text{…every courier, once he is primed, will seem to cooperate. … So if you say just cooperate, just do your best, all your couriers will be primed with beautiful stories, most of which will be unverifiable but on the face of it, they cooperated… And the death penalty will then not be imposed and you know what will happen to the deterrent value. Operational effectiveness will not be enhanced.}^{275}
\]

Hence, section 33B(2) ‘was not born of mere compassion to couriers and an intention that they be treated less harshly’.\(^{276}\) Given Parliament’s reasons for adopting this ‘outcome-centric approach’ to the issue, ‘the fact that some couriers may not be able to provide substantive assistance by virtue of their role in the syndicate does not render the provision absurd or arbitrary. \text{It is not necessary that it must be the best means of furthering the object and purpose of the statute}’.\(^{277}\)

This shows that the collective interest in combating drug trafficking was an explicit ground on which the CA held that the Substantive Assistance Requirement did not violate Article 9(1). Evidently, then, Singapore’s communitarian approach to rights places overwhelming emphasis on the collective interest; in this case, it is the need to combat drug trafficking and to protect society from the dangers of drug abuse. Hence, the CA’s overwhelming emphasis on the collective interest in combating drug trafficking shows that Singapore’s communitarian approach to rights does not sufficiently take into account the elevated status of constitutional rights.

\(^{274}\) ibid.

\(^{275}\) Singapore Parliamentary Debates, 14 November 2012, vol 89.

\(^{276}\) Prabagaran (n 267) [38].

\(^{277}\) ibid [95] (emphasis added), citing Quek Hock Lye v Public Prosecutor [2015] 2 SLR 563 where the CA held that the classifications in section 33B does not have to be ‘the best differentia possible and that there is no other better or more efficacious differentia which would further the social object and purpose of the particular statute’: [37].
ii. **Substantive Assistance and Equal Protection**

The problem with the Substantive Assistance Requirement lies also in the sometimes unequal treatment between two accused persons involved in the same criminal enterprise, which implicates the elevated status of Article 12(1). In *Muhammad Ridzuan bin Mohd Ali v Attorney-General*, the appellant was involved in the same drug trafficking enterprise with Abdul Haleem, but only Haleem was issued the certificate of substantive assistance. The appellant alleged that the Prosecutor’s failure to grant him the certificate despite their being in ‘apparently the same or similar circumstances’ was a violation of Article 12(1). The CA reiterated that Article 12(1) ‘in essence requires that like be treated alike’. The issue was: where two accused persons participated in the same drug enterprise, is the exercise of prosecutorial discretion under section 33B(4) MDA to issue the certificate of substantive assistance to only one co-offender a violation of Article 12(1)?

For executive actions, the test for a breach of Article 12(1) is ‘deliberate and arbitrary discrimination against a particular person’; ‘[a]rbitrariness implies the lack of any rationality’. The CA rejected the appellant’s claim, holding that he had failed to discharge his evidentiary burden to ‘raise a prima facie case of reasonable suspicion that the [Prosecutor] acted arbitrarily in choosing to grant only one co-offender the certificate of substantive assistance’. In order to discharge this burden, Ridzuan was required to show two things: first, that his level of involvement in the offence and knowledge of the drug syndicate was ‘practically identical’ to Haleem’s, and second, that despite having provided ‘practically the same information to CNB’, only Haleem was given the certificate by the Prosecutor. It is insufficient that Ridzuan had provided ‘largely similar’ information as Haleem because the paramount objective of combating drug trafficking required the higher ‘practically the same information’ threshold in order to serve the amended MDA’s purpose of adding ‘another string to our bow … to combat drug trafficking—to get at the real kingpins behind the couriers’.

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278 *Ridzuan* (n 269) [50].
279 ibid [67].
280 ibid [49], citing *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 [23] with approval.
281 *Ridzuan* (n 269) [51].
282 ibid.
283 ibid [54].
284 ibid [66].
The CA’s communitarian approach is apparent in the high evidentiary threshold of ‘practically identical information’—which indirectly reveals its interpretation of what ‘like be treated alike’ means. One way of analysing the case would be that, because Ridzuan and Haleem were involved in the same enterprise, they were two similarly placed accused persons and so satisfied the ‘like’ requirement of ‘like be treated alike’. But by requiring that Ridzuan provided ‘practically identical information’, and then holding that Article 12(1) was not violated because Ridzuan’s ‘largely similar’ information was insufficient, the CA was, in effect, suggesting that ‘like be treated alike’ requires that co-accused be in practically identical situations. This demanding interpretation of ‘like be treated alike’ is motivated by the amended MDA’s purpose; namely, to ‘maintain a tight regime’ by having ‘an additional avenue for our enforcement agencies to reach further into the networks, and save lives from being destroyed by drugs and hence make our society safer’.285 Anything lower than ‘practically identical information’ does not serve this purpose; and so Ridzuan could not demonstrate a prima facie case that the Prosecutor had acted arbitrarily, let alone argue successfully that his Article 12(1) right had been violated.

Furthermore, the primacy of the collective interest in protecting society from the harms of drug trafficking means that the question of whether the drug trafficker would be spared the death penalty hinges entirely on ‘the outcome of assistance rendered, independent of an offender’s ability to provide such assistance’.286 Consequently, because the courts are in no position to assess whether the assistance rendered has led to the disruption of drug trafficking activities, the Prosecutor’s discretion to grant a certificate of substantive assistance is not justiciable by the courts. To treat the certification ‘as if it were a matter to be proven and justified at trial’ would be contrary to Parliament’s intention underlying the discretionary regime; it would be to ‘seriously [jeopardise]’ Singapore’s battle against drug trafficking, and along with it, ‘the general interest of society’.287

This outcome-centric approach places overwhelming emphasis on protecting society from drug trafficking, such that whether a co-accused is afforded protection under Article 12(1) is contingent on his role in the criminal enterprise. It is worth noting that Ridzuan’s role made it factually impossible for him to provide ‘practically identical’ information as Haleem.

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286 Prabagaran (n 267) [64] (emphasis added).
287 Ridzuan (n 269) [66].
Although Ridzuan had arranged the drug deliveries, he did not have the contact details of the syndicate members whereas Haleem did; further, during one of the operations, Haleem was in a car with one of the syndicate members but Ridzuan was not.\textsuperscript{288} Hence, although it is arguable that Ridzuan and Haleem were similarly placed because they were involved in the same criminal enterprise, Singapore’s overwhelming emphasis on the collective interest in protecting society from drug trafficking demands the co-accused to be in \textit{identical} situations, and thus be able to provide practically identical information, before Article 12(1) might apply. In interpreting Article 12(1)’s ambit narrowly in favour of the collective interest, Singapore’s communitarian approach to the issue has negated the elevated status of Article 12(1)—and the result is that Ridzuan was sentenced to death.

\textbf{CONCLUSION}

I have shown how Singapore’s communitarian principle, ‘collective over individual’, is manifest in the courts’ constitutional rights case law. This approach has led to a disjunction between the elevated status of constitutional rights and their practical application. As the approaches taken by other courts have highlighted, a less restrictive, more calibrated approach could have been taken to resolve the contestation between the collective and the individual. While it is not suggested that the Singapore judiciary ought to adopt these other approaches, the disjunction produced by Singapore’s communitarian approach is problematic for producing an empty idea of rights. Under Singapore’s communitarian approach, the fact that the rights are enshrined in the Constitution, the nation’s supreme law, bears little meaning beyond mere formality.

It would be tempting to conclude that the idea of communitarian constitutional rights is a conceptual contradiction and ought to be abandoned. The larger issue, however, is not communitarianism per se; rather, it is Singapore’s conception of it as necessarily premised on ‘collective over individual’. The influence of this basic principle can be seen in the courts’ broad restrictions of individual rights in favour of the competing collective interest. Hence, although the desire to protect the interests of the community is laudable, Singapore’s ‘collective over individual’ brand of communitarianism is not the best conception of it, as these cases have demonstrated. The next chapter subjects ‘collective over individual’ to a normative critique.

\textsuperscript{288} ibid.
and concludes that it is not necessarily communitarian and hence should be abandoned. Once ‘collective over individual’ is rejected, an alternative conception of communitarianism will prove—as the rest of the thesis will strive to do—to be conducive to the idea and practice of rights.
INTRODUCTION

I have shown in Chapter One how Singapore’s ‘collective over individual’ communitarian approach to constitutional rights is incongruous with their elevated constitutional status due to Singapore’s \(a\ priori\) disproportionate weightage of interests between the collective and the individual. I suggested at the end of Chapter One that the problem with Singapore’s communitarian approach is not communitarianism \textit{per se}, but ‘collective over individual’. In order to preserve the elevated status of constitutional rights within a communitarian framework, two conceptual questions need to be addressed: is ‘collective over individual’ a necessary feature of communitarianism, and is there an alternative conception of communitarianism that can vindicate the elevated status of constitutional rights in appropriate cases?

The main obstacle in the way of such a conception is the basic assumption that animates Singapore’s communitarianism—namely, ‘[central] to communitarianism is the idea that collective interests are placed above individual ones’.\textsuperscript{289} In this chapter, I subject this basic ‘collective over individual’ principle to a normative critique in light of both ‘Western’ and ‘Asian’—specifically, Confucian—communitarianism. My purpose is to show that ‘collective over individual’ does not necessarily, and certainly does not always, follow from communitarianism’s central tenets. This critique asks the questions: 1) Does ‘collective over individual’ follow from the communitarian conception of the self? 2) Does ‘collective over individual’ follow from the concept of community and the communitarian politics of the common good? The answer is ‘no’.

In the course of this normative critique, I make a conceptual claim about the most favourable interpretation of communitarianism: it is one that does not prioritise the collective over the individual. Rather, it takes individual and community seriously in negotiating the normative boundaries between the individual and her variegated communal attachments,

\textsuperscript{289} Chua, \textit{Communitarian Ideology and Democracy in Singapore} (n 28) 191.
including the family, her social groups, and the nation. This conception of communitarianism is what Thio describes as

a “third way” between a radical individualism and a statist conception of the individual in instrumental terms to benefit the collective; a normatively desirable version of communitarianism would treat individual dignity as an intrinsic good, while appreciating that individuals are not atomistic but live in communities and value community life.

Embedded in this broad claim are two specific ones. First, communitarianism conceives of the self as a social, situated and relational self, and is premised on a pluralistic conception of community. Second, and accordingly, communitarianism’s politics of the common good advances only a thin theory of the good and not a substantive one as is commonly assumed. I will show that, in this light, ‘collective over individual’ does not survive the normative critique. As such, Singapore should abandon its current conception of communitarianism and adopt the Inclusive Communitarian Approach, to be developed in Chapters Three and Four.

I undertake this normative critique by reconstructing the arguments that a defender of Singapore’s ‘collective over individual’ communitarianism might make; hence, I have as my interlocutor this imaginary (but certainly plausible) defender. In Part I, I set out the defender’s best case in favour of ‘collective over individual’: it is a communitarian paradigm. Falling short of this strong claim, the defender might say either that it is paradigmatic of Asian communitarianism, or it is Singapore’s unique definition of communitarianism which should not be challenged by ‘foreign’ sources. I argue that these two weaker claims are unpersuasive. First, ‘Asian’ and ‘Asia’ are concepts too amorphous to ground a normative argument. Second, communitarianism is a value-laden and contested concept that is always open to challenge; as such, what communitarianism should be is not a mere matter of definition. In Part II, I show that ‘collective over individual’ does not necessarily follow from the communitarian conception of the self as a social, situated and relational self, and that, on the contrary, the communitarian conception of the self necessarily values the individual and community equally. Similarly, Part III shows that ‘collective over individual’ does not necessarily follow from the concept of community—which is necessarily pluralistic given the communitarian self—and communitarian politics of the common good. Instead, a necessary consequence of the communitarian self is that both community and the communitarian politics of the common

290 By ‘social groups’ I am referring to the individual’s constitutive communities; see Chapter Three.
291 Thio, A Treatise on Singapore Constitutional Law (n 16) 621.
good cannot advance a substantive conception of the good, thereby foreclosing ‘collective over individual’.

A caveat and a point of clarification. First, I use the terms ‘Western’ and ‘Asian’ as convenient shorthand to refer only to the geographical origins of the theories discussed; I will use quotation marks to indicate that I do not endorse normative implications associated with these terms. Second, my discussion of ‘Asian’ communitarianism focuses only on Confucian communitarianism in light of the fact that Singapore’s communitarianism was tailored to approximate some form of Confucianism; this is evident from some Confucian influences present in the White Paper. The White Paper invokes Confucianism to support ‘collective over individual’, claiming that one of the many Confucian ideals that are relevant to Singapore is ‘the importance of human relationships and of placing society above self’. It is a commonly held notion that Confucianism endorses ‘collective over individual’; some scholars have described Confucian communitarianism as ‘advocating that individual values should be subordinate to community values’. Hence, Confucian communitarianism is probably the form of communitarianism that Singapore’s communitarianism most closely resembles. However, due to the complexity of Confucianism and Confucian communitarianism, I will only refer to ideas in both theories that are relevant in supporting or disputing ‘collective over individual’. Finally, although Singapore’s communitarianism does not claim to be ‘Western’, it is still necessary to discuss ‘Western’ communitarianism in order to fully grasp communitarianism as a concept.

I. DEFENDING SINGAPORE’S COMMUNITARIANISM

a. A Communitarian Paradigm?

The defender of Singapore’s communitarianism would say that ‘collective over individual’ is a communitarian paradigm; that is, it is ‘a requirement of [communitarianism] if anything is’. Singapore’s communitarianism appears to take just this view. Founding Prime Minister Lee Kuan Yew had stated that Singapore is committed to ‘communitarian values where the interests

292 See Introduction, 8–11.
293 White Paper (n 37) [41].
of society take precedence over that of the individual’. 296 The White Paper claims that, as an Asian society, Singapore has ‘always weighed group interests more heavily than individual ones’. 297 Singapore’s ‘communitarian concerns’ are also reflected in the judiciary’s ‘rights balancing process’ which is informed by ‘the prioritisation of the collective welfare over individual concerns’. 298 Evidently, Singapore’s communitarianism prioritises the collective over the individual.

To support her strong claim that ‘collective over individual’ is a communitarian paradigm, the defender would have to show that it is not uniquely Singaporean. To do this, she would trawl the relevant literature to support her contention—and she would be richly awarded, for it is a common misconception that communitarianism prioritises the collective over the individual. For instance, communitarianism has been defined as a ‘20th [century] political doctrine which emphasizes the interest of communities and societies over those of the individual’. 299 George Kateb, writing scornfully of communitarianism, says that communitarianism sees a good society as one which lords over its inhabitants and ‘provides the script’, such that ‘in good societies all play their parts and say their lines unselfconsciously’. 300 Kim Sungmoon contends that one of communitarianism’s central aims is to ‘put the core argument of deontological liberalism in reverse, that is, to place the common good and civility prior to the right’. 301

Beau Breslin’s reconstruction of communitarianism’s core tenets 302 provides particularly strong support for the defender’s claim. Breslin argues that communitarians promote a collectively arrived-at conception of the good that is more substantial than a merely procedural conception, such as liberalism’s state neutrality, and it takes priority over individual interests and rights. Communitarianism is thus premised on the priority of the good over the right: ‘[The] community’s values exist prior to, and are more critical than, the wants of any

296 Lee Kuan Yew, quoted in Bell, ‘A Communitarian Critique of Authoritarianism’ (n 10) 17.
297 White Paper (n 37) [26].
298 Thio, ‘Protecting Rights’ (n 15) 195.
single resident of the polity.’ He claims, too, that all communitarians, liberal and conservative alike, ‘defend the principle that the community’s values supersede all competing noncommunal interests’. As such, communitarianism would resolve controversial issues, such as abortion and gay marriage, according to the community’s ‘collective and shared will’, with policies on these issues based ‘entirely on the interests of the collective whole’.

The defender might also use Michael Walzer’s shared meanings argument to show that ‘collective over individual’ is a communitarian paradigm. Walzer argues that a community’s governing political principles can only be derived from an interpretation of the community’s shared understandings. The fact of ‘the particularism of history, culture and membership’ that situates individuals in a particular context gives rise to a continuing shared culture and shapes a common life based on shared understandings. Accordingly, political arguments must appeal to these common meanings because the pluralistic nature of the principles of justice is ‘the inevitable product of historical and cultural particularism’. The logical conclusion is that ‘[a] given society is just if its substantive life is lived in a certain way—that is, in a way faithful to the shared understandings of the members’.

The defender would then claim that Walzer’s shared meanings argument itself prioritises the collective over the individual. If we agree with Walzer that principles of justice should be derived from a community’s shared meanings, then it follows that the community, as the legislator of what justice requires, is sovereign; and its determination of what justice requires reigns supreme over the individual’s competing ones. For example, if a community interprets its shared understanding of the sacredness of life to mean that abortion is murder, or conceives of its shared commitment to family values as requiring marriage to be reserved for a man and a woman, then these shared determinations would trump the individual’s assertion of a right to abortion or same-sex marriage. An external critique of these shared determinations would be irrelevant because, according to Walzer, justice depends on, and is determined by, the community’s shared understandings. Hence, the counter-argument that the foetus’s right to

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303 ibid 80.
304 ibid 85.
305 ibid.
307 ibid 29.
308 ibid 6.
309 ibid 312–313.
life cannot outweigh the woman’s right to choose, or that same-sex couples can equally uphold family values, would have little relevance to a community whose shared meanings do not contain these countervailing principles of justice.

The defender would go on to say that the above shows that ‘collective over individual’ is a communitarian paradigm because of communitarianism’s emphasis on the community’s normative significance. To do it justice, the defender would say, its interests and values must be taken seriously and take precedence over individual rights and interests. Therefore, ‘collective over individual’ is a communitarian paradigm. Since Singapore’s communitarianism is premised on this paradigmatic principle, it is the most favourable interpretation of communitarianism. As such, my normative critique is wholly unnecessary. But even if the defender were wrong about ‘collective over individual’ being a communitarian paradigm, she would have two further arguments: it is an Asian communitarian paradigm and so entirely suitable for Asian Singapore; and that Singapore possesses the definitional fiat to conceptualise its own communitarianism as it sees fit.

To assess whether ‘collective over individual’ is a communitarian paradigm, we need to test it against the values that the various communitarian theories promote, which will simultaneously give rise to the most favourable interpretation of communitarianism. The rest of the chapter will refute the defender’s argument that ‘collective over individual’ is a communitarian paradigm by showing that it neither follows from the communitarian conception of the person, nor from communitarian politics of the common good. As a preliminary matter, however, the defender’s latter two weaker claims can be dispensed with first.

b. ‘Asian’ Communitarianism?

The defender’s weaker claim is as follows. ‘Collective over individual’ is paradigmatic of Asian communitarianism. As an Asian society, it is appropriate for Singapore to adopt Asian communitarianism. Indeed, as the White Paper asserts, Singapore’s communitarianism is avowedly Asian: its very inception juxtaposed Singapore’s pristine ‘Asian’ values against supposedly degenerate ‘Western’ ones. As then-President Wee Kim Wee elaborated, Singapore needed the White Paper’s set of shared values because Singapore’s ‘openness … has exposed
us to alien lifestyles and values’. Specifically, ‘[traditional] Asian ideas of morality, duty and society which have … guided us in the past are giving way to a more Westernised, individualistic, and self-centred outlook on life’. As such, the White Paper embodies a paradigmatic Asian communitarianism that prioritises the collective over the individual.

i. Singapore’s Questionable ‘Asianness’

The defender, however, goes astray in making claims based on simplistic assumptions and cultural essentialism. The defender simplistically accepts Singapore’s ‘Asianness’ at face value without interrogating whether Singapore is uniquely or wholly ‘Asian’. On the contrary, as a hybrid of East and West, Singapore is an apt example of a country in Asia that is not wholly or uniquely ‘Asian’. Located in Southeast Asia, Singapore is indigenous to the Malay population and comprises immigrants from China and India, with a small minority of Eurasians (mixed European and Asian ancestry). Simultaneously, Singapore is a former British colony that inherited the Westminster Parliamentary system, the common law and English as the official and common language amongst Singaporeans. As Simon Tay correctly points out, ‘[a] blend of Asia and the West … was the starting point for the Singaporean nation-state’.

If Singapore’s birth was not uniquely, wholly or purely ‘Asian’, its coming-of-age was even less so because ‘Western influence continues [in Singapore] today in economic development that is encouraged by (mainly Western) multi-national companies’. Singapore’s openness to globalisation has been accompanied by its reception of ‘Western’ influences—and the White Paper readily acknowledges them, speaking positively of ‘values from European and American civilisations which we have rightfully adopted and made our own, such as parliamentary democracy and the rule of law’. The confluence of East and West in Singapore, and the attendant mix of values that Singaporeans have been exposed to, arguably dilutes Singapore’s ‘Asianness’, insofar as this notion is meaningful.

310 White Paper (n 37) [2].
311 ibid.
313 ibid 761.
314 White Paper (n 37) [29].
If Singapore is a mix of East and West, it seems that the defender’s assertion that Singapore’s communitarianism is rightly premised on the ‘Asian’ communitarian paradigm ‘collective over individual’ because ‘Asian’ is too quick a move. More is needed to support the defender’s position that ‘Asian’ Singapore should adopt ‘Asian’ communitarianism, for this assumes a perfect one-to-one mapping between the two based on an ‘Asianness’ to which Singapore cannot fully lay claim.\(^{315}\) This assumes, too, that the ‘Asian’ communitarian paradigm ‘collective over individual’ seamlessly fits ‘Asian’ Singapore, which arguably fails to account for individualistic impulses existing in Singapore society. Take, for instance, Singapore’s commitment to the principle of meritocracy. Meritocracy is ‘widely regarded as a core principle of governance in Singapore’\(^{316}\) regularly advanced by the government as ‘the only viable principle for organising and allocating the nation’s scarce resources to optimise economic performance and political leadership’.\(^{317}\) Meritocracy is also the governing principle in education\(^{318}\) and the civil service, including the political leadership.\(^{319}\) The ‘logical outcome’ of this meritocracy, however, is individualism, as Chua points out: ‘Meritocracy concurrently encourages individuals in the pursuit of excellence and serves, at both the societal and

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\(^{315}\) It is true that a system or society that is receptive to external influences is still strongly rooted in a particular cultural tradition; for instance, the US and Britain are ‘Western’. The difference with Singapore, however, is that, as a very young immigrant nation, it is not as deeply rooted in any particular cultural tradition, which makes it more likely for ‘Western’ influences to significantly challenge the various ‘Asian’ ones.


\(^{318}\) Singapore’s education system is known for being highly competitive and which largely awards students based on examination results. For a snapshot of the meritocratic nature of the education system and inter-racial inequalities it has produced, see Jason Tan, ‘Education in Singapore: For What, and for Whom?’ *Revue internationale d’éducation de Sèvres* (5 June 2014) <https://ries.revues.org/3856> accessed 3 September 2019.

\(^{319}\) Tan, ‘Meritocracy and Elitism in a Global City’ (n 317). See also Nur Diyanah Binte Anwar, ‘Negotiating Singapore’s Meritocracy’, *East Asia Forum* (28 February 2015) <www.eastasiaforum.org/2015/02/28/negotiating-singapores-meritocracy> accessed 3 September 2019, highlighting the negative effects of Singapore’s meritocracy (for example, elitism and social inequalities), as well as the government’s attempts to curb these negative effects (for instance, mooting the idea of ‘compassionate meritocracy’ that encourages Singaporeans who have benefited from the system to give back to society).
individual levels, to legitimise social inequalities as the natural outcome of individual differences in effort and/or intelligence, thereby, justifying and reinforcing individualism.320

The individualistic culture that Singapore’s meritocracy has produced raises doubts about how far the ‘Asian’ principle ‘collective over individual’ fits ‘Asian’ Singapore. Indeed, there is arguably a lack of fit between ‘collective over individual’ and Singapore society. For instance, after spending three years in Singapore, Bell noted a ‘glaring gap between the communitarian rhetoric and the individualistic reality’.321 This is why Chua describes the White Paper as a ‘moralising statement rather than [a] descriptive and/or prescriptive statement of the extant conditions’.322 So if ‘collective over individual’ is an ‘Asian’ communitarian paradigm, then it does not seem to suit a Singapore society imbued with individualistic elements.

Of course, Singapore’s communitarianism was devised precisely to correct these non-‘Asian’ individualistic elements in society. The defender would then say that the lack of fit challenge is no challenge at all: the whole point of the White Paper is to anchor an excessively individualistic society to values that its members inherently possess by virtue of being ‘Asian’. But this response fails to counter the objection. It makes the mistake of, first, assuming the existence of something that can be called ‘Asian’ in a meaningful sense; and second, purporting to know what it is—more precisely, purporting to speak authoritatively that to be Asian entails an innate impulse to prioritise the group over the individual; that, indeed, ‘Asian’ communitarianism is ‘collective over individual’. Appeals to ‘Asianness’ to justify normative arguments in this way are problematic; this will be explained fully in the next section.

For now, it suffices to say that a blithe appeal to Singaporeans’ ‘Asianness’, effectively an appeal to their ‘inherent instinct as Asians’ to place the interests of the group over their own, cannot meet the lack of fit objection because ‘collective over individual’ and ‘Asian’ communitarianism is a false equation—and this is because ‘Asian’ is an amorphous concept that cannot ground normative claims. Even if, arguendo, it could be shown that it is an ‘Asian’ impulse to place the interests of the group above individual ones, this still does not assist the defender because an empirical observation about culture is an insufficient basis for a normative claim. Hence, if Singapore is not uniquely or wholly ‘Asian’, then the defender cannot rely on

320 Chua, *Communitarian Ideology and Democracy in Singapore* (n 28) 27.
321 Bell and de-Shalit (n 31) 80.
322 ibid.
Singapore’s ‘Asianness’ to justify Singapore’s adoption of the purported ‘Asian’ communitarian paradigm, ‘collective over individual’.

**ii. What is ‘Asian’?**

The second problem with the defender’s position is that it relies on the vague concept of ‘Asian’. Its vagueness is simultaneously over- and under-inclusive: by claiming to capture the diverse societies, cultures and traditions in Asia by describing them all as ‘Asian’, it inevitably becomes a reductive and overly broad cultural essentialism that means little beyond a convenient shorthand for places, people, cultures, traditions etc that can be found in Asia. This lack of specificity matters when ‘Asian’ is used to support a normative argument, such as the claim that ‘collective over individual’ is ‘Asian’ communitarianism.

The current objection is reminiscent of the problems of the ‘Asian values’ challenge to ‘Western’ liberal democracy and universal human rights that originated in Singapore. The ‘Asian values’ challenge makes a few claims about some allegedly innate differences between ‘Asia’ and the ‘West’ that make liberal democracy and human rights inappropriate for extant conditions in Asia. One of these claims is that the individualistic nature of civil-political rights is unsuitable for Asia’s communitarian ethos, and that the antagonistic assertion of rights against the state goes against the preference of ‘most people’ in Asia for a less adversarial relationship between the state, society and the individual. I will challenge the claim that it is ‘Asian’ to be communitarian and to prioritise the group over the individual; and as I will demonstrate shortly, the contention is not a mere matter of semantics. Resorting to the cultural essentialist label ‘Asian’ to justify normative positions is dangerous because of its potential to silence competing voices in Asia, too easily dismissed for diverting from the sweeping cultural essentialist definition of ‘Asian’ and, thus, not-Asian.

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A few remarks are necessary to clarify what I am neither contesting nor endorsing. First, the ‘Asian values’ argument, because advanced by strong states like Singapore, has been criticised for being ‘self-serving … attempts by authoritarian regimes to take refuge in “traditional” values or to exploit their societies’ resentment of the West’. 326 Donald K. Emmerson, for instance, characterised ‘Asian values’ as ‘a mystification by certain authoritarian elites hoping to … legitimize illiberal politics in order to keep themselves in power’. 327 Christopher Lingle, too, argues that ‘[essentially], the clash behind the “Asian values” debate emerges out of the efforts to preserve an authoritarian political status quo against the forces of modernity’. 328 Whatever morsels of truth that this facially attractive critique contains, it is rather too dismissive of some intrinsic merits of the ‘Asian values’ argument, regardless of the degree of power wielded by those who advanced it.

Hence, I do not contest the plausibility of some of its claims. One such claim is that the ‘Western’ prioritisation of civil-political rights over socio-economic rights is misconceived because ‘order and stability [are] preconditions for economic growth, and growth [is] the necessary foundation of any political order that claims to advance human dignity’. 329 This claim is plausible insofar as it means that it is fantastical to promote civil-political rights while the country’s population does not have the basic requirements—for instance, food, water, shelter—to exercise them. 330 Another plausible claim is that ‘Western’ liberal democracy cannot be transplanted wholesale to other countries, including those in Asia. This is because ‘each country has its own unique set of natural, human, and cultural resources, as well as historical and political experiences’; as such, ‘the mode of governance … of a country must not accommodate these unique features but also devise responses that will resonate with …

327 Emmerson (n 324) 236.
329 Kausikan (n 325) 35.
330 However, there may not be any real conflict between the two categories of rights; see Amartya Sen, Human Rights and Asian Values (Carnegie Council on Ethics and International Affairs 1997) 11. It is also plausible that civil-political rights are necessary to allow citizens to protest—by voting, by freedom of speech, by political protest—against their country’s poor economic and/or social conditions. Hence, so long as the ‘economics first’ argument is not used to justify suppressing civil-political rights, it is persuasive.
that society’.\textsuperscript{331} This claim is plausible also because liberal democracy has emerged from a specific tradition in a particular part of the world, and so it would be naïve to expect that it could be seamlessly imported to societies that do not share this cultural heritage.

My contention, then, is with the label ‘Asian’, and the way those who use it purport that ‘Asian’ is a coherent concept capable of grounding a normative argument—namely, because it is ‘Asian’ to prioritise the collective over the individual, Asian societies ought to do so, and Singapore’s communitarianism is justified in doing so. My objection is two-fold. First, as alluded to above, ‘Asian’ encapsulates such a diverse range of societies, cultures and traditions in Asia that it becomes an overly broad cultural essentialism. To begin with, it is questionable whether Asia really exists beyond mere geography. Historically, Asia was defined in opposition to Europe; the terms ‘Europe’ and ‘Asia’ are European in origin and are essentially the ‘globalization of Greek geographic categories’.\textsuperscript{332} Hence, as Teemu Ruskola notes, ‘Asia, as a concept, stands for little more than not being Europe.’\textsuperscript{333} Amartya Sen makes the same point:

The temptation to see Asia as one unit reveals, in fact, a distinctly Eurocentric perspective. Indeed, the term “the Orient,” which was widely used for a long time to mean essentially what Asia means today, referred to the direction of the rising sun. It requires a heroic generalization to see such a large group of people in terms of the positional view from the European side of the Bosporus.\textsuperscript{334}

This explains why cultures as various as those in India and China are grouped together as ‘Asian’—which shows that ‘Asian’, by purporting to generalise the vast diversity that exists in Asia, does not really mean very much at all. This raises the question: if Asia is a collective of discrete countries, nations, cultures and traditions coincidentally located in a part of the world historically labelled ‘Asia’, why should this incidence of history infuse ‘Asian’ with normative meaning? While it is convenient, especially in everyday parlance, to use ‘Asian’ to describe people, traditions, values, cultures, food, etc from Asia, this convenience becomes objectionable when it is used to generalise everyone in Asia based on a particular culture or

\textsuperscript{331} Subramaniam (n 326) 22.
\textsuperscript{333} ibid.
\textsuperscript{334} Sen (n 330) 13.
While we can, and should, speak of values in Asia, referring to them as ‘Asian values’ is neither here nor there. Since ‘Asia’ as a category ‘has no coherent historical or cultural referent’, the notion of ‘Asian values’ is ‘groundless insofar as it purports to represent the values of all of Asia’. Conflating Islam, Buddhism and Confucianism (just to name a few traditions in Asia) ‘into one single “Asian” value system’ is thus to ‘[distort] reality’.

My second objection is a normative one. The label ‘Asian’ traps those onto whom the identity ‘Asian’ is foisted into a monolithic, essentialist identity—including its associated normative implications. By defining the amorphous label ‘Asian’ in a particular way—say, Asians prioritise the collective over the individual—those who are seen as Asian, including those who identify as such, are trapped into a particular understanding of what it means to bear this identity. This risks drowning out competing voices in Asia that reject or do not conform with this particular definition of ‘Asianness’. Tatsuo Inoue’s analysis of the ‘trap of identity’ is instructive. Tatuso proceeds from the premise that the ‘Asian values’ discourse ‘[asserts] Asian cultural uniqueness, based on the old dualism of Asia as the Orient and Euro-American countries as the Occident’ which posits that the ‘West represents Modernity, and Asia must … represent Countermodernity’. The problem with the assertion of ‘Asian’ cultural

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335 Ruskola (n 332) 886. Of course, proponents of ‘Asian values’ have said that this is not the point of the debate; rather, ‘[the] real debate … is about which values, in what degree and in what proportion, are necessary for sustained development, the maintenance of social cohesion, and the avoidance of serious problems’: Bilahari Kausikan, ‘The “Asian Values” Debate: A View from Singapore’ in Larry Diamond and Marc F Plattner (eds), Democracy in East Asia (Johns Hopkins University Press 1998) 24. Nonetheless, describing something as ‘Asian’ is problematic when the description has normative and political implications.


338 ibid 37.

339 ibid 39.
uniqueness is that, by reclaiming the ‘imposed Asian identity’\textsuperscript{340} from ‘the West’, those that use it positively risk imposing, tyrannically, the proper ways of being Asian.\textsuperscript{341} 

[The assertion of Asian identity] represses the recognition of Asia’s internal diversity and potential for endogenous transformation, and tempts one to discourage and even to oppress Asian demands for human rights and efforts at democratization … The cult of Asian identity has even produced the label “bananas” to express contempt for yellow-skinned Asians mimicking the values of whites. This cult will reinforce the Orientalist prejudice that Asian culture is inadequate for human rights and democracy…\textsuperscript{342} 

Beyond reinforcing historical ‘Western’ prejudices against ‘Asians’, equating the ‘Asian’ identity with certain normative values, such as ‘collective over individual’, defines away legitimate attempts by those in Asia who believe that a more balanced calibration between the interests of the collective and the individual is both necessary and desirable. These legitimate viewpoints thus run the risk of being shut out simply on the basis that these ‘Asians’ are not ‘Asian’ enough. Considering the vagueness of the label ‘Asian’, the power of the ‘Asian’ identity to stop a conversation about enacting change dead in its tracks before it even begins further underscores how problematic it is to use ‘Asian’ to ground normative arguments. 

To return to the defender’s argument that ‘collective over individual’ is paradigmatic of ‘Asian’ communitarianism: in order for this claim to make sense, the defender must specify which society in Asia, if any, subscribes to ‘collective over individual’. Since ‘Asian’ is a vague concept incapable of grounding a normative claim, the defender’s claim is unpersuasive, and so Singapore’s communitarianism cannot be justified as an instance of ‘Asian’ communitarianism. 

c. Against Definitional Disputes 

The defender might pose a definitional challenge to my normative critique: it does not matter whether ‘collective over individual’ is the most favourable interpretation of communitarianism.

\textsuperscript{340} ibid 40.

\textsuperscript{341} Cf. Kwame Anthony Appiah’s caution that ‘acts of recognition [do not] ossify the identities that are their object’: Kwame Anthony Appiah, \textit{The Ethics of Identity} (Princeton University Press 2007) 110. See also the discussion of the communitarian self’s autonomy in Chapter Three, Part II, 129–144.

\textsuperscript{342} Tatsuo (n 337) 40–41.
so long as Singapore has defined communitarianism in *this* particular way. As such, its definitional will should prevail.

This position, however, is unconvincing. Taken to its logical conclusion, it would mean that theoretical disagreements about what concepts mean can be defined out of existence by claiming the definitional fiat. Conceptual disputes cannot be resolved in this manner, especially when a particular concept carries with it expectations of certain baseline meanings that cannot be defined away. Take justice as an example. If a society had a law that punishes those who give birth to babies with blue eyes, it would be absurd to argue that this law accords with the requirements of justice because this society has defined justice to mean that no one should be born with blue eyes, and so its definition of justice should prevail. This understanding of justice does not fit our ordinary understanding of its meaning: this law seems so arbitrary that it has little, if anything, to do with justice—and so it cannot plausibly be defended as just in any meaningful sense of the word. Like justice, then, communitarianism is a value-laden concept that contains certain expected understandings of its necessary features.

The defender might say, however, that, unlike justice, communitarianism is amorphous and ill-defined. While we can reasonably disagree about whether Robert Nozick or John Rawls is right about what justice demands because the libertarian and liberal conceptions of justice share similar features and are disputes along a spectrum, communitarianism does not have the luxury of basic, fundamental conceptual certainty. While Nozick and Rawls disagree about whether justice is compatible with redistribution of wealth, they both agree that justice requires that individual rights cannot be unduly violated. But there is no such basic conceptual agreement as to what communitarianism means, the defender might say, apart from the overly vague and unhelpful edict that the community should be valued. This vagueness, then, lends communitarianism well to a flexibility that allows Singapore to define it as ‘collective over individual’ and still be within the bounds of communitarianism as a concept, for ‘collective over individual’ values the community greatly. This is evident, the defender would continue, from the examples that she cited in Part I, section (a) to support her claim that ‘collective over individual’ is a communitarian paradigm. Hence, Singapore is not defining theoretical disputes about communitarianism out of existence, but specifying what it means for itself.

The defender’s rejoinder fails on two grounds. First, even if communitarianism’s relative conceptual vagueness allows more conceptual room for Singapore to manoeuvre, it does not mean that communitarianism becomes an open-ended free-for-all once the
community’s value has been accounted for. Second, and accordingly, it is precisely this conceptual vagueness that makes the current normative critique necessary. Communitarianism does not exist in a vacuum, and so by calling its ideology ‘communitarianism’, Singapore inadvertently shoulders the conceptual baggage that comes with the term. This baggage has implications for the fidelity of Singapore’s conception of communitarianism to the broader concept of communitarianism in which it has squarely placed itself. After all, why use ‘communitarianism’ if not to associate with its positive normative connotations, especially when ‘collective over individual’ is arguably more descriptive of collectivism? The fact that it is unclear what these connotations are, and what else communitarianism entails apart from valuing the community, does not mean that an ideology can be comfortably termed ‘communitarian’ so long as it has accounted for the community’s value. On the contrary, this conceptual vagueness is a compelling reason to identify other basic features of communitarianism so that it can be understood more favourably. If ‘collective over individual’ ends up falling short of the most favourable interpretation of communitarianism, Singapore’s communitarianism would be harder to defend.

In light of the above, the defender’s claims that ‘collective over individual’ is paradigmatic of Asian communitarianism, and that ‘collective over individual’ is Singapore’s definition of communitarianism, cannot be sustained. What, then, of her main argument that ‘collective over individual’ simply is a communitarian paradigm? I will argue that communitarianism does not necessitate ‘collective over individual’, and that the most favourable interpretation of communitarianism cannot a priori prioritise the collective over the individual.

II. CONTESTING THE SELF

My first conceptual claim about communitarianism is that communitarianism values the individual as much as the community, and does not a priori prioritise the collective over the individual. This claim follows from the communitarian conception of the self. One of communitarianism’s core theses is that the self is situated within, and shaped by, a particular social context. ‘Western’ communitarianism largely has as its interlocutor a specific liberal conception of the self, paradigmatically represented by John Rawls’ A Theory of Justice—

that is, an atomistic, radically detached self. Confucian communitarianism, in turn, is grounded in the Confucian conception of the role-bearing person. Generally, then, the communitarian self is situated and relational, not atomistic or unencumbered. Singapore’s communitarianism is also premised on such a conception: the individual is not ‘pristine and separate’ but ‘exists in the context of his family [which is] part of the extended family, and then friends and the wider society.’ These conceptions of the person will be discussed to show that ‘collective over individual’ does not follow from either conception, and that communitarianism, properly understood, values the individual and the community.

a. ‘Western’ Communitarian Critique of Liberalism

i. Rejecting the Liberal Conception of the (Unencumbered) Self

Discussions of ‘Western’ communitarianism’s conception of the self must begin with a caveat. Although the four philosophers—Michael Sandel, Charles Taylor, Alasdair MacIntyre, and Michael Walzer—whose works challenged some problematic aspects of liberalism have been called communitarians, the label has not been endorsed by any of them. Nevertheless, they have in common their rejection of the individualistic conception of the self that is most famously implied by Rawls’ thought experiment, the original position and the veil of ignorance; hence, for convenience’s sake, I will refer to these philosophers as communitarians.

344 Zakaria (n 34) 113.
345 Sandel, Liberalism and the Limits of Justice (n 19).
347 Alasdair MacIntyre, After Virtue (Bloomsbury Academic 2013).
348 Walzer (n 306).
349 E.g. Stephen Mulhall and Adam Swift, Liberals and Communitarians (Wiley-Blackwell 1996) xv., pointing out that the label ‘communitarian’ is ‘not one which [the philosophers] employ to any great extent, and it is certainly not part of their self-understanding in the same way as the term “liberal” is for liberals’. In the Prologue to the third edition of After Virtue, MacIntyre states that a communitarian is something that he has never been: MacIntyre (n 347) xv.
350 Rawls, as is well known, later revised his ideas to account for the communitarian critique. Acknowledging the communitarian challenge that we are all constituted, at least in part, by our social world, Rawls stated that his justice as fairness is ‘the most reasonable doctrine for us. We can find no better charter for our social world’: John Rawls, ‘Kantian Constructivism in Moral Theory’ (1980) 77 The Journal of Philosophy 515, 519. Nonetheless,
What, then, do communitarians reject? The argument is two-fold. First, the liberal conception of the self implied by Rawls’ thought experiment—I will invoke Sandel and call this the Unencumbered Conception—is a mistaken understanding of the self, for it does not sufficiently account for ‘the importance of community for personal identity, moral and political thinking, and judgements about our well-being’. Second, the Unencumbered Conception causes normatively undesirable consequences in its ‘exclusive pursuit of private interests’ which ‘erodes the network of social environments on which we all depend’, thus causing a breakdown in civil society. Further, the ‘increased atomisation of western societies’ caused by the Unencumbered Conception has led to ‘unshackled greed, rootlessness, alienation from the political process, [and] rises in the rate of divorce’. The claim here is that the Unencumbered Conception leads to an uncivil self and thus a breakdown in civil society. I will call this second claim the Uncivil Self Claim.

Before discussing the Unencumbered Conception and the communitarian critique of it, it is noteworthy that the communitarian critique has been criticised for taking the unencumbered self to be the liberal self, and for failing to distinguish between a civil and uncivil self. The unencumbered self is not the liberal self, as liberals could concede that the liberal self is encumbered by the liberal tradition. Further, Kim’s criticism of the Confucian communitarian critique of liberalism reveals something important about the Uncivil Self Claim. Kim argues that the Confucian communitarian critique fails to distinguish between two liberal selves: the ‘liberal moral self and the Hobbesian amoral self’. Kim contends that the

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the communitarian critique of old Rawls (as it were) is still relevant because what is at issue here is the communitarian conception of the self, which was developed in response to Rawls’ metaphysics in A Theory of Justice (n 343).

351 Daniel A Bell, Communitarianism and Its Critics (Clarendon Press 1993) 4. Of course, it is important to note that communitarians were not the only ones who objected to the Unencumbered Conception and other aspects of liberalism; the feminist critique is an equally prominent one. Though there are some similarities between the two critiques, my focus is on communitarianism, and so I will not discuss the feminist critique.


354 Bell, Communitarianism and Its Critics (n 351) 1.

355 Kim (n 301) 32.
Uncivil Self Claim, and arguments along those lines, actually target the Hobbesian amoral self because the unencumbered liberal self, such as the Kantian self, is a moral self. This is because Kantian autonomy is ‘accompanied by moral as well as civil and legal responsibilities for the social consequences of the freely chosen action’.\textsuperscript{356} Likewise, the Rawlsian self is a moral self because it would eventually choose two principles of justice\textsuperscript{357} that uphold the moral principles of equality and the redistribution of wealth. If this is right, then the communitarian critique is perhaps not as salient as it seems, for the liberal conception of the self could be readily re-conceptualised to take into account its situatedness per the communitarian critique.

To avoid the mistake of conflation, I refer only to a particular liberal conception—the Unencumbered Conception—in my discussion of the communitarian critique. As for Kim’s argument, while he is right to point out that the communitarian critique might go too far too quickly in its Uncivil Self Claim, nevertheless, the critique makes an important point about how the Unencumbered Conception undermines the value of community. As such, I will disregard the Uncivil Self Claim and focus only on the first part of the communitarian critique.

What, then, is the Unencumbered Conception? The communitarian critique is that Rawls’ thought experiment implies an individualistic and atomistic—hence unencumbered—conception of the self. For Rawls, principles of justice should be universally applicable and equitable, unblemished by social inequalities. He places individuals in the original position behind a veil of ignorance, such that they have no knowledge of their social context—their place in society, their natural assets or skills, their rational life plans, their social status, their family background, the circumstances of their own society, etc.—in order to arrive at principles of justice that are fair and just. Hence, when Rawls claims that the self is ‘prior to the ends that are affirmed by it’,\textsuperscript{358} it suggests that, in A Theory of Justice, he conceives of individuals as radically free, unencumbered to any pre-existing social context, with total autonomy to paint on the blank canvases of their lives.

\textsuperscript{356} ibid 33.

\textsuperscript{357} The two principles are: (1) each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; and (2) social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all: Rawls (n 343) 60.

\textsuperscript{358} ibid 560.
If the self is prior to its ends in this way, then the right is prior to the good: the unencumbered self, with the unfettered freedom to choose its own ends, requires a political framework that guarantees, in the form of rights, the exercise of its radical freedom. The liberal politics of rights must thus be neutral between competing conceptions of the good because the unencumbered self must not be barred from choosing some ends that it affirms \( a \ posteriori \). Similarly, it must not be decided, \( a \ priori \), for the unencumbered self what ends it should choose. Accordingly, a just society in which the right is prior to the good is one that ‘[refuses] to choose in advance among competing purposes and ends’. 359

\[\text{ii. The Priority of the Good over the Right?}\]

The communitarian critique rejects the Unencumbered Conception as a mistake because it is an implausible way of understanding ourselves. Communitarianism, then, rejects the priority of the right over the good; but does it follow that it \textit{endorses} the priority of the \textit{good} over the \textit{right}? This is the claim the defender of Singapore’s communitarianism wants to make. If it is right, then she is also right that ‘collective over individual’ is a communitarian paradigm because it follows from an important, arguably paramount, aspect of communitarianism: the communitarian critique of the liberal self. Indeed, the defender would have good reasons to believe that she is right; as we have seen in Part I(a) above, it is commonly thought that communitarianism prioritises the community’s values and needs over the individual’s.

Unfortunately, the defender’s argument is a \textit{non-sequitur}, and it is a common \textit{misconception} that communitarianism \textit{endorses} ‘collective over individual’ as a matter of course. Simply put, it does not \textit{necessarily} follow from communitarianism’s rejection of the right over the good that the good is, or should be, prioritised over the right. The communitarian critique of the Unencumbered Conception essentially stresses the normative significance of community without forcing the individual into normative insignificance. The critique is two-fold. First, it criticises the Unencumbered Conception for disregarding the fact that we are all born into and embedded in a particular social context. As such, the Unencumbered Conception fails to consider the moral significance of our constitutive attachments to ‘family or community

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or nation or people and their importance in shaping our self-understanding. Similarly, our inheritance of the history of the family, tribe or nation to which we belong gives our lives their ‘own moral particularity’. Because we are so encumbered, we cannot be totally (or, arguably, sufficiently) abstracted from these particular attachments and their morality when thinking about principles of justice. As such, the Unencumbered Conception is false.

Second, the communitarian critique argues that what follows from the falsity of the Unencumbered Conception is a corresponding failure to sufficiently account for the normative significance of community. We can understand this by considering two related implications of the Unencumbered Conception. The first implication is that, for the unencumbered self, choice itself is of the highest value. Being unencumbered by any antecedent attachment and placed in a position to choose freely, the only thing that the unencumbered self can affirm as valuable is that which it chooses—which implies that its freedom of choice is of utmost value. Without choice, it cannot act as the self-determining agent that it is. Second, it follows that the Unencumbered Conception leads to a self that is unable to affirm as valuable anything that is unchosen—such as its communal attachments. The fact that we are all born into a particular social context means that our identity is constituted, at least partly, by our communal attachments; our ends are not things that we choose, but discover.

Thus, communitarians argue that the unencumbered self is not only false, but is unable to value community’s normative significance because the constituent communal features of her identity are unchosen. This inability ‘rules out the possibility that common purposes and ends’ could describe a community as ‘the subject … of shared aspirations’. For the unencumbered self, community is little more than an instrumental association of self-interested individuals who come together to solve coordination problems. This thread-bare notion of community neglects the constitutive nature of our communal attachments and precludes the possibility that individuals could consider their membership in communities an integral part of their identity.

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361 MacIntyre (n 347) 255.
363 Bell, Communitarianism and Its Critics (n 351) 93.
364 Sandel, Liberalism and the Limits of Justice (n 19) 150.
365 ibid 62.
366 Mulhall and Swift (n 349) 51.
The communitarian critique thus demands a more substantive conception of community, one that sees it as a constituent of our identity. If community is so constitutive, then, contra Rawls, the self cannot be prior to its ends, for it is these ends which partly constitute the self. If the self is not prior to its ends, then it follows that the right is not, or should not be, prior to the good.

But notice that the communitarian critique of the Unencumbered Conception does not claim that the partially constituted self ought to allow community to be the legislator and final arbiter of what the self should affirm as valuable. All the critique says is that the Unencumbered Conception leads to a self that cannot value community because it is unchosen. It would be too quick for the defender of Singapore’s communitarianism to extrapolate from this critique—which essentially demands a greater emphasis on the value of community—that, because the critique stresses the constitutive nature of the individual’s communal attachments, then the individual is so thoroughly constituted that she is nothing but her attachments. It would be too quick because the partially constitutive nature of communal attachments allows room for a sphere of agency within the individual that is left uncolonised by community.367 As Bell notes, the fact that we are ‘deeply bound up in [our] social world’368 such that our identity is partly constituted by it does not mean that one ought to ‘subordinate [one’s] individuality to the good of the community’.369 ‘Collective over individual’ would lead to precisely such subordination: the interests that rights protect, such as the freedom to profess and practise a religion, are subordinated to communal goods, such as national defence. Automatically subordinating the individual to the collective in this way is undesirable because, even though it is a part of human existence and daily life that one’s well-being is affected by others, ‘[no] individual is so thoroughly socialised that there is no trace of a “residual” sense of self, of agency, that does not react to repressions by the social’.370 As such, it would be a mistake to argue from the communitarian rejection of the Unencumbered Conception, and the priority of the right over the good, that communitarianism prioritises the good over the right. Rather, the communitarian critique of Unencumbered Conception stresses the value of community to the individual who is partially constituted by it. If the communitarian critique does not lead to ‘collective over

367 Chapter Three elaborates on this point. See Chapter Three, Part II(c)(i), 136–142.
368 Bell, Communitarianism and Its Critics (n 351) 31.
369 ibid.
370 Chua Beng Huat, ‘Communitarian Politics in Asia’ in Chua (n 13) 9.
individual’, as I have shown here, then ‘collective over individual’ is not a paradigmatic communitarian principle.

At this juncture, it is appropriate to point out a mistake in Breslin’s reconstruction of communitarianism, described in Part I(a). Though cognisant of the danger of ‘building a communitarian strawman’, that is precisely what Breslin ends up doing with his factually false claim that all communitarians prioritise the community’s values and interests over the individual’s values, interests and rights. Sandel, for instance, rejects the ‘communitarian’ label insofar as it implies that ‘rights should rest on the values or preferences that prevail in any given community at any given time’. However, this does not entail ‘collective over individual’; rather, in advancing a politics of the common good, the issue is not whether rights should be respected, but whether rights can be justified without presupposing a conception of the good. In his review of Breslin’s book, Etzioni rejects Breslin’s mistaken claim and says that the issue is not whether rights should be respected, but how to calibrate the balance between competing communal and individual interests. The debate, then, focuses on ‘how much licence to give communities, and never treats them as the social entities whose values trump all others’. Indeed, Etzioni has stressed this point repeatedly in his own work. He argues that when communitarians criticise the overly individualistic nature of American society, they are not also aiming to ‘[encourage] a community that suppresses individuality. We aim for a judicious mix of self-interest, self-expression, and commitment to the commons—of rights and responsibilities’. In his discussion of the relationship between autonomy and society, he emphasises that not only are human beings social by nature, but ‘their sociability enhances their human and moral potential’. Hence, the ‘social fabric sustains, nourishes, and enables individuality rather than diminishes it’, indeed, ‘communal attachments and individuality go hand-in-hand, enrich one another, and are not antagonistic’.

371 Breslin (n 302) 79.
372 Sandel, Liberalism and the Limits of Justice (n 19) 186.
373 ibid x.
377 ibid.
378 ibid 27.
In this light, not only does ‘Western’ communitarianism not necessarily entail ‘collective over individual’, but it can hardly be said that ‘collective over individual’ is a communitarian paradigm. This undermines the defender’s claim that it is paradigmatic of communitarianism. The next section considers whether it is supported by Confucian communitarianism.

b. Confucian Role-Bearing Person

Even though it is commonly thought that Confucianism advocates ‘collective over individual’, it is at least doubtful whether the Confucian communitarian conception of the person supports the defender’s claim. Although the defender would argue that the Confucian conception of the person as a social role-bearing person would lead to ‘collective over individual’, this is arguably a non-sequitur. Like the ‘Western’ communitarian critique of the liberal self, the Confucian conception of the person does not force the individual into normative insignificance.

i. The Absence of an Individual Self

*Prima facie*, the defender appears to have a strong case. The Confucian conception of the person goes further than the ‘Western’ communitarian rejection of the Unencumbered Conception; indeed, it seems to reject altogether the very notion of the individual self. Whereas the liberal self is a free, rational and autonomous individual, the Confucian person is constituted by her social roles through the practices of ritual propriety, practices which dissolve the tension between the self and society. As Henry Rosemont Jr puts it, we do not simply

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379 Tan Sor-hoon, ‘From Cannibalism to Empowerment: An Analects-Inspired Attempt to Balance Community and Liberty’ (2004) 54(1) Philosophy East and West 52. Tan states, at 52, that ‘[the] Confucian tradition has often been credited with a strong allegiance to the value of community’, and points out scholarly views that accuse Confucianism of being hostile to individual liberty. These two elements taken together suggests that Confucianism endorses ‘collective over individual’.

380 Kim (n 301).


382 See Rosemont for a critique of the notion of a free, rational and autonomous individual: ibid 33–88.

383 Kim (n 301) 31.
play the roles of daughter, sister, mother, and friend; we live them, and are constituted by them, such that we are the ‘aggregate sum of the roles [we] live’. If we are thoroughly constituted by our social roles, it follows that there is ‘no essential self’ that remains at the core of the person who, for instance, is now a mother in addition to her role as a daughter. In other words, there is no individual that is independent of our social relations.

The defender would say that, in light of the above, there is simply no question whether ‘collective over individual’ is a sound prioritisation of values because there is no individual. A metaphysical ‘individual’ with interests and needs independent of her social roles does not exist; and these social roles, the defender would say, are an extended web of social relations that, together, make up the ‘collective’. Understood in this way, the collective is embodied in the person in the form of the various social roles that constitute her. Thus, ‘individual’ has neither metaphysical nor normative significance, and refers only to discrete persons. Consequently, if Confucianism does not contain a conception of the person as a free and autonomous individual, then ‘collective over individual’ is normatively unproblematic. Individuals qua discrete persons have no special sphere of personhood and individuality that needs protection from the collective, and so these discrete persons bear no moral costs when the collective interest is placed above their own. The defender would even say that the needs of the collective are the needs of individuals qua discrete persons. In this light, then, ‘collective over individual’, as a core feature of Confucian communitarianism, is a communitarian paradigm; and since it raises no normative problems in the context of Confucian communitarianism, my normative critique cannot be made viz. Confucian communitarianism.

**ii. Confucian Roles-Based Ethics of Reciprocity**

On closer inspection, however, ‘collective over individual’ does not clearly or automatically follow from the Confucian role-bearing person. The defender’s case is flawed in two ways. First, her characterisation of the ‘collective’ as the sum total of the Confucian person’s social roles is suspect; and second, it misses the important point that the Confucian person is based on the Confucian roles-based ethics of reciprocity. The problem with the defender’s case is that it is unclear how reciprocity operates, if at all, between the Confucian person and the

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384 Rosemont (n 381) 94.
385 ibid.
collective. If it cannot be shown that there is such reciprocity, then the Confucian conception of the person does not clearly, if it does at all, support ‘collective over individual’ because ‘individual/collective’ would not be a valid Confucian role.

In Confucian ethics, the family is the source of the Confucian role-bearing person’s moral knowledge: it is in the family that the role-bearing person learns true reciprocity of the roles. In an ideal Confucian family, children cultivate from childhood the virtue of filial piety (孝) from which flows an ‘unswerving loyalty’ and gratitude to parents. Parents, in turn, do things for their children’s sake, and so children feel a sense of joy when they have the opportunity to care for them. The parent-child relationship is the foundational reciprocal relationship on which the other roles embodied by the Confucian person are based; hence, reciprocity is not quid pro quo, but ‘loving integrated actions’. The Confucian role-bearing person works towards the goal of cultivating a common humanity based on mutual concern and respect, and a genuine willingness to carry out her responsibilities to others, unfettered by feelings of resentment that these responsibilities compromise her autonomy.

If reciprocity is integral to a Confucian role, then reciprocity in the form of ‘loving integrated actions’ needs to exist between the Confucian person and the collective. But even before this: can the collective be collapsed into the totality of the Confucian person’s social relations? Let us notice what the five Confucian roles are: parent/child; ruler/minister; husband/wife; siblings; and friends. What is conspicuously missing from these five roles is something along the lines of ‘person/society’, or even ‘person/neighbourhood’, or simply ‘neighbours’. A tentative implication that we can draw, then, is that Confucian roles-based ethics is silent on the relationship between person and society.

Nonetheless, let us assume, for the sake of argument, that we can interpret Confucian roles-based ethics to include some notion of ‘society’. The defender might say something like this: it is a fact of modern-day life that our relations extend beyond the five Confucian relations. Not only are we a parent, a sibling, a child, etc., we are also a neighbour, a constituent of a

386 ibid 100.
387 ibid 98–99.
388 ibid 100.
389 ibid.
390 ibid 99.
town, and a citizen of a country. So long as we can find some reciprocity between these relations, they can count as a Confucian role embodied by the Confucian person. In this sense, the defender would be right to say that the collective is the sum total of the Confucian person’s roles; and since the person has no needs or wants outside of these roles, the collective interest can take precedence over individual ones precisely because the latter does not exist. However, this is still problematic because of Confucianism’s emphasis on the family. If the family is the source of the Confucian person’s moral knowledge and behaviour, then it suggests that the family is more salient than other Confucian relations. Hence, the primacy of familial relations in itself precludes the defender from conflating all social relations as the ‘collective’, for doing so would undermine the family’s normative power.

Alternatively, the defender might say that the collective can be understood as the country of which the Confucian person is a citizen. Once again, as long as we can identify some reciprocity between country and citizen, ‘citizen/country’ can count as a Confucian role; and if this is so, then the collective interest can be prioritised over the individual qua Confucian person. The problem, however, with conceiving of the collective as the counterparty to the ‘citizen/country’ relation is that the reciprocity in this relation is insufficient for it to be a Confucian role. Going back to the parent/child example: we owe loyalty and sacrifice to our parents to reciprocate the sacrifices that they have made for us. Notice, though, that this particular relation is a concrete reciprocal one of mutual giving and love—but the ‘citizen/country’ relation is of a qualitatively and saliently different sort. Instead of having a tangible person (my parent) with whom I share a reciprocal relation, my relationship with my country is abstract, my counterparty a sea of anonymous faces, most of whom I would never know on an intimate level. Although we could say that there is some reciprocity when I make sacrifices for my country—for instance, when I give up two years of my life for compulsory military service in exchange for national security—whatever benefit I gain from this relation is qualitatively different from that which I gain in the parent/child—indeed, in all the traditional Confucian roles—relation. This is because ‘country’, ‘nation’, ‘the national collective’, etc lack the tangibility of a face-to-face relationship that a Confucian relationship requires. Hence, whatever reciprocity that exists between citizen and country is too insubstantial for ‘citizen/country’ to count as a Confucian role, and so the Confucian role-bearing person does not support ‘collective over individual’.
iii. The Confucian Role-Bearing Person’s Moral Agency

The defender would object to this and reiterate a prior argument: that there is no individual self within the Confucian role-bearing person. Since there is no individual self as such, the Confucian person bears no moral cost when he makes sacrifices for the collective. This logic, however, focuses too much on the autonomous self. Even accepting that the Confucian person is not an autonomous self, individual autonomy is not the only value at stake when the individual’s interests are sacrificed for the collective. The Confucian person can, for instance, be called upon to make other types of sacrifices, such as sacrificing familial relationships for the nation. To illustrate with Singapore’s national service scheme, say that war breaks out between Singapore and Malaysia, and every male citizen is called upon to fight in the war. Xiaoming is obliged to the nation to go to war, but his parents do not want him to fight because they fear that he would lose his life. Xiaoming thus faces conflicting moral obligations between filial piety to his parents (abiding by their wishes) and loyalty to his nation (fighting in the war).

Xiaoming eventually fights in the war. If the defender’s logic is right, he bears no moral cost because his autonomy was not at stake; indeed, it could not have been at stake as he is not autonomous. On the contrary, however, Xiaoming bears an onerous moral cost: it is the cost incurred by abandoning his duty of filial piety. Given that the family is the moral centre of the Confucian person, and that filial piety is one of the bedrock tenets of Confucianism, this moral cost is just as burdensome as the loss of autonomy that Xiaoming qua individual self suffers by fighting in the war against his will. The defender is thus wrong to say that the Confucian person bears no moral cost when it makes sacrifices for the collective. Since the Confucian person does bear a moral cost, ‘collective over individual’ does not necessarily follow from the Confucian role-bearing person.

391 Assume that he has no legal choice in the matter. In any event, Singapore does not recognise a right of conscientious objection to compulsory service as we have seen in Chapter One’s discussion of the freedom of religion claims brought by the Jehovah’s Witnesses: see Chapter One, Part I, 25–31.
c. Communitarianism, Properly Understood: The Individual’s Normative Significance

I have argued that ‘collective over individual’ necessarily follows from neither the ‘Western’ communitarian critique of the liberal self, nor the Confucian role-bearing person. I will now make a conceptual claim about communitarianism’s conception of the individual. Far from being a communitarian paradigm, ‘collective over individual’ is arguably a distortion of communitarianism because communitarianism does not play a zero-sum game between the individual and the community. Rather, since communitarianism conceives of the self as a situated and relational one, it follows that communitarianism values the individual as much as the community because one cannot exist without the other. ‘Collective over individual’ is thus mistaken for discounting the individual’s normative significance which communitarianism values.

This claim is relatively uncontroversial and somewhat obvious in the context of ‘Western’ communitarianism, which has been called a ‘correction of liberalism’. We can see how this is so from communitarianism’s emphasis on the community’s normative significance in shaping our self-understanding. In arguing for the community’s normative significance, what ‘Western’ communitarians are concerned with is what is important to the individual, and the community is normatively important insofar as it informs and shapes the individual’s self-understanding, identity and well-being. This uncontroversial observation is intelligible: even ‘Western’ communitarians work within a rights/individual-centric liberal tradition, which means that their critique is framed within the terms of the debate fixed ex ante by liberalism. It is for this reason that Rosemont, who rejects the very notion of the individual self, calls philosophical communitarians such as Sandel ‘foundational individualists’ despite their rejection of the Unencumbered Conception. So long as communitarians do not reject the conception of the individual as a free, rational and autonomous self, ‘Western’ communitarianism allows conceptual scope for the individual to assume normative significance. If this is so, then the very idea of ‘collective over individual’ threatens to subvert

393 Rosemont (n 381) 36–37.
the individual’s importance to communitarianism. Hence, ‘collective over individual’ is incompatible with ‘Western’ communitarianism.

My conceptual claim is more controversial in the context of Confucian communitarianism because it works with a conception of the person that is radically different from the ‘Western’ notion of the individual self. It is plausible that someone defending Singapore’s communitarianism would conclude from Confucian roles-based ethics and the Confucian role-bearing person that, per Rosemont, ‘there can be no me in isolation’, and thus the collective can be prioritised over the individual. But as argued earlier, even Confucian role-bearing persons bear moral costs when they make sacrifices for the collective—which tacitly suggests that there is a ‘me’ that exists outside of the Confucian person’s roles, a residual individual caught in the crossfire between conflicting moral obligations. It is thus questionable whether the Confucian person ought to be conceived as so thoroughly constituted by its social roles that it completely precludes the notion of an individual outside of these roles, one that possesses moral agency. As Joseph Chan argues, it is a mistake to view Confucian roles-based ethics as subjugating the needs and interests of individuals to the collective. In the Confucian paradigm of reciprocity and mutual concern, ‘what are we supposed to care for if not that person’s needs and interests’? Indeed, what other purpose would there be to stress reciprocity when a Confucian person carries out the obligations of his roles if not to ensure that the Confucian person’s needs and interests are taken care of? We care for, and are benevolent towards, others for at least two reasons: these ‘others’ are discrete persons whose needs and interests matter as much as our own; and we are individual persons, constantly cultivating our ability to realise ren (仁) for our self-improvement. The person, then, is important as well in Confucian communitarianism.

Accordingly, given the communitarian conception of the person, ‘collective over individual’ is not a necessary feature of communitarianism because it does not follow from the communitarian social, situated and relational self. Communitarianism, properly understood, values the individual as much as the community. Part III will consider whether ‘collective over

395 Joseph Chan, ‘A Confucian Perspective on Human Rights for Contemporary China’ in Bauer and Bell (n 337) 220. Chan cites Mencius for this point.
396 It means, among other things, ‘a certain ability or disposition to care for and sympathize with others’: ibid 217.
individual’ follows from the concept of community and the communitarian politics of the common good.

III. COMMUNITY AND POLITICS OF THE COMMON GOOD

a. Substantive Conception of the Good?

The defender of Singapore’s communitarianism has not lost the battle yet. She could concede that the individual is significant in communitarianism: the individual, as a moral agent, has legitimate interests that are protected by rights because the individual incurs a cost when her interests are sacrificed for the group. The question, then, is whether this cost is justified—which does not mean that ‘collective over individual’ is not communitarian. The defender could argue that ‘collective over individual’ is still a communitarian paradigm in the following way. ‘Collective over individual’ means that a communitarian society organises itself around a collectively arrived-at conception of the good to which the individual moral agent chooses to yield when his own conception of the good conflicts with the community’s. This thick conception of community is not incompatible with a conception of the individual as an autonomous moral agent. To substantiate this claim, the defender would rely on three communitarian arguments, the first two of which are related: the Walzerian ‘shared meanings’ argument referred to in Part I; the communitarian politics of the common good contra the liberal politics of rights; and the Confucian conception of community.

‘Collective over individual’ is paradigmatic of communitarianism’s emphasis on the community’s normative significance as follows. Communitarianism advocates the ‘politics of the common good’ which can be understood in at least two ways. First, following Walzer, a community’s principles of justice should be derived from its shared meanings and not an external and/or universal standard. Second, a community should organise itself around its own politics of the common good based on ‘a substantive moral belief powerful enough to inspire the citizenry’ and ‘a set of public values which the community considers important and seeks to honour and preserve’. The idea is essentially that, instead of liberalism’s politics of rights

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397 See Part I(a), 72–73 above.
399 Breslin (n 302) 80.
400 Lee (n 25) 370.
that advocate state neutrality between competing conceptions of the good, communitarianism’s politics of the common good uphold and advance the *community’s* conception of the good. The common good of a communitarian society, according to Will Kymlicka, ‘is conceived of as a substantive conception of the good which defines the community’s “way of life”’; and this common good ‘provides a standard by which [people’s] preferences are evaluated’.\(^\text{401}\) Thus conceived, the politics of the common good resolve conflicts between values and comprehensive worldviews, and allow the public pursuit of the community’s way of life to ‘[take] precedence over the claim of individuals to the liberties and resources needed to choose and pursue their own ends’.\(^\text{402}\)

The community, then, acts as the individual’s moral voice and guides her actions. Far from imposing its will on individuals, the ideal communitarian society can also be understood in the Confucian sense: a ‘genuine community’ comprising not of self-interested individuals pursuing their own ends, indifferent to others in the community, but is instead ‘composed of virtuous members thinking of shared goals and values over one’s own’.\(^\text{403}\) This makes sense, the defender would say, because it is only when a community is organised around a shared conception of the good, comprising shared goals and ‘shared moral values’,\(^\text{404}\) that individual members are willing to put the interests of the community above their own. For the defender, this is what ‘collective over individual’ is really about, and it is in this way that it is a communitarian paradigm. Nothing about this communitarian ideal presupposes a heteronomous conception of the individual; all this means is that the individual sometimes has to conform to the community’s conception of the good which is what a virtuous citizen would do in any event. It would thus be a mistake, the defender would say, to ascribe to ‘collective over individual’ the pernicious idea that the individual is somehow devalued in service of the collective.

\(\text{401}\) Kymlicka, *Liberalism, Community and Culture* (n 398) 77.

\(\text{402}\) ibid.


\(\text{404}\) Breslin (n 302) 82.
b. Against a Substantive Conception of the Communitarian Common Good

This argument, however, does not accord with the most favourable interpretation of communitarianism. Although communitarianism is often thought to advocate a substantive common good around which the community organises itself, communitarianism, properly understood, cannot advance a substantive conception of the common good for two reasons. First, it does not follow from the communitarian conception of the self; and second, it is not supported by Confucian communitarianism.

i. The Multifaceted Communitarian Self

The communitarian conception of the self does not allow for a substantive conception of the communitarian common good. The communitarian self is a moral agent whose identity is constituted by its multifarious communal attachments, not just one communal attachment. If the ideal communitarian society advances a thick conception of the good, which specific community’s conception of the good, amongst competing ones, is being advanced? On the contrary, it follows from the communitarian self that communitarianism cannot advance a substantive conception of the good. Such a substantive conception, in order to satisfy communitarianism’s valuing of community, necessarily presupposes either that community is homogeneous with a unifying telos, or that the individual is more or less constituted by only one community. Both of these presuppositions are at odds with the communitarian recognition that the individual’s identity is partly constituted by multiple communities.

To this the defender would say that some communitarians, when writing about community, have argued for the homogeneous community with a unifying telos that I am rejecting. MacIntyre, for instance, argues for a return to an Aristotelian community where ‘my good as a man is one and the same as the good of those others with whom I am bound up in human community’. In this community, the good of individuals is the good of the community, and there is no tension between individual and community. However, the metaphysical component of MacIntyre’s longing for this ideal community must not be overlooked. MacIntyre’s ideal community is not just any community, but a specific type of Aristotelian and Thomistic community. This ideal is grounded in the metaphysical stipulation

\[\text{ibid } 80–81.\]

\[\text{MacIntyre (n 347) 266.}\]
that humans have a specific nature that directs them to a particular end,\(^\text{407}\) the ‘ultimate human good’. In this ideal community, members work towards ‘the shared achievement of those common goods without which the ultimate human good cannot be achieved’.\(^\text{408}\) MacIntyre’s is thus a conception of community that is inextricable from a specific Thomistic metaphysics. In fact, he categorically states that ‘I see no value in community as such—many types of community are nastily oppressive’.\(^\text{409}\) It would thus be a serious mistake to take MacIntyre’s argument for his ideal community that coheres around a substantive Thomistic conception of the common good to be an argument for a substantive conception of the common good \textit{simpliciter}.\(^\text{410}\)

In any event, we need not decide whether MacIntyre’s ideal community is really ideal, or whether it is compatible with communitarianism’s basic premise that the individual is partly constituted by many communal attachments. MacIntyre’s ideal community operates at a different metaphysical level which does not translate to an argument for just any substantive conception of the common good. Instead of getting distracted by metaphysics, the salient point here is that MacIntyre’s ideal community does not support the defender’s claim that it advocates whatever strong conception of the good that a community advances. Hence, the defender still has to specify which community’s conception of the good ought to be advanced above other communities’ conceptions when it is a fact of modern societies that our ‘communal attachments [and] loyalties stretch to more than one community—home-town, nation, family’.\(^\text{410}\)

A seemingly obvious candidate would be the national community. Just as it is a fact of modern life that our loyalties stretch to more than one community, it is similarly a fact of modern life that most of us are citizens of a country that claims our allegiance and which has constituted our identity in some way. Assuming that the national community refers to the political community contained in a single country,\(^\text{411}\) the defender might say that the national

\(^{407}\) ibid xi.
\(^{408}\) ibid xv.
\(^{409}\) ibid.
\(^{410}\) Bell, \textit{Communitarianism and Its Critics} (n 351) 91.
\(^{411}\) I am using ‘national community’ in exactly this way, and I am assuming that the state enacts laws on the national community’s behalf. I am not referring to the different nations that might exist within a country based on some commonalities, such as ethnicity or religion (e.g. the Basque within Spain). My usage of ‘nation’ will be made clearer in Chapter Four.
community’s substantive conception of the good should prevail over all others because it is the only community that has the authority to impose legally binding obligations on its members. Since it is one of the many communal attachments that constitute our identity, allowing the national community’s substantive conception of the good to prevail comports with the communitarian ideal because it is not per se a denial of our identification with many communities. Rather, it can recognise this fact but it declares that, because conflicts of values in society have to be resolved, the pragmatic way out is to allow the national community’s conception of the good to prevail since it has the authority to impose political obligations on its members via the state.

This pragmatic solution, however, is an unsatisfactory response to the question of principle that the defender cannot escape. The national community’s prerogative to enact legally binding resolutions to conflicts per se is not a good reason for its conception of the good to prevail over competing conceptions. Advancing a single substantive conception of the good undermines the essence of communitarianism; namely, that we should value the normative significance of community to our self-understanding, not value a community above all others. Doing the latter is likely to undermine community and the notion of equality of membership that it implies. I will illustrate with the instructive example of Israel.

Breslin describes Israel’s constitutional model as communitarian because the Israeli nation is constituted by a commitment to a substantive conception of the good, i.e. Judaism, which the state promotes at the expense of competing conceptions. According to Breslin, Jews enjoy ‘participatory citizenship’ which comes with the responsibility to shape the nation’s good, while non-Jews are left with ‘nonparticipatory citizenship’: they are left to practise religions that conflict with the nation’s religion in private, as long as they do not interfere with Israel’s promotion of Judaism. One manifestation of this disparity is the ban on political parties who challenge ‘the existence of the State of Israel as the state of the Jewish people’. Such a ban attenuates the right of citizens, especially non-Jewish citizens, to participate meaningfully in the political process; anyone who wishes to challenge the primacy given to the

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412 Breslin (n 302) 186–195.
413 ibid 187.
414 Israel’s Basic Law, quoted in ibid 193 (emphasis added).
Jewish way of life at the national level, even by Jewish groups who call for ‘increased attention to the values of equality and liberalism’,\textsuperscript{415} are prohibited by the law from doing so.

This divide between Jews and non-Jews was recently deepened when the Israeli government passed the Jewish Nation-State Law\textsuperscript{416} which stated that ‘the right of national self-determination in the State of Israel is unique to the Jewish people’ and downgraded Arabic’s official status to a ‘special status’. Israel’s promotion of one substantive conception of the good in a pluralistic state creates the impression that there are two classes of citizenship: those that conform to the nation’s conception, and those that do not. Such inequality arguably cannot foster a genuine communitarian community, for it does little to allow the latter group of citizens to feel a sense of belonging to the national community when they feel that they are being treated unequally by the majority.

The defender might object that there must be some instances when the national community’s conception of the good can prevail over other communities’ conflicting conceptions. After all, the national community, as represented by the state, can impose legally binding obligations on its members to resolve conflicts, suggesting that the national community has some elevated status viz. other communities. This objection is not incorrect. In fact, the national community does have some added significance, and it can promote a conception of the good—but only a thin conception, as section (c) below will establish. Suffice to say for now that if the national community compels some members to give up their community’s conception of the good, the national community can only do so if there is adequate justification. An example would be if the community promulgated a racist worldview; in this case, the justification would be that this worldview denigrates the equal membership of other members in the national community. More will be said about this in Chapter Four.

To sum up: given communitarianism’s recognition of the multifaceted nature of our communal attachments, community does not refer to a community, but encompasses all these various communal attachments. As such, community is pluralistic, encompassing these different communal attachments, and promotes a sense of belonging and inclusiveness. It does not prescribe in advance standards by which to choose which community should prevail, and neither does it inherently suggest the superiority of any one community over all others. If our

\textsuperscript{415} ibid.

\textsuperscript{416} See e.g. ‘Read the Full Jewish Nation-State Law’ Jerusalem Post (Jerusalem, 19 July 2018) \textless www.jpost.com/Israel-News/Read-the-full-Jewish-Nation-State-Law-562923\textgreater accessed 3 September 2019.
communal attachments are multifarious, then communitarianism, properly understood, recognises and values the different communities contained within the larger national community, and so cannot advance a substantive conception of the good. We now turn to consider whether the defender can successfully rely on Confucian communitarianism for her claim that communitarianism can advance a substantive conception of the good.

ii. What is Community in Confucian Communitarianism?

The defender’s Confucian communitarianism argument is as follows. Confucian communitarianism regards ‘the interest and value of the community [as] higher than those of the individual’.\(^{417}\) It ‘advocates and thinks highly of community values, advocating that individual values should be subordinate to community values, and [that] the former can be achieved only through the execution of the latter’.\(^{418}\) This is one way in which Confucian communitarianism prioritises the community’s values over the individual’s. The other way is that, as Hu Weixi argues, community in Confucian communitarianism ‘is more of a vertical understanding of political composition rather than a lateral understanding of civil society’, which extends upwards from the family to the kin, then the state, and finally the world.\(^{419}\) Given this conception of community, the state lies at the centre of Confucian communitarianism;\(^{420}\) and in the context of the nation-state, the state represents the interests of the nation qua national community. One could then say that the community in this context is the national community as represented by the state. As such, the substantive conception of the good that communitarianism advances is the national conception, which means that the collective interest *qua* the national conception of the good can be prioritised over the individual’s interests.

This argument, however, is problematic. To begin with, Hu’s claim that Confucian communitarianism regards the interest and value of the community as higher than the individual is somewhat confusing. He derives his claim from the Confucian concept of the union of heaven and man (天人合一), but his brief explanation of the concept does not explain

\(^{417}\) Hu (n 294) 482.

\(^{418}\) ibid 477.

\(^{419}\) ibid.

\(^{420}\) ibid 478.
why, or how, it supports his contention that Confucian communitarian places the community’s interest higher than the individual’s. According to Hu, the concept says that the way (道 dao) of heaven and man are the same, and it is from this concept that ‘Pre-Qin Confucians found a foundation for the possible union of individual value and social value’.\(^{421}\) The quest for a union between individual and society does not suggest that the community’s interest is placed higher than the individual’s since ‘union’ suggests a fusion of community and individual, not a prioritisation of community over individual. A further argument is required to substantiate Hu’s claim.

However, it is unclear if we can find this argument in the concept of the union of heaven and man, which indicates the larger problem with the defender’s reliance on Confucian communitarianism to support ‘collective over individual’: the lack of a similar concept of community. First, though, the concept of the union of heaven and man takes a holistic view of the individual’s role in society.\(^{422}\) The individual is not opposed to his surroundings, but is an integral part of it, which in Confucian terms extends outwards from the family to the country and then to the world. The individual becomes a holistic person, a person with 仁 ren, when he realises his ren within the family, the country and the world when he cares for others in the same way that he cares for his family. This, however, does not mean that the individual person is subordinated by society. Rather, there is a symbiotic relationship between individual and society: the individual realises his ren and becomes a moral person in society, and society benefits from having morally responsible individuals as members. It is thus difficult to see how one could infer from the concept of the union of heaven and man that the community’s interests are valued more than the individual’s.

But there is a deeper problem with the defender’s attempt to rely on Confucian communitarianism—and it is that Confucianism does not seem to have a concept of community that is used in ‘Western’ philosophy and as we understand it today. I have said briefly in this chapter that community refers to those communal attachments that constitute our identity. More generally, community also refers to ‘groups that have certain common interests within a

\(^{421}\) ibid 482. (emphasis added)

\(^{422}\) The explanation that follows is taken from 荆雨, ‘儒家“成己成人”的伦理诉求——个人与社群关系视域的现代性省思 A Whole Realization of Individual and Community in the Confucian [Sic]’ [2012] 东北师范大学报: 哲学社会科学版 27.
country, and the associations or groups that are formed by social contacts and connections, e.g. race, religion, and other social and cultural activities’. Confucianism—and by extension, Confucian communitarianism—does not appear to contain such a concept; and if it does not, then there is arguably no a notion of ‘the group’ whose interests can be placed above the individual’s. As Wm Theodore De Bary points out, while Confucian ethics have developed a sophisticated system of thought regarding the family, little work has been done to develop the concept of the group. Without a concept of the group, the ‘Western’ concepts of community are not easily translatable into meaningful Confucian terms.

Where scholars have identified and explicated on a Confucian community, the idea is rather different from that of social groupings based on common interests and identity traits. Instead, it is one in which its members cultivate their potential for, and strive towards, the ultimate Confucian moral value of ren. Tan Sor-hoon argues that a Confucian community ‘should be understood not as a closed collective—an abstract entity to be set above its individual members—but as an open network of relationships’. Since ren is achieved through ritual propriety conducted in relation to others, the Confucian community is achieved through Confucian rituals. Put another way, Russell Arben Fox states that ‘community in classical Confucianism is a horizontal concept’ and it is ‘a morally immanent community’. Members strive to achieve ren through the performance of their role rituals, and it is through their participation in community activities that ‘everyone, in different times and places, has the potential to show forth … the sort of authority which binds the community together’. Note that ‘authority’ in this Confucian community is not concentrated in one person or institution. Rather, ‘the moral authority of [ren] is inherent in one’s own sphere of activity’—that is, the performance of one’s role rituals. The extent to which one’s authority

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423 Hu (n 294) 477.
425 Tan, ‘An Analects-Inspired Attempt to Balance Community and Liberty’ (n 379) 54 (emphasis added).
427 Ibid 591.
428 Ibid 582.
429 Ibid 581.
should be respected is determined by ‘one’s understanding of and dedication to the common good’. 430

This does not mean, however, that all members of the community must ‘submit to one objective truth’, 431 and so neither the Confucian community nor Confucian communitarianism would endorse ‘collective over individual’. Instead, the Confucian community points to an ideal of authority that is exercised ‘with a sense of judiciousness, difference and reserve’. 432 Further, because Confucianism presupposes that everyone has the capability to cultivate ren, such capability must be respected by the individual and the community, so that ‘instrumental concerns’ cannot ‘trouble the cultivation of [ren]’. 433 As a result, neither the person nor community should be ‘subordinated as an instrumental means to serve the realization of the other. Rather, they stand as mutually implicatory ends’. 434 This is also because ren ‘would seek consensus in a way that respected difference and did not expect uniformity’. 435 All this points away from the contention that Confucian communitarianism supports ‘collective over individual’.

Another interpretation of the Confucian community, offered by De Bary, also evinces a mutually beneficial harmonious relationship between individual and community. Despite the lack of a developed concept of community in Confucian communitarianism, there are two manifestations of community in Confucianism: the community compact (乡约) and the well-field system, and both emphasise voluntarism and cooperation. De Bary describes the community compact as intending to ‘incorporate … voluntarism into community structures that might mediate between state power and family interests’ 436 and promote voluntary cooperation in a community where members are mutually engaged in encouraging moral deeds, correcting errors and failings, and providing aid in times of distress. 437 The well-field system, representing the ideal Confucian community, is predicated on a division between the common

430 ibid 582.
431 ibid 583.
432 ibid 584.
433 ibid 585.
435 Fox (n 426) 585.
436 De Bary (n 424) 60.
437 ibid 59.
people and the leadership class. In this system, land is divided between eight families, with the ninth plot in the centre belonging to the public.\textsuperscript{438} The idea is that the families would work on bettering the public plot of land together, and they would do so as follows, according to Mencius: ‘[Neighbours] share the well together in farming, befriend one another both at home and abroad … They live in love and harmony…’.\textsuperscript{439} This paradigm of the community compact/well-field suggests a highly localised, close-knit community whose nucleus is the family and the immediate neighbourhood. In line with the highly interpersonal nature of the ideal Confucian community, in this ideal, ‘[each virtuous] member thinks of furthering the goals and needs of the community as a gain for oneself’.\textsuperscript{440}

The point is, the idea of community in Confucianism does not readily lend itself to the defender’s claim that Confucianism communitarianism endorses ‘collective over individual’, or the claim that it elevates the national community’s conception of the good over its members’ competing conceptions. This is primarily because the Confucian community seeks harmony between individual members, and all members as a collective. The individual is an integral member of the community whose interests are in line with, and not opposed to, the community’s. This understanding of the Confucian community comports with the Confucian role-bearing person discussed in Part II: if the Confucian person \textit{is} the various roles that she plays, then there is no sharp distinction between individual and community in the way that ‘collective over individual’ implies, or even requires. So even accepting that the Confucian community can be understood as the national community, a loyal interpretation of the Confucian community would be that members of the national community seek harmony in the national community by maintaining harmonious relations with each other. In contrast, the claim that the national community’s interest is prioritised over its individual members’ introduces an element of contention and subordination that is not clearly present in the Confucian community. As such, Confucian communitarianism does not support the defender’s claim.

For the foregoing reasons, the defender’s claim that ‘collective over individual’ is a communitarian paradigm because it encapsulates the idea that the community should organise itself around a substantive conception of the good is erroneous. Communitarianism, properly understood, does not support the promotion of a community’s substantive conception of the

\textsuperscript{438} ibid 33.

\textsuperscript{439} Lee (n 403) 253.

\textsuperscript{440} ibid 252.
good due to the multifaceted nature of community in modern societies. But this is not to say that communitarianism cannot advance any conception of the good; in fact, my conceptual claim is that communitarianism is based on shared values—but these shared values determine a thin conception of the good.

c. Communitarianism, Properly Understood: Promoting a Thin Theory of the Good

My second conceptual claim about communitarianism is that, because community is multifaceted, communitarian politics can only promote a thin theory of the good. This thin theory promotes communitarianism’s aim of enabling individuals to access and participate in their communities in order to lead meaningful lives. It is also based on the notions of inclusiveness and reciprocity that are implied by the concept ‘community’. Finally, it is, by necessity—necessary because of the inevitable fact of the modern nation-state—engineered to strengthen ‘the bond of solidarity’ between members of the national community.

This thin theory of the good has been conceptualised as an inclusion of citizens by Sandel and Taylor. For Sandel, the communitarian politics of the common good is the politics of ‘civic virtue’, a recognition of the ‘full membership of fellow citizens wrongly excluded from the common life of the nation’.

For Taylor, the bond of solidarity is the communitarian politics of the common good: it is the common good of a political community that citizens identify with ‘the republic as a common enterprise’, creating a sense of shared fate that binds together members of a community where ‘the sharing itself is of value’. Taylor calls this ‘patriotic identification’: a ‘common identity and history, defined by a commitment to certain ideals’ shared amongst citizens of a particular nation.

The idea of a common identity and full membership is consonant with the notion of inclusiveness inherent in the notion of community that lies at the heart of communitarianism. A community is formed when a group of people who share some interest or morally relevant characteristics organise their lives, at least in part, towards a shared enterprise. Those who

442 Sandel, Public Philosophy (n 359) 153–154.
443 Taylor, ‘The Liberal-Communitarian Debate’ (n 441) 170.
444 ibid 174.
possess this morally relevant characteristic are included in the community for which this characteristic is relevant. Conversely, those who do not possess the morally relevant characteristic are excluded from the community, which strengthens the inclusiveness that is due to those who possess the morally relevant characteristic.\textsuperscript{445} For the purpose of the nation \textit{qua} community, then, the morally relevant characteristic is nationality, or a shared national identity. In this regard, the communitarian theory of the good seeks to promote the \textit{inclusion} of all members of the national community and their equality of membership. There is also an added element of reciprocity, encapsulated in the ideal Confucian community, that is important,\textsuperscript{446} so as to curb self-interested tendencies inherent in human beings. The onus is not only on the community to include those individuals who possess the morally relevant characteristic;\textsuperscript{447} but there is also an obligation of reciprocity on individual members to set aside their interest for the sake of the community if they are able and willing to bear the cost incurred.

These theories of the communitarian common good are thin in that they do not promote a comprehensive conception of the good. Instead, they specify the minimal standards that a communitarian state should put in place to realise the communitarian aim of promoting community and inclusiveness. This is the ‘good’ that communitarianism advocates: the inclusiveness that enables the communitarian self living in a modern society to immerse herself in the communities that are important to her. Undoubtedly, a reasonable question may arise: why should we be concerned with community at all? It is important to note that community’s normative significance lies not in community as a metaphysical entity, but in its being a source of value and meaning to its members. In this sense, community, and as Part II of this chapter has alluded to, is (partly) \textit{constitutive} of our identity. As Sandel describes it, a constitutive conception of community is one in which its members ‘conceive their identity … as defined to some extent by the community of which they are a part’.\textsuperscript{448} Bell fleshes out this idea more fully in his account of what he calls constitutive communities, i.e. those communal attachments that

\textsuperscript{445} I develop this point further in Chapter Four, Part II(a), 184–188. There are, of course, problems with the exclusionary nature of community \textit{viz.} outsiders. Although it is beyond the scope of this thesis, I state in Chapter Four Part II(c)(ii), 199–200 that, on top of our particular ethical obligations, we also owe obligations to human beings as such.

\textsuperscript{446} Similarly, Michael Taylor lists one requirement of community as the need for members to ‘practise certain forms of reciprocity’: Michael Taylor, \textit{Community, Anarchy and Liberty} (Cambridge University Press 2010) 3.

\textsuperscript{447} See Chapter Four, Part II, 184–196 for my articulation of the duty to include.

\textsuperscript{448} Sandel, \textit{Liberalism and the Limits of Justice} (n 19) 150.
define our identity. I will turn to this in more detail in the next chapter. Suffice to say for now that the constitutive conception of community presents communitarianism in its most favourable light: it values both individual and community, and promotes a thin theory of the good that benefits community without sacrificing the individual’s interests in the way that ‘collective over individual’ does. This thin theory is the good of inclusiveness of all members of the national community by upholding their equality of membership. This will be further elaborated on in Chapter Four.

CONCLUSION

I have subjected the principle ‘collective over individual’ to a normative critique in the light of ‘Western’ and ‘Asian’ communitarianism. I have also made a conceptual claim that the most favourable interpretation of communitarianism values both individual and community, and promotes only a thin theory of the good. I began by challenging the contention that ‘collective over individual’ is an ‘Asian’ communitarian paradigm which ‘Asian’ Singapore should adopt. I argued that this claim cannot be sustained because, first, Singapore’s ‘Asianness’ is questionable; and second, ‘Asia’ and ‘Asian’ are concepts too vague to ground a normative claim. I also challenged the argument that ‘collective over individual’ is acceptable because it is how Singapore has chosen to define its own communitarianism, arguing that conceptual disputes cannot be defined out of existence. Hence, if ‘collective over individual’ is not a favourable interpretation of communitarianism, then Singapore ought not adopt it.

I then examined the defender’s broader claim that ‘collective over individual’ is paradigmatic of communitarianism *simpliciter* and established my conceptual claim about communitarianism. The first strand of my claim is that, contrary to ‘collective over individual’, communitarianism values both individual and community. This is evident from both the ‘Western’ communitarian critique of the liberal self and the Confucian role-bearing person. These conceptions of the person collectively make up the communitarian conception of the self: the self is a social, situated and relational self.

The second strand of my claim is that communitarianism cannot promote a substantive theory of the good, but only the thin theory of the good of inclusiveness—specifically, the inclusion of all in the national community. It cannot promote a substantive theory of the good because communitarianism is premised on a pluralistic conception of community; and given
this, no single substantive conception of the good of a particular community can prevail over
the others. But a communitarian state can, and should, promote the inclusion of all in the
national community. This would enable members to participate in public life as well as the
communities that constitute their identity. The next chapter elaborates on the first element of
this inclusive conception: the theory of constitutive communities.
INTRODUCTION

I have argued in Chapter Two that Singapore’s communitarian principle ‘collective over individual’ is not a necessary requirement of communitarianism, much less a paradigmatic communitarian principle, because it does not necessarily follow from the communitarian self and the communitarian politics of the common good. The most favourable interpretation of communitarianism, in fact, values both individual and community. Given that ‘collective over individual’ is incompatible with the elevated status of Singapore’s constitutional rights, and is not necessitated by communitarianism, we have little reason to retain Singapore’s current communitarian approach to rights. To redress the problem with Singapore’s communitarian approach to rights, we should construct an alternative communitarian approach, one that proceeds from the most favourable interpretation of communitarianism. In this thesis, I construct just this approach—the Inclusive Communitarian Approach. It consists of two elements: a pluralistic conception of community as constitutive communities, and the national community’s duty to include.

This chapter elaborates on the first element: constitutive communities. As mentioned in Chapter Two, Sandel advances a constitutive conception of community, and Bell develops a full-fledged communitarian theory based on the constitutive conception. Following from the communitarian conception of the self as a social, relational and situated self, the theory adopts a pluralistic conception of community as the communal attachments that partly constitute our identity. In line with the most favourable interpretation of communitarianism, the theory values both community and individual by protecting the communities that are partly constitutive of the individual’s identity. To be constitutive of identity, these communal attachments should have shaped the individual’s values and outlook, such that they are integral to her identity and sense of self. The individual, then, has to be able to live as a member of her constitutive communities: to have access to them, to participate in them, and so on. The

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449 See Chapter Two, Part III(c), 88 and 110.
450 Bell, Communitarianism and Its Critics (n 351).
451 Appiah (n 341). This will be elaborated on later in the chapter.
Inclusive Communitarian Approach to rights conceptualises these communities as the sufficiently important interests that ground rights. Hence, constitutional rights protect constitutive communities from unjustified encroachment by the state and/or the majority in two related ways. It protects, first, the individual’s interest in accessing and participating in them, and being protected from the social harms caused by such membership. Second, it protects the communities themselves, in the variegated forms they take, from disproportionate state measures to restrict or prohibit their existence or activities.

The chapter will proceed as follows. Part I explains the theory of constitutive communities with reference to Sandel and Bell, and provides pragmatic and normative justifications for adopting this theory. Pragmatically, it responds to criticisms about communitarians’ lack of specification of what a community is by providing just this specification. Normatively, it is the most appealing theory of community because, contrary to criticisms of community as oppressive and homogenous, it recognises and promotes social differences by attaching normative significance to all the communities that constitute our identity, not just a community. This will be shown by juxtaposing the theory against monistic conceptions of community.

Part II responds to a formidable challenge to the theory: the objection from autonomy. The objection is that the idea that we are constituted by our communal attachment risks forcing autonomy out of the picture: if the self is attached and encumbered, it seems that the constitutive communities theory is simply a variation on the theme of ‘collective over individual’. Indeed, Bell’s theory ascribes wholesale normative significance to the inescapable features of our identity by asserting that they are always valuable to us in a strong sense. This claim follows from his ontology of the person that allows too little room for autonomy. I argue instead that Bell’s strong claim about constitutive communities requires a more substantive conception of autonomy so that the individual can affirm or reject the value of her constitutive communities, and prevent the theory from collapsing into ‘collective over individual’. Drawing on Kwame Anthony Appiah, I argue that the theory should be premised on the ideal communitarian self, the Constituted Autonomous Self, i.e. one who makes decisions about things of value within the boundaries set by his social world.

Part III specifies the type of communal attachments that are constitutive and hence constitutionally protected. Constitutive communities have two features: the Fundamental Feature and the Social Harm Feature. The Fundamental Feature encompasses the ordinarily
unchangeable, mostly unchosen and deep-seated elements of identity to which the individual
has made an ethical commitment. It points to the fact that membership in constitutive
communities is a fundamental aspect of our identity because these communities provide us
with what Charles Taylor calls the ‘framework’\footnote{Taylor, Sources of the Self (n 346).} within which we make important choices. As such, our membership in them is intimately intertwined with our identity and sense of self. The Social Harm Feature identifies the social harms, such as discrimination, that arise from the inexorably social nature of constitutive communities. I illustrate the salience of the Social Harm Feature of constitutive communities with Appiah’s structure of a collective identity, and Iyiola Solanke’s stigma imagery\footnote{Iyiola Solanke, Discrimination as Stigma: A Theory of Anti-Discrimination Law (Hart Publishing 2016).} which she uses to identify traits that anti-discrimination law should protect.

Communal attachments that qualify as constitutionally protected constitutive communities under the Inclusive Communitarian Approach usually contain both the Fundamental and Social Harm Features. Some examples are communal attachments based on gender, ethnicity, religion, nationality, and sexual orientation, though these are merely indicative and non-exhaustive. Because of the Constituted Autonomous Self’s capacity for autonomy, and the social dimension of constitutive communities, the question of which communal attachments should count as constitutive is always in flux. In a sense, then, it is an empirical question that depends on the extent to which individuals claiming a communal attachment to be constitutive demonstrate an ethical commitment to it, and whether the attachment is vulnerable to social harms.

Finally, a caveat: the constitutive communities theory only claims that our identity is \textit{partly} constituted by our communal attachments. When I say that we are constituted by these attachments, it should be taken to mean partly constitutive.

I. CONSTITUTIVE COMMUNITIES

a. The Theory Explained

The constitutive communities theory states that our identity as individuals is partly constituted by our social relations and communal attachments. This follows from the communitarian
conception of the social, situated and relational self: if we are born into, and then embedded in, a pre-existing social context in which we are intimately related to others, it follows that our identity is shaped and constituted by the social world and relations in which we are immersed. I am not only an individual in pursuit of a PhD; I am also a daughter, a woman, a friend, a Singaporean citizen, an ethnic Chinese, and so on.

The theory of constitutive communities ascribes normative significance to the communal attachments that have constituted our identity. This means, briefly, that they are those communities ‘with which the individual self-identifies and from which the individual gains self-esteem’ by ‘[providing her] with certain … goods that enable her to function and make choices about her life’. Constitutive communities are thus fundamental to our self-understanding and sense of identity. This sense of identity includes notions of self-esteem, dignity, personhood, self-understanding and self-confidence; essentially, it refers to the idea that we are someone worthy of our own and others’ respect because we know who we are and what we stand for. For the purpose of rights protection, the pluralistic, constitutive conception of community should be adopted to fully account for all the communal attachments that are important for our self-understanding. I will now explain the theory.

i. Sandel’s Argument

Sandel advances a constitutive conception of community in his critique of two prominent liberal arguments for redistributive justice: John Rawls’ common assets component of his difference principle in *A Theory of Justice* and Ronald Dworkin’s argument for affirmative action. Essentially, Sandel argues that Rawls and Dworkin need a stronger, constitutive conception of community than they explicitly acknowledge for their arguments to be successful. Community, for Sandel, is not only a sentiment that the ‘unencumbered self’ experiences every now and then, and neither is it an attachment that it chooses. Rather, community is a ‘constituent’ of the self’s identity, an attachment that it discovers, a description

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455 Rawls (n 343).
of what it is as a member of its community.\textsuperscript{458} Without this constitutive conception of community, Sandel argues, Rawls’ common assets cannot be redeemed without violating Kant’s injunction against treating an individual as a mere means to an end, and without disrupting the priority of the self over its ends.

For Rawls, the moral arbitrariness of natural talent and social privilege means that the benefits of those naturally talented and socially privileged are the community’s common asset\textsuperscript{459} and should be redistributed to aid the worst-off members of society. This argument, in Sandel’s view, presupposes a ‘sentimental conception’\textsuperscript{460} of community in which individuals work towards some ‘shared final ends’ and regards cooperation as a good in itself. But this sentimental conception lacks the requisite robustness to support Rawls’ theory of justice that asserts the priority of the right over the good. The sentimental view of community compromises the unity of these supposedly common assets, exposing them to the danger of crumbling under the fragility of the sentimental conception. For the self to properly view the fruits of its labour as part of its community’s common assets, it would have to be constituted to some degree by its community so that it is not treated as a means with which the community’s worst-off members improve their own ends—a using of the individual which deontological liberals are against. It would have to view, at least partially, the well-being and success of its community as its own well-being and success, not some detached others to whom the self is only sentimentally related.\textsuperscript{461} “[By] my efforts I contribute to the realization of a way of life in which I take pride and with which my identity is bound.”\textsuperscript{462} In order to arrive at this enlarged self-understanding, we need a constitutive conception of community.

Sandel’s constitutive conception is also pluralistic. In his critique of Dworkin’s argument for affirmative action, Sandel argues that Dworkin’s argument suffers the same flaw

\textsuperscript{458} Sandel, \textit{Liberalism and the Limits of Justice} (n 19) 150.

\textsuperscript{459} Sandel, \textit{Liberalism and the Limits of Justice} (n 343) 101.

\textsuperscript{460} Sandel, \textit{Liberalism and the Limits of Justice} (n 19) 149.

\textsuperscript{461} One could try to counter Sandel’s objection to Rawls’ sentimental conception of community by saying that the self would not be used as a means to an end if it cares, at some minimal level, about the success and well-being of its community, without being constituted by it. However, it is unclear why the self would care (in the relevant sense of not being used as a means to an end) about the success of this particular community and not another, and hence willingly surrender the fruits of its labour to the common asset, if it did not see its identity as partly constituted by the community to which it contributes.

\textsuperscript{462} Sandel, \textit{Liberalism and the Limits of Justice} (n 19) 143.
as Rawls’ common asset argument: it lacks an account of the ‘antecedent bond or tie’ that would justify denying some citizens an equal opportunity to compete for university admission without violating deontological liberalism’s commitment against using the individual as a means to another’s ends. For Dworkin, affirmative action policies that favour black people for university admission are justified, even if they sacrifice a constitutional right not to be disadvantaged based on race, because such policies seek to correct historical injustices against black people by reducing, in the long run, ‘the degree to which American society is over-all a racially conscious society’. Society as a whole would also benefit from having more representation of racial minorities in the legal and medical professions.

However, Sandel persuasively points out that Dworkin never specifies to whom the individual surrenders her right to compete equally for university places. Dworkin refers variously to ‘the more general society’, ‘some more general concern’, and the nation when he says that universities with affirmative action policies are ‘[fulfilling] what they take to be their responsibilities to the nation’. For Sandel, however, these terms fail to determine the relevant subject of possession that would avoid using the individual as a means to an end. For one, it does not follow that, just because the individual has no moral or privileged claim to the assets that he accidentally possesses, the wider society automatically does, because locating these assets in the wider society is just as arbitrary as locating them in the individual. More importantly, Dworkin’s lack of a distinction between society in general and the national community, and hence his lack of a conception of community, is problematic for two reasons. First, there is simply no such thing as the wider community and the society as a whole; community, rather, is pluralistic:

Each of us moves in an indefinite number of communities, some more inclusive than others, each making different claims on our allegiance, and there is no saying in advance which is the society or community whose purposes should govern the disposition of any particular set of our attributes and endowments.

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463 ibid 144.
464 Dworkin, ‘Why Bakke Has No Case’ (n 456).
465 ibid.
466 ibid.
467 Sandel, *Liberalism and the Limits of Justice* (n 19) 146.
Given community’s plurality, the second problem with Dworkin’s lack of a conception of community is that there is no immediate reason why the individual’s assets should default to the national community. For this move to work, Sandel says, Dworkin needs an account of why the nation is the relevant subject of possession and what makes it able ‘to claim … allegiance to the purposes that would arise from [the common national] identity’. Without this account—indeed, without a constitutive conception of community—Dworkin’s argument for affirmative action collapses into an utilitarian calculus by which the entitlements of some are sacrificed for the greater good, hence using them as a means to an end. A constitutive conception of community, Sandel argues, corrects this problem: if the self is partly constituted by its various communal attachments, then it sees the good of these communities as its own good, and so it is also furthering its own ends when it makes sacrifices for its various communities.

ii. Bell’s Theory

These two ideas—community as constitutive and pluralistic—are the focus of Bell’s theory of constitutive communities. Following the communitarian rejection of the unencumbered self, he adopts the communitarian conception of the self as a social being embedded in a particular contingent world. This social world provides an unchosen moral framework that imparts to the individual the values of a life worth leading. Bell then asserts that, when we think of what matters most in our lives, the answer will likely involve ‘a commitment to the good of the communities out of which [our identity has] been constituted’. The primary purpose of communitarian politics is to ‘[allow] people to experience their life as bound up with the good of the communities which constitute their identity’. Bell’s use of the plural ‘communities’ is significant: he stresses that, in the modern world, we are encumbered by many communities, including the home-town, nation and family; and so it follows that the communitarian ideal ‘must begin with a recognition of the fact that most of us identify with many communities’.

468 ibid 145.
469 Bell, Communitarianism and Its Critics (n 351) 94.
470 ibid 93.
471 ibid 91.
But not just any community that we identify with at whatever facile level has political and moral salience; only those communities that have defined our identity—i.e. constitutive communities—do. Bell specifies three closely-connected criteria for distinguishing these communities from voluntary and contingent attachments. First, a community is constitutive if it defines our sense of who we are.\textsuperscript{472} The typical intuitive replies to the question ‘who are you?’ will usually be along the lines of ‘I’m Singaporean’, ‘I’m a woman’ and so on.

Following from this, the second distinguishing feature of constitutive communities is that they ‘provide a largely background way of meaningful thinking, acting, and judging, a way of being in a world which is much deeper and more many-sided than any possible articulation of it’.\textsuperscript{473} This means that, while I can name a few traits that point to what being Singaporean means—a love for food, a native command of Singlish, a fear-of-losing-out mentality—or be convinced that ‘Singaporean’ describes an integral part of my identity, a complete picture of what it means to bear this identity eludes articulation. Contrast this with membership in a voluntary or contingent association—say, the Cambridge Lawn Tennis Club. It is exactly as its name describes: a gathering of individuals in Cambridge to play tennis. For Bell, the constitutive features of identity are always operating in the background, such that ‘we’re principally connected with [these] features … in a way which resists articulation’.\textsuperscript{474} Our inability to articulate what it means to bear these constitutive features means that they are ‘exempt from evaluation and possible rejection’.\textsuperscript{475} Bell, then, advances a strong conception of constitutive communities: unlike membership of a voluntary association, membership in constitutive communities cannot be shed. These constitutive aspects of identity, Bell argues, are ‘more than a descriptive fact about [oneself]’.\textsuperscript{476} Rather, one experiences a sense of shared fate with other members of one’s constitutive community and share a bond of solidarity with them that gives a special meaning to one’s life, such that one values this community in a way that one would not value other non-constitutive communities.\textsuperscript{477}

Bell’s third feature of a constitutive community logically follows from its deep embeddedness in the individual’s psyche and sense of identity: if an individual tried to shed

\textsuperscript{472} ibid 94.
\textsuperscript{473} ibid 95.
\textsuperscript{474} ibid 97.
\textsuperscript{475} ibid 95.
\textsuperscript{476} ibid 98.
\textsuperscript{477} ibid.
his constitutive communities, he would be ‘thrown into a state of severe disorientation’\textsuperscript{478} leading to ‘damaged human personhood’,\textsuperscript{479} a state where a person can no longer distinguish the good from the bad, the meaningful from the trivial, and is unwilling to take a stand on things that matter. This radical conclusion follows from the premise that constitutive communities define our identity in a meaningful manner. Constitutive communities are, in Taylor’s word, ‘frameworks’ in which we make strong evaluations of meaningful questions about how we live our lives, what sort of life is worth living, or how to lead a fulfilling life according to our talents and aspirations.\textsuperscript{480} To escape our constitutive communities, then—to remove ourselves from these frameworks—would be to plunge ourselves into an ‘appalling identity crisis’,\textsuperscript{481} or ‘damaged personhood’ in Bell’s words, for we would be disoriented when faced with a fork in the road, forced to make decisions about fundamentally important issues.

I will illustrate the plausibility\textsuperscript{482} of this radical claim with a literary example. In Philip Roth’s \textit{The Human Stain},\textsuperscript{483} Coleman Silk is a light-skinned African-American brought up in a black household. In his early 20s, he joins the US Navy, puts his race as white, and spends the rest of his life living as a white Jewish man. But his quest to be ‘free as his father had been unfree’\textsuperscript{484} comes at a high price: to sustain his secret, he tells his wife and children that he has no surviving family members when his mother and siblings are alive. In a powerful scene, Silk visits his mother to tell her that he is marrying a white woman who believes that he is white—and in choosing to continue to escape his constitutive blackness, he cuts off all ties with his mother, ‘[murdering] her on behalf of his exhilarating notion of freedom’.\textsuperscript{485} Silk is a strong case for damaged personhood: to sustain a fundamental lie about who he is for the rest of his life is surely no easy feat. Furthermore, if we often define ourselves in relation to our familial ties, then we could imagine that, in choosing to relinquish his ties with his family, Silk has also lost a fundamental aspect of his identity.

\textsuperscript{478} ibid 103.
\textsuperscript{479} ibid 100–102.
\textsuperscript{480} Taylor, \textit{Sources of the Self} (n 346) 14.
\textsuperscript{481} ibid 31.
\textsuperscript{482} Though partly objectionable; see Part II(a)–(b), 130–136 below.
\textsuperscript{483} Philip Roth, \textit{The Human Stain} (Vintage 2001).
\textsuperscript{484} ibid 109.
\textsuperscript{485} ibid 138.
Nonetheless, Bell’s strong claim is problematic. It suggests an eternal involuntariness of identity that ends up being as implausible as the radical voluntariness of it that communitarians have rejected. It traps us into the pre-determined narrative structures of our constitutive communities and denies that we, as individuals, write our own lives alongside our constitutive communities. This is the objection from autonomy which I will address in Part II, where I will argue that the constitutive communities theory should be premised on the Constituted Autonomous Self.

To sum up the discussion so far: the theory of constitutive communities states that, in modern societies, our identity is constituted by the various communal attachments in which we are embedded. This constitution is both a description of identity and a normative definition of who we are as individuals. As Bell argues, one implication of the theory is that the aim of communitarian politics is to allow us to access and participate in our constitutive communities so that we can lead meaningful lives. The theory, then, soothes the tension between community and individual by seeing their respective goods as intimately intertwined, and directs communitarian politics towards promoting access to and participation in our constitutive communities.

b. Justifying the Constitutive Conception

Why should we adopt the constitutive conception of community when the constitutive communities theory is not the most obvious understanding of community? As we have seen in Chapter Two, community is frequently understood to be a single entity that organises itself around a substantive conception of the good. More casual uses of community also point to different understandings of the word; for instance, community is used in common parlance to refer to associations and groups ranging from a particular neighbourhood, to members of a college at university, all the way to the ‘international community’. What are the advantages of the constitutive conception?

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486 Michael Taylor calls them ‘intentional communities’ and they include associations of individuals based on profession (‘the business community’, ‘the artistic community’, etc): Taylor (n 446) 26.
i. **Pragmatic Advantage: Specificity**

The first advantage of the constitutive conception is a pragmatic one. It is a robust response to criticisms that communitarians are often vague or unspecific about what a community is, which communities should be valued, and the political implications that follow. For instance, Bell’s expansive and specific account of constitutive communities responds to criticisms such as Ian Shapiro’s that communitarians should shift the debate ‘to a lower level of abstraction and seek to supply substantive content to the various communitarian proposals they advocate’.  

Elizabeth Frazer also points out the lack of conceptual analysis of the term ‘community’ in the communitarian literature despite the frequent references to it by political philosophers and theorists.

By defining community pluralistically as constitutive communities, the constitutive conception is specific and clear: a community that can ground constitutional rights and impose duties is one that is constitutive of its members’ identity. This element of constitution distinguishes constitutive communities from vague uses of the term in popular parlance; it might, for instance, exclude the business community and the association of tennis players. More will be said in Part III below about the two features of a constitutive community. Suffice to say for now that the constitutive conception provides a specific criterion that singles out the relevant communities that have the necessary importance to ground constitutional rights. The latter is particularly important in the context of the national community; this will be elaborated upon in Chapter Four.

ii. **Community’s Positive Connotations**

The second advantage is a normative one. The constitutive conception retains the positive connotations of community and discards the negative ones, and shields my Inclusive Communitarian Approach from some criticisms that have been directed at community. I will begin with the positive connotations. While it ought to be assumed that community is valuable and worthy of preservation within a communitarian framework, a few things should be said about its value. Frazer has identified several valuable positive connotations of community,

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including ‘commitment, reciprocity, solidarity, wholeness, personalism’. Community, too, is ‘a value, or an ideal’; an ‘aspiration to community [is] an aspiration to a kind of connectedness that transcends the mundane and concrete tangle of social relations’.

These positive connotations of togetherness, of solidarity, of a commonness of identity, buttress the normative significance of membership in these communities to the individual’s life. It is the sense that a particular deeply entrenched aspect of my identity—one that I ‘discover’, one that I am ‘thrown into’, one that I ‘inherit’—is shared with others like me, understood by others like me, that makes community valuable. This gives rise to a transcendental sense of belonging to something in the world, a sense that anchors an individual who would otherwise be adrift on a sea of endless possible contingent attachments, threatening always to sweep her this way or that, untethered to a fixity of place, of significance, of meaning, but for her constitutive communities.

The significance of these constitutive communities to the individual’s identity can be intuitively grasped by members of the national community because all of us have our own constitutive communities to and from which we feel a sense of belonging. Hence, we can tap into such sentiments of our own when asked to respect the constitutive communities of co-nationals to which we do not belong. Constitutive communities, and the sense of belonging that they evoke, are what we experience on a day-to-day basis when we interact with our family and friends, neighbours, fellow students, etc. This experience may, at times, be transcendental and intangible in Frazer’s sense; but what matters fundamentally that community is a daily lived experience, one that we have internalised, so that we can understand more easily why we should recognise others’ constitutive communities to which we do not belong. This has implications for the second element of the Inclusive Communitarian Approach, to be explained in Chapter Four.

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489 ibid 82.
490 ibid 76.
491 ibid 83.
492 Sandel, Liberalism and the Limits of Justice (n 19) 150.
494 MacIntyre (n 347) 255.
iii. Against a Monistic Theory of Community

The third advantage of the constitutive conception is that it shields the Inclusive Communitarian Approach from some of community’s negative implications. Iris Young, for instance, rejects the notion and language of community. In desiring ‘the fusion of subjects with one another’, community ‘denies and represses social difference’ by insisting on a forced commonness, including common values, between individuals and groups who may have little in common apart from a shared inhabitation of a particular geographical entity.\footnote{Iris Marion Young, \textit{Justice and the Politics of Difference} (Princeton University Press 2011) 227.} By privileging the sharing of some commonality between members, community, at best, is blind to extant differences between its members. At worst, it represses these differences in order to manufacture or manipulate a common ground on which community stakes its survival. Community so understood is exclusionary rather than inclusive, homogenous rather than diverse, and oppressive rather than empowering.

Community is exclusionary in two ways. First, community’s emphasis on commonality and mutual identification inadvertently ‘validates and reinforces the fear and aversion some social groups exhibit towards others’.\footnote{ibid 235.} This is because these social groups, by possessing a different culture, history, and point of view, violate the pact of commonness on which community is founded. Second, community’s lifeforce of commonality suggests one of two undesirable things: either this something shared already exists, which means that the population is homogenous; or the commonality must be created and maintained through a system of moral education which compromises autonomy.\footnote{HN Hirsh, ‘The Threnody of Liberalism: Constitutional Liberty and the Revival of Community’ (1986) 14(3) Political Theory 423, 435.} The homogeneity that a community seeks to maintain is dangerous because ‘only a modern society that ruthlessly engages in the practice of exclusion can be homogeneous’.\footnote{ibid.} If a community sustains itself on a commonness of meaning or ideology, then members of a community could plausibly cohere around ‘a common hatred or fear of the outsider’.\footnote{ibid 438.} This either breeds xenophobia or perpetuates the marginalisation of unpopular minorities such as homosexuals and the disabled. On this view,
community does not value the multifaceted nature of individual identities; rather, it is exclusionary, oppressive, and champions a homogeneity that eradicates differences.

Kymlicka is similarly suspicious of communitarians who harken back to a ‘romanticized view of earlier communities in which legitimacy was freely given and earned, based on the effective pursuit of shared ends’. However, such communities—including 18th century New England town governments—were able to secure this legitimacy because a significant portion of society, i.e. ‘women, atheists, Indians and the propertyless’, was excluded from membership. These communities provide a discomforting and inappropriate model for a communitarian politics of the common good because their historical practices and roles ‘were defined by … propertied, white men [] to serve the interests of propertied, white men’ to the exclusion of women, black people, and lesbians, gays and bisexuals (LGBs), etc. As such, any strengthening of community will do little for these marginalised groups. Why, then, should we privilege the language and ideal of community if it denies the very identities that I am arguing should be valued?

These criticisms of community are valid only insofar as we presuppose a monistic conception of community. The constitutive conception, on the other hand, rebuts these criticisms. An example of a monistic conception of community that validates these criticisms is Walzer’s political community, two strands of which are instructive. Walzer essentially argues that distributive justice is not a singular concept, but is relative to the different spheres of goods that a community seeks to redistribute. One such good is membership in the community itself, which the community can, and often does, distribute to strangers. The first strand of Walzer’s political community is that the criteria for distribution are shaped by ‘our own understanding of what membership means in our community and of what sort of a community we want to have’. A community is entitled to defend its distinct culture and common life against outsiders, subject to the principle of mutual aid that obliges a community to assist outsiders in certain extreme circumstances such as a humanitarian disaster. But the

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500 Kymlicka, *Liberalism, Community and Culture* (n 398) 85.
501 ibid.
502 ibid 86.
503 ibid 87.
504 Walzer (n 306).
505 ibid 32.
506 ibid 33.
principle of mutual aid will always be in tension with ‘the internal force of social meanings’.  

the community’s determination of the kind of community it wants to have.

This leads me to the second strand of Walzer’s argument that substantiates the criticisms of community. Social meanings, for Walzer, set the boundaries and content of justice. A society is just under Walzer’s framework if ‘its substantive life is lived … in a way faithful to the shared understandings of its members’. But who, if not the community, determines the social meaning of a good and its shared meanings? Walzer, in fact, says that social meanings are determined through the political community’s decision-making process—and it is justice that is subjugated to these social meanings, not the other way around.

Walzer’s monistic conception of a political community substantiates the criticisms of community because, save for his insubstantial principle of mutual aid, there is little in it to prevent a community from deciding what membership means based on an ideology that ostracises outsiders or marginalised minorities, and so potentially leading to a dangerous enforced homogeneity. Walzer’s response to the problem of marginalised members and their unshared meanings seems to assume that membership qua citizenship in the political community is sufficient to count a not-like-the-majority individual as a fully integrated member of this community, which suggests that the community’s shared meanings will also be shared by the minority member. However, he fails to mitigate the exclusionary effects of his relativistic conception of justice as social meanings save to say that social meanings are not always harmonious, and sometimes provide the tools and structure for debate. One wonders how an unpopular marginalised minority group would have the means to make its voice heard, let alone effect tangible change, if it has been historically and systemically dominated and oppressed by the majority group.

This brief account of Walzer’s monistic conception of community shows that the undesirable implications of the monistic conception are good reasons to adopt the constitutive conception of community. It is worth emphasising that, as my thesis will show, the concept of

507 ibid 34.
508 ibid 313.
509 ibid 314.
510 See e.g. on-going discrimination against Rohingya population in Myanmar. These policies and practices form the population’s shared meanings and social meaning of membership in the Myanmar political community. They are also unjust.
community is not inherently antithetical to granting rights to marginalised groups or
recognising social differences; the arguments that it is presuppose a monistic conception of
community organised around a substantive conception of the good. Young’s criticism that
community seeks a commonness which suppresses social differences is sustainable only if we
assume that this commonness is based on a substantive conception of the good. Likewise, HN
Hirsh’s charge of homogeneity presupposes that community must be based on a shared
substantive culture and way of life. Both these criticisms further assume that community
demands, like an autocratic sovereign, that each member can only adopt this one common
culture, this one common way of life, to the exclusion of all other cultures and ways of life.
Viewed in this tyrannical light, of course community is unpalatable and undesirable. But the
totalitarian implications of the monist conception demonstrate that this conception is deeply
opposed to the communitarian theory of the good of inclusiveness, as well as the aim of
fostering a sense of belonging between members.

The constitutive conception, on the other hand, rebuts these criticisms because it
recognises and values the multifaceted nature of the communal attachments that constitute our
identity and which inform our self-understanding. It does not seek to force individuals into
some arbitrarily designated enlarged self-understanding based on a single community whose
conception of the good may conflict with other communities’ conception. Rather, the
constitutive conception promotes only a thin theory of the good, some foundational principle
to which the larger (national) community is committed and which welcomes and values social
differences; namely, the good of inclusiveness. The theory, then, values the many communities
that have constituted our identity. Far from suppressing differences and diversity, the
constitutive communities theory celebrates and promotes them—and it is arguably in this way
that historically marginalised minorities can leverage on the positive connotations of
community—the sense of belonging, a source of meaning—to empower themselves.

This is not to say, of course, that community is never exclusionary under the
constitutive communities theory, for the inclusive nature of community logically entails
exclusion. The community’s prerogative to exclude outsiders is perhaps more pertinent in the
context of the political community, which I call the national community; this will be taken up
in Chapter Four. The important point for now is that the constitutive conception of community
does not suppress extant differences in the larger community, such as the national community,
by promoting a substantive theory of the good. Rather, it recognises that our identity is
constituted by many overlapping concentric circles, all of which are important sources of
meaning to our lives. The thin theory of the good that it promotes is inclusiveness, which follows from the inclusive nature of community; again, this will be taken up in Chapter Four.

To sum up the discussion so far, I have outlined the first element of the Inclusive Communitarian Approach: constitutive communities. We should adopt the constitutive conception of community because it specifies what community refers to, and it retains the positive connotations of community while rebutting the negative ones. Above all, and in accordance with the most favourable interpretation of communitarianism presented in Chapter Two, it values both the individual and the community: it protects the communities that are important for the individual’s self-understanding, and values community by protecting these different communities. I now address an important objection to the theory: the objection from autonomy.

II. CONSTITUTIVE COMMUNITIES AND INDIVIDUAL AUTONOMY

Despite the strong arguments in favour of the constitutive communities theory, there is a potential drawback. It may be objected that, if the theory essentially claims that individuals are constituted by their communal attachments, such that, following Bell, constitutive communities are exempt from evaluation and rejection, the theory inadvertently creates a recipe for social domination and oppression. Put differently, does this communitarian theory contain any conceptual space for individual autonomy, or does it conceive of the self as radically attached, without autonomy, incapable of standing apart from her constitutive attachments to reject or revise them? Without some provision for individual autonomy, it is hard to see how the theory values the individual beyond protecting the communities that have constituted her identity. Indeed, the theory may collapse back into ‘collective over individual’ if it cannot be shown how the theory carves out a space for individual autonomy, without which the individual cannot be said to be valued.

The autonomy objection is a serious one, and Bell’s strong conception of constitutive communities is particularly vulnerable to it. I will first outline the objection in section (a) and show how Bell’s theory is flawed in this way: his scant allowance for autonomy risks erasing individuality from his theory altogether. Section (b) explains that Bell’s strong claim is premised on an undesirable ontology of the person with little capacity for autonomy, and points out that his strong claim requires a more substantive role for autonomy than he allows. In
section (c), I redress the autonomy problem by outlining the ideal communitarian self on which the constitutive communities theory should be premised—the Constituted Autonomous Self. In order for constitutive communities to have value, we need to be able to affirm or reject their significance to our self-understanding. Simultaneously, in order for the Inclusive Communitarian Approach to value the individual, it has to recognise our autonomy to affirm or reject the value of our constitutive communities to our self-understanding.

a. The Objection from Autonomy

Quite ironically, the potential Achille’s heel of the constitutive communities theory is integral to it: the seemingly controversial claim that we are constituted by our communal attachments. Seyla Benhabib criticises communitarians for conflating the significance of constitutive communities for identity formation with ‘a socially conventionalist and morally conformist attitude’.\(^5\)\(^1\) Richard Dagger argues that, if the individual is constituted so thoroughly by her communal attachments, then the danger is that she would be ‘unable to think at all critically about [their] practices and traditions’, with some ‘consigned to a life of community-sanctioned oppression and exploitation’.\(^5\)\(^2\) While it is not undesirable to think of one’s identity as defined, to some extent, by one's communal attachments, this is no longer desirable if one’s identity is defined ‘almost entirely’ by these attachments, because then ‘there [would be] little room left for a sense of self, let alone individuality’.\(^5\)\(^3\) If the constitutive communities theory is unable to accommodate some individual autonomy, then it might valorise communities to the detriment of the individuals that comprise them and collapse back into ‘collective over individual’.

This objection zooms in on the problem with Bell’s theory. He puts forward a strong conception of constitutive communities without the necessary corresponding degree of autonomy to support it, resulting in, first, an internal incoherence in the theory; and second, a vindication of the autonomy objection. One may have anticipated this objection from my explication of Bell’s theory in Part I, particularly from the third feature of constitutive

\(^{51}\) Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Polity 1992) 74.


\(^{513}\) ibid.
communities—that our constitutive communities cannot be shed, and that we cannot stand apart from them to evaluate and possibly reject them. While this claim is descriptively true, Bell arguably overstates the case by claiming that these descriptive constitutive elements of our identity will always be meaningful to us in a strong, substantive way, even when we want to reject them.

To illustrate: Bell argues that if a Jew who was raised Jewish tried to ‘stop being Jewish’, it would likely be self-defeating because she is ‘principally connected’ with the constitutive nature of her Jewishness ‘in a way that resists articulation’; as such, it is ‘not possible’ to reject it.\(^{514}\) Even if the Jew does not think of herself as Jewish, the fact that being Jewish is constitutive of her identity means that she will always value the Jewish constitutive community. Valuing a community, for Bell, does not entail ‘a special obligation to endorse every particular belief or deed of that community’;\(^ {515}\) it simply means exhibiting special concern for this particular community, such as ‘[caring] more about Israeli repression in the occupied territories than about Chinese repression in Tibet’.\(^ {516}\) Given the constitutive importance of these communal attachments, escaping them would thus lead to damaged personhood (Bell’s third criterion of a constitutive community).

Kymlicka objects to Bell’s strong conception by pointing out, from a feminist perspective, that we can sometimes be damaged by our constitutive communities as well. This is why it is more plausible and desirable to understand ourselves as capable of rationally revising the constitutive features of our identity. The ‘social construction of femininity’, Kymlicka says, has ‘socialized [women] to be submissive or passive, etc’, which shows that some constitutive attachments can ‘systematically undermine people’s sense of self-respect, and make them subordinate to others’.\(^ {517}\) As such, we must be free to question and possibly reject our constitutive attachments. In response, Bell contends that women can reject the view that we are ‘biologically endowed to do dishes and change diapers’ and still feel that ‘femininity is something deep inside [us], not open to willed rejection’.\(^ {518}\) Being constituted by the community ‘women’ means, for Bell, that, even after rejecting sexist notions of femininity,

\(^{514}\) Bell, Communitarianism and Its Critics (n 351) 97.

\(^{515}\) ibid 99.

\(^{516}\) ibid 100.

\(^{517}\) Will Kymlicka, ‘Justice and Community’ in Bell (n 351) 210.

\(^{518}\) Bell, Communitarianism and Its Critics (n 351) 225.
I still care more about the fate of women and relate to women in a way that men would not, and ‘still live my life as bound up with the good of the female community’. Trying to escape the inescapable constitutive features is profoundly damaging, Bell argues, because ‘it means losing touch with the deepest source of one’s being’. Bell uses Simone de Beauvoir as an example: even after consciously rejecting feminine notions by, for instance, rejecting marriage and spending most of her time in the company of men, Bell says that her writings on women and the elderly ‘suggest that she was drawing on caring social values deep inside her [that were] sustained by women in history’. Presumably, this means that de Beauvoir’s attempt to escape her female constitutive community was self-defeating because ‘feminine’ values had already been deeply entrenched in her.

Both Bell’s strong conception of constitutive communities and Kymlicka’s objection are problematic. While Kymlicka is right to point out that we should be able to rationally revise the damaging aspects of our communal attachments, he misses Bell’s point about the constitutive nature of these attachments. In Bell’s words, they are inescapable, and so even when feminists rightly reject sexist notions of femininity, this does not amount to a total rejection of being a woman. Rather, it means engaging in a discourse with other women about what it means to be a woman and participating in the female constitutive community in this way. In this regard, Bell is right to say that these constitutive features of our identity are inescapable; simply in virtue of our discussing what it means to be a woman or a Jew, we are acknowledging the importance of these descriptive facts of our identity to our identity.

But where Bell goes wrong, and where I depart from his theory, is to conflate acknowledgement with affirmation, the result of his theory’s lack of autonomy. I can acknowledge that being a woman is an important fact of who I am in a descriptive way, but I do not necessarily have to affirm its importance. I could reject sexist notions of femininity without consciously building my life around a particular feminist conception of the good life. The contention, then, is over the degree to which these constitutive elements of identity, inescapable in a descriptive sense, are a source of meaning and value to the individuals who bear them.

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519 ibid.
520 ibid 226.
521 ibid.
Following from the above, the second problem with Bell’s strong conception is that it is a simplistic and risky overstatement of the importance of constitutive communities to our identity and self-understanding. That we value these constitutive communities to varying degrees suggests that all of us have different ideas about what it means to be a member of these constitutive communities. Bell’s strong conception appears to neglect the fact that the meaning of membership in these constitutive communities is constantly contested, especially by the members themselves. His theory is thus simplistic for assuming that there is a universal conception of these various memberships; for instance, the ‘universal’ conception of a woman defined by ‘caring social values’. To define a woman in this way is to undermine the value of a female conception of the good life, one which does not conform to the ‘universal type’ of woman, to the woman who lives it—such as de Beauvoir. Put differently, by paying scant attention to competing ideas of what it means to be a woman, this simplicity overlooks the reality that what some women find sexist—such as marriage and the expectation of motherhood—others find fulfilling and vice versa.

Bell’s strong conception is risky, then, because his simplicity neglects the extant diversity within a constitutive community, and the autonomy that the individual needs to navigate this diversity. Without this autonomy, Bell’s theory is unable to live up to its own promise of enabling us to access and participate in our constitutive communities to live meaningful lives. It neglects the possibility that one way for us to lead meaningful lives is sometimes a rejection of a particular idea of what it means to be a member of a particular community, an idea that conflicts with our own understanding of it. Indeed, Bell’s strong conception risks distorting constitutive communities as a source of meaning to the individual. Now engorged, these constitutive communities become a deluge in which the individual cannot stay afloat, engulfing her with its demands to conform to the beliefs and mode of behaviour that other members of the constitutive communities expect, which she does not endorse.

This also suggests that Bell’s theory does not adequately account for the fact that, because we are constituted by many different communities, we often find ourselves having to negotiate the competing demands that our constitutive communities make on us. As pointed out in the feminist critique of autonomy, there are vast disagreements amongst feminists themselves about how to conceptualise autonomy in the ‘feminist way’ because women are not
just women; we are also black, or LGB, or Catholic.\textsuperscript{522} These other constitutive communities inform our experience as women in a manner that might be alien, or insensitive, to women from other constitutive communities.

Similarly, and going back to Bell’s claim that it would be self-defeating for a Jew to stop being Jewish, there is no obvious reason why we cannot supplement a loss of meaning from our rejection of one constitutive community with the meaning we derive from other constitutive communities. While we can see how a Jew who renounces Judaism would feel a deep sense of loss because being Jewish was a fundamental part of her life, it is not really self-defeating because she \textit{can} stop being Jewish without being less of a person—and this is possible because the Jewish constitutive community is but one of her many constitutive communities. It may be that she was motivated to renounce Judaism because it clashed with another constitutive community which she has affirmed as more important, thereby balancing out the loss of meaning from her renunciation of Judaism. So even though it may be the case that she will always identify with some aspects of being Jewish, it is more plausible than Bell claims that she would stop thinking of herself as Jewish in an important, non-descriptive sense, and that it would not lead irretrievably to damaged personhood.

Hence, if we accept Bell’s strong claim about constitutive communities without supplementing it with some degree of autonomy, it suggests that we ought to either conform to a conception of a particular identity, or always feel a special concern for our constitutive communities, or both. The question then arises: where does the constitutive community end and the self begin? Thus vindicating the objection from autonomy.

\textbf{b. The Constituted Self?}

The problem with Bell’s theory is that it is based on an impoverished ontology of the person hostile to a minimal conception of autonomy—and this ontology is irreconcilable with his strong conception of constitutive communities. Bell’s strong claim is intelligible only if his theory contains some degree of autonomy so that we can affirm or reject the value of our constitutive communities. Having this degree of autonomy also values the individual by acknowledging her capacity for making decisions about what is valuable within a particular

\textsuperscript{522} Diemut Bubeck, ‘Feminism in Political Philosophy: Women’s Difference’ in Miranda Fricker and Jennifer Hornsby (eds), \textit{The Cambridge Companion to Feminism in Philosophy} (Cambridge University Press 2000).
context. I will turn to the latter point in section (c). For now, I will address the issue of the lack of autonomy in Bell’s theory, and how it does not cohere with his strong conception of constitutive communities.

In line with the communitarian tradition, Bell’s starting point is that we are ‘social beings, embodied agents “in the world” engaged in realizing a certain form of life’. Our actions are guided by the ‘hidden hand of the community’, including its social practices such as ways of talking, eating, walking, dressing and so on. These practices operate mostly in the background and are our coping skills for everyday life; our normal mode of existence is ‘unreflectively acting in a way specified by the practices of one’s social world’. We only act as a deliberate, choosing subject when there is a disruption in our normal mode of existence; Bell calls this a ‘breakdown mode’. It can be mundane, such as trying to use chopsticks in a Chinese restaurant; or it can be significant, such as resolving a moral dilemma. In such situations, the individual, forced to struggle with the problem, formulates different solutions, eventually choosing one.

Bell reveals his scepticism towards autonomy when he argues that there has been a disproportionate philosophical focus on this breakdown mode. We are not self-sufficient subjects realising an autonomously arrived-at life plan, Bell argues; we have mistakenly believed that we have the capacity to choose our conception of the good life and make our own decisions regarding things of value. We do not choose a conception of the good as much as we inherit ‘a framework which defines the shape of lives worth leading’ set by our social world, forming the ‘authoritative moral horizons within which we determine … “what’s worth doing, achieving or being”’. Choice as a value is thus overstated, for Bell sees no reason why the best life is one that is chosen by the individual because there are legitimate reasons for living a life that is both unchosen and uncoerced by the state, such as unreflectively stumbling into an occupation and finding it fulfilling.

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523 Bell, Communitarianism and Its Critics (n 351) 31.
524 ibid 32.
525 ibid.
526 ibid 33.
527 ibid 36.
528 ibid 37.
From this sketch of Bell’s ontology of the social being, we can see that the only allowance he makes for individual autonomy is the individual in breakdown mode—which suggests that the individual exercises autonomy only exceptionally. For the rest of the time, the individual acts unreflectively throughout the course of her life. She does not choose her life plan but stumbles into it, pushed along by the hidden hand of her constitutive communities. Her identity is so thoroughly constituted by her communal attachments that she cannot rationally affirm or reject them; instead, she is constituted by them in an unthinking, almost mechanical fashion, and jolted out of her stupor only when she experiences a breakdown in her everyday routine.

So why would Bell’s communitarian individual value her constitutive communities and feel a sense of shared fate with her fellow members? Why would her constitutive communities matter to her other than as mere vehicles for her unthinking procession through life in a bizarre, Huxleyian manner? As an unreflective being, Bell’s communitarian individual’s sense of meaning cannot penetrate what is only skin deep; she is bereft of the self-reflective, self-determining capacity that enables her to affirm the value of these unchosen constitutive communities to her self-understanding, to appreciate their significance beyond external, fixed facets of her identity. If the unencumbered liberal self lacks character, as Sandel argues, then Bell’s unreflective, oblivious communitarian self lacks substance and depth. This, then, undermines the normative force of constitutive communities. Instead of a source of meaning and belonging for the individual, these constitutive communities mutate into something pernicious, degenerating into totalitarian entities imposing their hegemony over hapless individuals trapped in their dominions. The objection from autonomy would then win the day: the individual constituted by her communal attachments is ensnared, even if unknowingly, by her communities, the usurpation of her individuality so complete that there is nothing left but a coat-hanger for her communities’ practices, traditions and values. This account of constitutive communities fails to value the individual and collapses into ‘collective over individual’.

c. The Constituted Autonomous Self

We need an account of a self who recognises the constitutive force of its communal attachments, yet retains a degree of autonomy with which to affirm or reject the value of her

constitutive communities. At the risk of stating the obvious, we need a midpoint between the unencumbered and the encumbered self—I will call this the Constituted Autonomous Self. This ontology of the person should be preferred to Bell’s for two reasons. First, as sub-section (ii) will demonstrate, it makes better sense of Bell’s strong conception of constitutive communities than his own ontology. Second, this account is arguably a more plausible description of our self-understanding than Bell’s. As will be shown shortly, we act autonomously in ordinary, mundane ways, and not only in an exceptional breakdown mode as Bell suggests. Since I am seeking to draw normative implications from my proposed account of the Constitutive Autonomous Self for my pluralistic conception of community as constitutive communities, these implications would be more persuasive if they are drawn from a more plausible descriptive account of autonomy.  

i. A Sketch of Constituted Autonomy

For the self to be constituted and autonomous, it needs to possess the necessary tools and capacities to participate in the constitution of its own identity. It needs, first, and following Sandel, the capacity for self-reflection to survey the claims and demands made upon it by its constitutive attachments. Its capacity for self-reflection allows it to place some reflective distance between itself and its history to negotiate the boundaries between itself and its encumbrances, finally arriving at a self-understanding ‘less opaque if never perfectly transparent’. Within this process of self-reflection is an element of choice which Sandel downplays when he contrasts reflection with choice. But this element of choice is necessary for the self to arrive at a more-or-less satisfactory self-understanding. And so, second: it needs the capacity for choice, exercised after it reflects on the various stakes made upon it by its constitutive attachments, rejecting the ones that go too far and affirming the ones that cohere with its self-understanding. Without the capacity for choice, the self, however reflective, however reflective,

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530 It might be said that this is guilty of the ‘is/ought’ fallacy. As James Griffin has argued, however, a moral philosophy should not prescribe an impossible, or exceptionally good, moral life for us to lead. In the same vein, a normative theory that appeals to existing intuitions and which comports with our self-understanding will have greater persuasive force than one which does not. See James Griffin, What Can Philosophy Contribute to Ethics? (Oxford University Press 2015).

531 Sandel, Liberalism and the Limits of Justice (n 19) 153.
however interpretive, would be too encumbered and crumble under the weight of these competing claims.

The Constituted Autonomous Self constructs its self-understanding and self-conception from what Appiah calls ‘a tool kit of options made available by [its] culture and society’. Autonomy, after all, ‘requires a social context as an enabling, or causal, background; it cannot emerge except out of social relationships’. This toolkit of options is the Constituted Autonomous Self’s constitutive communities. It reflects on these available options and chooses the one that best expresses its self-conception, or individuality, in Appiah’s term. Appiah uses a literary character, the butler Mr Stevens from Kazuo Ishiguro’s *The Remains of the Day*, to illustrate his point. Mr Stevens is autonomous, Appiah argues, because he chooses his own plan of life within the limits set by his culture and society. This plan is to be the best butler that he can be, and he acquires and develops skills to pursue this plan. His commitment is ‘an expression of [his] individuality, of who [he is]’, an individuality expressed within his constitutive communities: his history (his father was a butler) and social context (one cannot be a butler in a world without the social institutions that require a butler). The objective quality of Mr Stevens’ choice is immaterial: it does not matter that Mr Stevens’ life plan is perhaps not something that ought to be chosen if he had other reasonable options, or, if it is his only option, he ought not to be as committed to it as he is because ‘the life of the perfect servant is not one of great dignity’. What matters, for Appiah, is that the choice to be the best butler that he can be is an expression of Mr Stevens’ individuality, a contextualised exercise of his autonomy.

One might be sceptical of this account of autonomy, its expanse curtailed by the very thing that autonomy should fight against: the individual’s social limitations. The sceptic might say that Mr Stevens is not really autonomous: by defining himself almost entirely by his constitutive attachments—his family background, his social class, his inherited place in society—Mr Stevens has failed to truly choose his conception of the good life. Rather, he is, as Bell might say, merely ‘slipping’ into his inherited role as a butler and ‘[acting] in a largely unreflective manner’. In contrast, Coleman Silk is the one who is truly autonomous. He has

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532 Appiah (n 341) 107.
534 Appiah (n 341) 13.
535 ibid 11.
536 Bell, *Communitarianism and Its Critics* (n 351) 41–42.
rejected his constitutive racial community, his family, the way of life in which he was brought up and chosen, freely and autonomously, to live by his self-conception as someone unshackled by the burdens of history, free to invent and re-invent himself, unencumbered by any antecedent claims of his race upon his personhood. For the sceptic, Silk epitomises what it means to be autonomous. Mr Stevens, on the other hand, is a cautionary tale against a reduced conception of autonomy: it traps the individual into his social station and prevents him from rising above his lot.

The sceptic might have a point about Silk—that he illustrates what an unencumbered self exercising its autonomy might look like. But one wonders if he is truly autonomous in the sense of being radically free to choose his own identity. One wonders, and as Roth suggests, if Silk were not simply living as an American: ‘Was he merely being another American and, in the great frontier tradition, accepting the democratic invitation to throw your origins overboard if to do so contributes to the pursuit of happiness?’ So Silk may have abandoned some of his constitutive attachments; but when it truly matters—when he believes that he has broken free of the particularistic chains of his history—he is as tethered as anyone else—others less egomaniacal, less grandiose, like Mr Stevens—to the formative anchor of one of his constitutive communities.

Furthermore, one wonders if it is ever possible for any individual to completely ‘[distance] himself from social influences and conventions, and [conduct] himself according to principles that he has himself ratified through critical reflection’. What the communitarian insight into the self tells us is that such a view from nowhere, as it were, is incoherent and empty. ‘One is a self only among other selves,’ Taylor says; we require the tools and language for our self-understanding in a ‘common space’ with those that surround us, including the communities that constitute us. That said, the boundaries of our constitutive communities are porous rather than impermeable; we may later ‘innovate’, ‘develop an original way of understanding [ourselves] and human life’, and we may even follow in Silk’s footsteps and denounce certain constitutive aspects of our identity. But such autonomous

537 Roth (n 483) 334.
538 Appiah (n 341) 38.
539 Taylor, Sources of the Self (n 346) 35.
540 ibid.
541 ibid.
innovations, to paraphrase Taylor, do not sever our dependence on our constitutive communities; they only change the nature of our dependence by shifting it from one (Silk’s constitutive blackness) to another (Silk’s constitutive Americanness).\textsuperscript{542} A radical conception of autonomy is thus implausible.

What matters for a meaningful and realistic conception of autonomy is not the absence of fetters on the individual’s choice, but the capacity for \textit{making a self-reflective choice} within the range of options that the individual’s social framework makes available to her. But what of the actual choice that the individual makes? Should we agree with Appiah that it does not matter that the chosen life plan is perhaps one that the individual should not have chosen if she had other options, as long as the individual chooses and commits to it? As Appiah himself admits, his choice of Mr Stevens to illustrate his conception of an autonomous person is vulnerable to objection: Mr Stevens’ life seems like a failure because the man that he serves is a failure, and his dogged pursuit of his vocation cost him the love of his life.\textsuperscript{543} Hence, someone like James Griffin might say that, far from being autonomous, Mr Stevens has fallen prey to conventionality, the enemy of autonomy.\textsuperscript{544} For Griffin, we make an autonomous decision when we come to realise that our life goes better when we accomplish something with it,\textsuperscript{545} and so we choose something that is worth doing, something valuable that fulfils life and prevents it from being wasted.\textsuperscript{546} Value judgements of this sort, Griffin says, can be correct or incorrect, and so Mr Stevens has made an incorrect choice to be a butler because he eventually accomplishes very little with his life. Perhaps more agonisingly, and as the feminist critique of autonomy has highlighted, can one autonomously affirm a life that contains inherent inequalities? After all, being a butler exemplifies class divisions and social inequalities; he is

\textsuperscript{542} ibid 39. This is a paraphrase of Taylor because, in this part of his book, he talks about the formation of identity through a common language with those around us; our interlocutors and our selves exist only in ‘webs of interlocution’: ibid 36. In the original text, Taylor says that although we can ‘dethrone the given, historic community as a pole of identity’, this merely changes the webs of interlocution and the nature of our dependence on them. Even though Taylor is specifically referring to the role of language in our identity formation, the point is the same for constitutive communities.

\textsuperscript{543} Appiah (n 341) 12.

\textsuperscript{544} Griffin (n 18) 151.

\textsuperscript{545} ibid 155.

\textsuperscript{546} ibid 117–118.
subordinated to those that he serves. Could one autonomously choose a life of subordination,\textsuperscript{547} or are we so thoroughly socialised that we are oblivious to it?

The problem with what Marilyn Friedman calls a substantive, as opposed to content-neutral, conception of autonomy,\textsuperscript{548} one that would judge Mr Stevens’ life a failure, is that it valorises autonomy as the ultimate value, thereby diminishing the value of anything that is not chosen in a radically free manner—including the range of options given to us by our constitutive communities. Not only is substantive autonomy inconsistent with communitarianism, but it is also, as Friedman argues, excessive and ‘implausibly cumbersome as [a reconstruction] of what people ordinarily care about’.\textsuperscript{549} It is excessive because a person committed to autonomy as a value is simply committed to making self-reflective choices about what matters to her and acting accordingly; this does not require that she eradicates all external influences on her choices. It is implausibly cumbersome because, if substantive autonomy required us to value our own substantive autonomy, this amounts to saying that ‘I valued my very valuing of my own [autonomous] activity’.\textsuperscript{550} If autonomy essentially requires us to make choices that cohere with our deepest self-understanding and wants, substantive autonomy demands too much by asking for unnecessary ‘metalevel self-reflections’.

More importantly, substantive autonomy demands that our choices be free of the external forces of socialisation—and this is implausible because ‘no one escapes the influence of socialization’.\textsuperscript{552} This fact alone ‘does not undermine humanly possible autonomy … [if the] autonomous behaviour … represent what someone reaffirms as deeply important to her upon reflective consideration’.\textsuperscript{553} If Mr Stevens’ choice to be a butler is an expression of who he is, and an affirmation of what is deeply important to him, then it is an autonomous choice even if he chose a life of subordination. To discount the autonomous quality of this choice on a substantive conception would be to ignore other equally important values to our lives, such as the satisfaction that he derives from his job, and his conviction that he is living his authentic

\textsuperscript{547} Marilyn Friedman and Angela Bolte, ‘Ethics and Feminism’ in Linda Martín Alcoff and Eva Feder Kittay (eds), \textit{The Blackwell Guide to Feminist Philosophy} (Blackwell Publishing Ltd 2008) 90.
\textsuperscript{548} Friedman (n 533).
\textsuperscript{549} ibid 21.
\textsuperscript{550} ibid.
\textsuperscript{551} ibid.
\textsuperscript{552} Friedman and Bolte (n 547) 90.
\textsuperscript{553} Friedman (n 533) 25.
What ought to lie at the heart of autonomy, then, and as Appiah argues, is the individual’s choice of life plan that best accords with her self-conception, not objective standards of what is a life worth living. For this, a minimum, content-neutral conception of autonomy would suffice: a range of options within one’s social world, a capacity for self-reflection and choice, ‘an endowment with minimum rationality, an absence of coercion’,\footnote{555} and choices that ‘accord with deeper wants and values that the acting person has self-reflectively reaffirmed’.\footnote{556} This is the autonomy that the Constituted Autonomous Self exercises within the boundaries outlined by its constitutive communities.

### ii. The Significance of Constitutive Communities

The Constituted Autonomous Self’s capacity for choice allows it to affirm or reject the value of its constitutive communities to its self-understanding. We can now make sense of Bell’s strong conception of constitutive communities: for constitutive communities to matter to us beyond external aspects of our identity in the manner that Bell claims, we need to have \textit{affirmed} their value to our self-understanding. Bell’s strong conception, then, requires the Constituted Autonomous Self.

I will say more about what it means to affirm the value of our constitutive communities to our identity in Part III, section (a) below. Suffice to say, for now, that Appiah’s notion of ‘living-as’ is instructive: we affirm their value when we live as members of our constitutive communities. Mr Stevens, for instance, chooses a plan of life in which he ‘lives \textit{as} a butler, his father’s son, a man, a loyal Englishman’—and it is this ‘living-as’ that singles out our identity.\footnote{557} In living as members of its constitutive communities, the Constituted Autonomous Self internalises them as a source of value that ‘structures [its] sense of [its] life’.\footnote{558} Contra Bell’s unreflective self, the Constituted Autonomous Self can appreciate its constitutive communities in the manner that Bell suggests; namely, they are so important that trying to escape them, or to change the constitutive elements of identity, would lead to ‘damaged

\footnote{554} This is an allusion to Taylor’s moral ideal of authenticity. See Charles Taylor, \textit{The Ethics of Authenticity} (Harvard University Press 1992).
\footnote{555} Appiah (n 341) 40.
\footnote{556} Friedman (n 533) 28.
\footnote{557} Appiah (n 341) 16.
\footnote{558} ibid.
personhood’. And the Constituted Autonomous Self is capable of doing so because it has affirmed the value of its constitutive communities by living as its various members. As such, it is cognisant of the meaning and value that its constitutive communities bring to its life.

Nonetheless, we should reject Bell’s strong conception of constitutive communities insofar as it fails to notice the important difference between acknowledgment and affirmation, discussed in section (a) of this Part. Because the Constituted Autonomous Self is autonomous, it can choose not to affirm the value of certain constitutive communities to its self-understanding, even if the communities’ practices, values and modes of behaviour operate in the background, as Bell claims. This is important for two reasons. First, conflating a descriptive fact about identity with its normative significance to its bearer is likely to misdescribe and overstate the significance of some constitutive communities to their members. While Bell’s insight about how constitutive communities operate in the background and are so ingrained in us that we can never totally escape them is a plausible description of identity, it does not mean that all of our constitutive attachments have normative significance to us. It is as plausible that an ethnic Chinese would feel connected to her culture as it is that another ethnic Chinese would feel no such connection at all.

As such, a second reason to reject Bell’s strong conception is that a communitarian theory oblivious to the importance of individuals affirming the value of their constitutive communities is likely to be self-defeating. Without this affirmation, constitutive communities are merely descriptive facts about their members: the Singaporean who does not value the Singaporean constitutive community is only a Singaporean in a descriptive sense, and the Singaporean constitutive community would not be a source of meaning to her. Even if it has provided her with objectively important values, these values are valuable to her only if she has affirmed them, for they would not be important to her if she is unaware of their significance to her life.

To sum up Part II: I have addressed the autonomy objection to Bell’s theory and argued that, in order for Bell’s strong conception of constitutive communities to work, it needs to be premised on a self that is capable of some autonomy. I then argued for the Constituted Autonomous Self, i.e. one who exercises its capacity for self-reflection and choice within the boundaries of its constitutive attachments. The Constituted Autonomous Self affirms the value of its constitutive communities by living as a member of those that are important to its identity and self-understanding.
So far, I have said a lot about constitutive communities and used various illustrative examples, but I have not specified and explained the criteria with which to determine which communal attachments are constitutive communities. I now turn this task in the final Part III.

III. CONSTITUTIVE COMMUNITIES AND CONSTITUTIONAL RIGHTS

The purpose of the Inclusive Communitarian Approach is to protect rights within a communitarian framework. I am thus looking for communitarian interests that can be protected by constitutional rights. In this regard, my basic argument is as follows. On the Inclusive Communitarian Approach, constitutional rights protect constitutive communities, including our interest in them, from unjustified encroachment by the state and/or the majority. Such encroachment could be a restriction or prohibition of a constitutive community’s activities or an outright ban on its existence.

This basic argument presupposes that our interest in our constitutive communities—to participate in them, to have access to them, to exit them—is sufficiently important to impose duties on others to respect the various rights that arise accordingly. In order to be sufficiently important, a constitutive community typically has two features: the Fundamental Feature and the Social Harm Feature.

a. The Fundamental Feature

The Fundamental Feature of a constitutive community points to the ordinarily unchangeable, mostly unchosen and deep-seated elements of identity that are deeply entrenched in our self-understanding, and which reflect a demonstrated ethical commitment. The Fundamental Feature is the key communitarian insight that animates the core of my Inclusive Communitarian Approach: for a communal attachment to be constitutive and constitutionally protected, it has to form an integral part of identity and provide us with a context of meaning with which we make sense of our lives and the world. The committed Catholic, for instance, ‘cannot conceive of herself without those deep-down attachments’.\(^5\) Being fundamental, these features cannot

\(^5\) Bell, *Communitarianism and Its Critics* (n 351) 170.
be easily discarded: the Constituted Autonomous Self has affirmed their value to its identity, so that changing them would come at a great personal cost.

Following from the discussion in Part II, a communal attachment contains the Fundamental Feature if its members have affirmed its value to their self-understanding. As mentioned earlier, we affirm a communal attachment as constitutive when we live as its members—when we have internalised it as a source of value that structures our lives. To live as a member is also to identify as one. Identification, as Appiah says, is ‘the process through which individuals shape their projects—including their plans for their own lives and their conceptions of the good life—by reference to … available identities’.560 Making such decisions involves asking whether a certain plan or conception of the good life is ‘appropriate’ for a woman or a gay man, for instance; and this is because the identity ‘plays a role in shaping the way the agent makes decisions about how to conduct a life, in the process of the construction of one’s identity’.561

Note, though, that identification and affirmation do not always require that the individual makes a conscious, deliberate choice to affirm the value of the constitutive community.562 Minimally, the individual identifies as a member of a constitutive community—say, the Swiss constitutive community—when this membership is nominally more than a descriptive fact of who he is; that is, this membership is important in a more than merely descriptive way. A Swiss who is not particularly patriotic nevertheless identifies as Swiss, and hence affirms the value of the Swiss constitutive community to his self-understanding, when he recognises that the Swiss constitutive community has, for instance, shaped his thinking about participatory democracy in a fundamental way.

We can, of course, also affirm the value of our constitutive communities in a more substantive way. Constitutive communities provide what Taylor calls the ‘frameworks’ within which we make sense of our lives. ‘Frameworks’, Taylor says, are our articulation of ‘[what] we presuppose when we judge that a certain form of life is truly worthwhile, or place our dignity in a certain achievement or status, or define our moral obligations in a certain manner’.563 Constitutive communities thus orientate us in ‘moral space, a space in which

560 Appiah (n 341) 66. (emphasis removed)
561 ibid.
562 I am grateful to Raffael Fasel for his feedback on this point.
563 Taylor, Sources of the Self (n 346) 26.
questions arise about what is good or bad … and what is trivial and secondary’. My strong sense of duty to my parents, for instance, is moulded by my ethnic Chinese constitutive community that stresses filial piety as a fundamental value.

The inextricable connection between constitutive communities and identity means that trying to change them—trying to change the fundamental, deeply important aspects of who we are as individuals—would come at a great personal cost. ‘To know who I am,’ Taylor argues, is a species of knowing where I stand. My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon within which I am capable of taking a stand.

If membership in our constitutive communities defines our identity, losing it would cause an “identity crisis”, an acute form of disorientation … [lacking] a frame or horizon within which things can take on a stable significance, within which some life possibilities can be seen as good or meaningful, others as bad or trivial’. This is the great personal cost that we would incur if we tried to change the constitutive elements of identity. I would, for instance, cease to know who I am and how to shape my life if I were forced to become a man, or a certain type of woman; likewise, losing touch with my home country would be a loss of something that has ‘stable significance’ if my home country has been a positive source of meaning to my life. As such, affirming the value of our constitutive communities affirms that our membership in them is fundamental to our identity; and because our identity helps us navigate the world, it is inseparable from our sense of dignity and personhood. It follows, then, that our ability to live as a member of the constitutive communities that we have affirmed is integral to our identity, self-understanding, dignity, etc.

My explanation of the Fundamental Feature may raise the following question: what type of communal attachments possess the Fundamental Feature, and to what extent does the Fundamental Feature require a communal attachment to be ordinarily unchosen and unchangeable? To put the question another way, does the Inclusive Communitarian Approach follow Bell’s distinction between constitutive communities and voluntary/contingent

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564 ibid 28.
565 ibid 27.
566 ibid 27–28.
attachments; that is, between ‘the proud French speaker, the committed Catholic, and the … homosexual’, and ‘the checkers player or the member of the Led Zeppelin Fan Club’. In light of his examples, Bell is likely to say that only communal attachments based on traits such as nationality, sexual orientation, religion, gender and ethnicity are constitutive communities. He is likely to deny that someone who has lived in many different countries but who is a committed salsa dancer has a constitutive salsa dancing community, or that a profession that we have chosen is more constitutive of identity than being English, or Catholic, or black, and so on.

The spirit of Bell’s distinction is arguably sound; that is, there is something special about constitutive communities that elevates them above other communal attachments that are merely contingent or voluntary. However, Bell’s sharp distinction conflicts with Constituted Autonomous Self on which the Inclusive Communitarian Approach is premised. Although Bell is right to highlight that the types of communal attachments that tend to possess the Fundamental Feature are those based on what anti-discrimination law calls ‘immutable characteristics’ and ‘constructive immutability’, such as nationality, gender, sexual orientation, religion (including conscience) and ethnicity, the Constituted Autonomous Self has more leeway than Bell allows for other types of communal attachments to be fundamental to its identity and self-understanding. In this regard, Bell’s distinction dismisses as frivolous too quickly the ‘means through which contemporary selves are (re)made’ and the possibility that participation in a subculture can be an authentic communitarian experience, too. The Constituted Autonomous Self, unlike Bell’s unreflecting communitarian self, possesses the capacity for self-reflection and choice. It is able to reflect upon its communal attachments,

567 Bell, Communitarianism and Its Critics (n 351) 170.
569 This is a term used by the Canadian Supreme Court to refer to characteristics that, strictly speaking, are not immutable, but which are nevertheless ‘changeable only at an unacceptable cost to personal identity’: Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2 SCR 203 [13]. My Inclusive Communitarian Approach does not distinguish between these two types of characteristics. As long as an element of identity satisfies the Fundamental and Social Features, it will be considered constitutive.
including those that it has chosen after the original constitution of its identity, and affirm the ones that cohere with its self-understanding, and reject the ones that do not. Affirming its communal attachments in this way is also to make an ethical commitment to it; that is, to acknowledge that this communal attachment defines its identity *fundamentally* because it provides it with certain important values, without which it ceases to be the same person. Hence, the cosmopolitan salsa dancer can reject the value of his national communities to his self-understanding, and affirm the value of the salsa dancing community as an integral element of his identity. The Constituted Autonomous Self ought not be coerced into aping a moral commitment to a constitutive community with which it does not identify, and be denied the dignity of living as a member of one to which it has made an ethical commitment.

What, then, of the extent to which the Fundamental Feature requires a communal attachment to be ordinarily unchosen and/or unchangeable? While it is perhaps usually the case that the immutable and constructively immutable features of identity are constitutive, these are neither necessary nor sufficient conditions. The crux of the Fundamental Feature is our affirmation of the value of certain communal attachments to our self-understanding; whether they are unchosen and/or unchangeable does not, and should not, affect the quality of the affirmation. Although communal attachments based on traits such as nationality, gender, sexual orientation, religion and ethnicity provide the initial frameworks in which we choose our conception of the good, to deny the fundamental importance of the choices that the Constituted Autonomous Self makes within these frameworks would be to deny its very autonomy altogether. As argued in Part II, this is both an implausible and undesirable way to think about ourselves.

On the Inclusive Communitarian Approach, then, the Constituted Autonomous Self has the leeway to affirm as fundamental to its identity those communal attachments that Bell would consider voluntary and/or contingent. These communal attachments are fundamental if the individual has reflected upon their value and affirmed their fundamental importance to her self-understanding. We could say, for instance, that Mr Stevens’ choice of being a butler, and hence his ‘butler’ communal attachment, exhibits the Fundamental Feature because he has affirmed its value to his identity by committing himself to be the best butler that he can be. Likewise, a committed marathon runner’s communal attachment of marathon runners may also possess the Fundamental Feature if the runner has made an ethical commitment to running because running gives meaning to her life by, say, teaching her discipline and determination. It is thus plausible that a group of committed marathon runners would feel a greater sense of belonging with each
other than, say, a group of Singaporeans if the former group of individuals has affirmed the value of the communal attachment to their lives and the latter has not. Hence, communal attachments that fall outside the usual categories can contain the Fundamental Feature as well.

If the Constituted Autonomous Self has the scope to affirm and/or reject the value of its ordinarily unchosen and unchangeable communal attachments, and to choose communal attachments that it later affirms as meaningful, this seems to pose a problem for the Inclusive Communitarian Approach. I have said that constitutional rights protect only interests that are sufficiently important to justify imposing a duty on others to respect our right to those interests. My explanation of the Fundamental Feature of constitutive communities has shown that the Fundamental Feature, although containing an objective element when it points to descriptive facts about identity, is largely subjective, allowing the Constituted Autonomous Self to choose certain communal attachments—salsa dancers, butlers, marathon runners—to be fundamental aspects of its identity. If this is so, does it mean that any communal attachment that is affirmed as meaningful to the individual has the requisite importance to qualify as a constitutive community, and hence to be protected by rights?

This conclusion should be resisted. A communal attachment needs to also exhibit the Social Harm Feature to be a constitutionally protected constitutive community. First, though, I will sum up what I have argued so far. The Fundamental Feature of constitutive communities points to the ordinarily unchangeable, usually unchosen and deep-seated features of our identity which we have affirmed as valuable, and to which we have made an ethical commitment. The usual types of communal attachments that have this feature are those based on religion, nationality, gender, sexual orientation and ethnicity. But because the Inclusive Communitarian Approach is premised on the Constituted Autonomous Self, other types of communal attachments that the individual has affirmed as valuable can also exhibit the Fundamental Feature. This does not mean, however, that all of them will be constitutionally protected as constitutive communities; they will have to also exhibit the Social Harm Feature to attract constitutional protection. I now turn to this feature.
b. The Social Harm Feature

The Social Harm Feature concerns the social dimension of constitutive communities. By this I mean, first, the Janus-faced dialogical process by which they constitute identity; and second, the social harms that often arise from this process.

i. The Dialogical and Janus-Faced Process of Identity Formation

Our identity is constituted by our constitutive communities not in an inward, monological way, but through a dialogical process with others. Taylor contends that, through this process, we acquire modes of expression—words, gestures, etc—and become ‘full human agents, capable of understanding ourselves, and hence of defining our identity’.\(^{571}\) We define a conception of our identity through dialogue with, and struggles against, other people’s understandings of who we are, and through concepts and practices presented to us by ‘religion, society, school, and state, mediated by family, peers, friends’.\(^ {572}\) This dialogical process of identity formation takes place in specific contexts, such that individual identities are constituted within a broader collective.

The collective dimension of the constitutive elements of identity shapes our understanding of what it means to be members of our constitutive communities. In other words, to engage with the collective dimension is also to engage with the ‘socially transmitted conceptions of how a person of that identity properly behaves’.\(^ {573}\) On the one hand, and as we have seen in section (a), our constitutive communities provide us with the framework within which to make decisions about things of value, and we interpret the concepts and values given to us by our constitutive communities through dialogue with others. On the other hand, the Janus-faced nature of this dialogical process entails that, much as our identity is constituted by the values and practices that our communities transmit to us, they are equally constituted by socially transmitted misconceptions of membership, including how members of our constitutive communities ought to behave.


\(^{572}\) Appiah (n 341) 20.

\(^{573}\) ibid 21.
Take my identity as a woman. It is beset by a particular history: being ‘all but absent from history’, being ‘the slave of any boy whose parents forced a ring upon her finger’, being someone who ‘could hardly read, could scarcely spell, and was the property of her husband’.\(^{574}\) To the extent that this projected image of inferiority is internalised, Taylor says, it can ‘distort and oppress’.\(^{575}\) Not only should women be able to reject such sexist notions of femininity, which the Constituted Autonomous Self can do; but women, and similarly situated members of other constitutive communities, should be protected from the harms that arise from such socially transmitted misconceptions as well.

\[\textit{ii. Inexorable Social Harms}\]

The Social Harm Feature is thus concerned with the inexorable social harms that constitutive communities expose to their members. These social harms are pernicious because, to build on the Fundamental Feature, they target constitutive elements of identity that are integral to our self-understanding, thereby attacking us as morally worthy individuals and undermining our equality of status in our larger national community.\(^{576}\)

We can explore the Social Harm Feature using Appiah’s three-part structure of a collective identity. First, there is a \textit{social conception} of members of the constitutive community. This social conception exists when there are some terms in public discourse that \textit{labels} bearers of these identities by ascribing to them some criteria, such that they are recognised as members of the group (e.g. men, women; straights, gays).\(^{577}\) Appiah mandates that it must be generally known that this label exists, and that there be some degree of consensus, usually based on stereotypes, on how to identify those labelled as a member of the

\(^{574}\) Virginia Woolf, \textit{A Room of One’s Own} (Penguin 2002) 45.

\(^{575}\) Taylor, ‘The Politics of Recognition’ (n 571) 36.

\(^{576}\) I will say more about the national community in Chapter Four. For now, it essentially refers to the political community contained in a nation-state.

\(^{577}\) Appiah (n 341) 66–67. Note, however, that social conception is not to be confused with social \textit{recognition}, implying some form of social acceptance of the identity. Hence, while there is probably no social recognition of a gay individual in countries where homosexuality is criminalised, there is nonetheless a social conception of, say, a gay man in India. The lack of social recognition of this identity and constitutive community is a social conception of it: since being LGB is unacceptable, in this society, the social conception of an LGB person is someone who is morally reprehensible person and undeserving of equal recognition. (I am grateful to a participant at the 7th Annual Yale Law School Doctoral Scholarship Conference for this point.)
constitutive community. A social conception thus refers to some ideas in society about how members of a particular constitutive community behave, what they are like, and how they may be spotted.

Second, as a consequence of the dialogical process of identity formation, at least some of those who bear the label must have internalised the label as part of their identities. There must be some, for example, who have internalised the label ‘woman’, such that there exists an identification as a woman; that is, thinking of ourselves as a woman in a significant way that ‘carries ethical and moral weight’. \(^{578}\) This includes behavioural and ethical norms; for instance, Singaporeans should never litter, women ought to care about gender equality, homosexuals ought to care about marriage equality. Identification also means locating your own life story within a larger narrative and fitting it into certain patterns. This may involve ‘rites of passage into womanhood … or a sense of national identity that fits one’s life into a larger saga’.\(^ {579}\)

The final part, arguably the most crucial distinguishing feature, is the ‘existence of patterns of behaviour towards [those labelled, for instance, gays], such that [gays] are sometimes treated as [gays]’.\(^ {580}\) While not always negative, the type of treatment—as that is immediately obvious is ‘invidious discrimination: gender, sexuality, and racial and ethnic identity have all been profoundly shaped … by histories of sexism, homophobia, racism, and ethnic hatred’.\(^ {581}\) This sort of treatment—as is the social harm that befall us qua members of our constitutive communities. When all three parts are satisfied, we have a collective identity ‘that matters for ethical and political life’:

That it matters for ethical life … flows from the fact that it figures in identification, in people’s shaping and evaluation of their own lives; that it might matter for politics flows from the fact that it figures in treatment by others, and that how others treat one will help determine one’s success and failure in living one’s life.\(^ {582}\)

In other words, membership in constitutive communities exposes us to social harms that bring with them tangible consequences. Racial or gender discrimination, for instance, results in the tangible consequence of the woman or black person being denied a job. What is

\(^{578}\) ibid 68.

\(^{579}\) ibid.

\(^{580}\) ibid.

\(^{581}\) ibid 69.

\(^{582}\) ibid (emphasis added).
also crucial about these social harms is that they are both historical and current phenomena. I will explain this with Solanke’s stigma imagery which she uses to identify traits that anti-discrimination law should protect.

A stigma, Solanke says, ‘begins with the deliberate social creation of a “mark” and results in individual discrimination’.\(^583\) Ethnicity, for instance, is ““marked””, and so is the person bearing it—the stigmatised person becomes ‘engulfed by an attribute, status or condition to the extent that she becomes it’,\(^584\) such that ‘[there] is no separation between the mark and the person’.\(^585\) Solanke notes that ‘the purpose of the “mark” [is] to spread a generalised negative message about the group in society’.\(^586\) Hence, when gay men were stigmatised for being HIV/AIDS sufferers, they also faced prejudice and discrimination.

Solanke identifies five key aspects of a stigma.\(^587\) First, the created mark is based on an arbitrary attribute or condition of the individual, such as ethnicity or gender, that has no inherent meaning. Second, these marks are given a negative meaning by society. Third, this negative meaning is buttressed by a ‘difficult to challenge social power’. Fourth, the negative association with this mark is widespread in society; everyone knows, for instance, that women stay at home to take care of the children while men go out to work. Finally, because the stigma is common knowledge, ‘the stigmatised person cannot control or “wish away” the societal definition’.\(^588\) Consequently, a stigmatised person experiences social harms in the forms of, \textit{inter alia}, status loss and discrimination. Since the stigma results from stigmatised membership in her constitutive community, these consequences are more profound and harmful because they result from, and target, an integral part of her identity. Other consequences of being stigmatised that Solanke identifies, and which she argues are reasons to attract the protection of anti-discrimination law, are a reduction of the individuals’ humanity, an exclusion of them from mainstream society, and a blocking of their access to key resources.\(^589\)

\(^{583}\) Solanke (n 453) 37.
\(^{584}\) ibid 20.
\(^{585}\) ibid.
\(^{586}\) ibid 21.
\(^{587}\) ibid 37.
\(^{588}\) ibid.
\(^{589}\) ibid 162–163.
In sum, the Social Harm Feature points to the social harms to which our membership in our constitutive communities exposes us. These social harms arise when we are treated as members of our constitutive communities in a manner that makes our lives go worse, and which reduce our humanity. I will now bridge the gap between communal attachments and constitutive communities.

c. From Communal Attachments to Constitutive Communities

How does the Social Harm Feature relate to constitutive communities? As mentioned, a communal attachment usually needs both the Fundamental and Social Harm Features to be constitutionally protected as a constitutive community, such that members’ interest in the communal attachment is sufficiently important to justify imposing a duty on others to respect their right to it. A communal attachment based on, say, ethnicity satisfies both features. Say that a black individual has affirmed the value of his ethnic constitutive community to his identity: he identifies as a black man in a more than descriptive manner, and he treats the history of his ethnic community an integral part of his identity, etc. The Fundamental Feature is thus satisfied.

The identity ‘black man’ satisfies the Social Harm Feature as well. It fits Appiah’s structure of a collective identity: there is a social conception of a black man, there are people who have internalised the label ‘black man’, and black men are often treated as black men. For instance, there is an ‘endemic’ distrust in the United Kingdom of ‘black men in hoodies’: they are seen as people ‘who [have not] achieved much in life’ at best, and ‘violent [thugs]’ at worst. This social conception and its associated negative meanings have been entrenched by a long history of racial discrimination, leading to the negative consequences that Solanke points out: exclusion from mainstream society, blocking of access to key resources, a reduction of the members’ humanity. Being ordinarily unchangeable, the black man cannot ‘wish away’ the stigma against his ethnic constitutive community. As such, the harm that the black man suffers


is the harm to his very sense of self—and hence, these social harms ‘[fail] to respect fully the personhood of its targets’. 592

What about the types of communal attachments that Bell considers voluntary and/or contingent, but which I argued do exhibit the Fundamental Feature? Unfortunately, many of these communal attachments do not have the Social Harm Feature, and thus would not be constitutionally protected. Take academics as an example. We can accept that the communal attachment ‘academics’ is integral to the academic’s self-understanding. However, it is generally less likely that the communal attachment would exhibit the Social Harm Feature even after constructing the best argument in its favour. Let us start with Appiah’s structure of a collective identity. First, the social conception of an academic is someone concerned with esoteric intellectual matters with poor social skills. Second, the label ‘academic’ has been internalised by academics, such that there are certain behavioural and ethical norms associated with the label. For instance, academics are expected to adhere to academic integrity which includes not plagiarising and representing opponents’ views in their best possible light. Third, academics are sometimes treated as academics: they are mocked for being socially awkward.

While mockery can be considered a social harm, it is not the relevant type of social harm: it is far-fetched to say that this harm rises to the level of harm experienced by black men. Further, even if the social conception of the academic satisfied Solanke’s five characteristics of a stigma, it also seems far-fetched to say that the academic suffers social loss or discrimination, a loss of humanity, an exclusion from mainstream society, etc. Indeed, academics as such generally do not suffer the same kind of discrimination and exclusion from mainstream society that black men do; on the contrary, many of them are included in society and enjoy reasonable respectability and social standing. The communal attachment of academics, then, does not have the Social Harm Feature because academics do not suffer the relevant type of social harm. Without the Social Harm Feature, a communal attachment is not sufficiently important to attract constitutional protection. This is not to deny that the attachment is important to the individuals who are so attached; but if they wish to claim constitutional protection of their communal attachment, they would need to demonstrate that their membership in the communal attachment has exposed them to the relevant social harm.

592 ‘A Communitarian Defense of Group Libel Laws’ (n 20) 690.
Having said that, the Social Harm Feature is always in flux. Whether or not a communal attachment possesses it depends on social forces such as the society where the communal attachment is located, the society’s history, and so on. For instance, the academics communal attachment may have a better claim to the Social Harm Feature in the People’s Republic of China (PRC) where intellectuals and teachers were targeted as ‘class enemies’ during the Cultural Revolution, and were ‘publicly humiliated, beaten and in some cases murdered or driven to suicide’.\textsuperscript{593} Furthermore, it is possible that, due to the lack of academic freedom in the PRC, academics are treated as academics when they are silenced for criticising the state. These social factors, specific to the Chinese context, establish a strong arguable case that the Social Harm Feature is present in the communal attachment of academics in the PRC; and hence, the communal attachment can be a constitutionally protected constitutive community.

To sum up the discussion so far: I have argued that communal attachments that have the Fundamental Feature but not the Social Harm Feature do not rise to the level of a constitutive community that attracts constitutional protection. Since rights protect only interests that are sufficiently important to justify imposing a duty on others to respect our right to those interests, both the Fundamental and Social Harm Features need to be present. It is only when we are treated negatively as members of our constitutive communities, which we have affirmed as fundamental aspects of our identity, that our interest in these communities is important enough to be protected by constitutional rights.

d. Constitutive Communities and Constitutional Rights

How do constitutional rights protect constitutive communities? Briefly,\textsuperscript{594} rights protect both the existence of constitutive communities and their members’ interest in accessing and participating in them from unjustified encroachment by the state and/or the majority. Constitutive communities can either be abstract—the gay community, for instance—or specific, such as the women’s welfare association of my local neighbourhood. The Inclusive Communitarian Approach protects our ability to live as members of our constitutive


\textsuperscript{594} A fuller account will be presented in Chapter Five, Part II, 222–245.
communities, including our ability to associate with fellow members, in order for us to lead meaningful lives.

Following from the Social Harm Feature, protecting constitutive communities also protects members’ equality of status and equal membership in their national community. Our constitutive communities mark out the identity traits that are integral to our self-understanding. Hence, full public recognition of equal citizenship requires respect for the ‘unique identities of each individual, regardless of gender, race, or ethnicity’, and respect for ‘activities, practices, and ways of viewing the world that are particularly valued by … members of disadvantaged groups’.

In this light, giving political recognition to constitutive communities recognises the equal moral worth of individuals who live as a certain identity; and so political recognition of, for instance, the gay community in the form of equal rights is also a recognition of the equal moral worth of individuals who identify as gay.

This is an important link to my second conceptual claim about communitarianism—that it promotes a thin theory of the good—and to the second element of my Inclusive Communitarian Approach, the duty to include. Briefly, the thin theory of the good that communitarianism promotes is inclusiveness, and members of the national community owe each other a duty to include.

CONCLUSION

I have argued for a pluralistic conception of community as constitutive communities, which is the first element of the Inclusive Communitarian Approach. This theory comports with my first conceptual claim that communitarianism values community and individual equally. By conceiving of community as the communal attachments that constitute the individual’s identity, the theory values the constitutive communities themselves as a source of meaning to their members, and values the individual by ascribing constitutional significance to the constitutive attachments that define her identity. Since the theory recognises the pluralistic nature of these attachments, it eschews advancing a monistic conception of community which would oppress weaker communal attachments.

595 Amy Gutmann, ‘Introduction’ in Gutmann (n 571) 8.
I have also argued that the theory should be predicated on the Constituted Autonomous Self. This means that, for our constitutive communities to be more than descriptive facts about ourselves, we have to affirm their significance and value to our self-understanding and choose to live as members of our constitutive communities. Such affirmation also means that these constitutive identity traits are integral aspects of who we are. I ended the chapter by identifying two features that elevate a communal attachment to a constitutive community: the Fundamental Feature and the Social Harm Feature. In this regard, our interest in our constitutive communities, and the communities themselves, are constitutionally protected because they are integral to our self-understanding and define who we are as individuals; yet, they can cause us intolerable social harms, too, such as discrimination and exclusion from mainstream society. The second element of the Inclusive Communitarian Approach seeks to mitigate these social harms by arguing that members of the national community owe each other a duty to include; that is, to respect each other’s equality of membership regardless of their constitutive communities. I now turn to this task.
INTRODUCTION

I have argued in Chapter Three that, although constitutive communities are a source of meaning to our lives, they can cause us social harms as well: our membership in our various constitutive communities can expose us to negative treatment by others, typically motivated by attitudes of dislike. Such attitudes can, and have, led to clashes between constitutive communities within the national community, including the national community itself, whose fundamental beliefs are diametrically opposed. Skirmishes also arise when the national community imposes obligations that conflict with a constitutive community’s fundamental beliefs. When can the national community compel members to fulfil obligations that contradict their constitutive communities’ beliefs and practices? In what situations can the national community restrict the activities of one constitutive community to protect another? How should clashes between constitutive communities be resolved? In other words, what do members of the national community owe to each other?

In this chapter, I argue that the national community’s members owe each other a basic duty to include. This duty has two grounds. First, it is generated by the correlative relationship between rights and duties under the interest theory of rights that the thesis presupposes. That is, our constitutive communities, and our interest in them, are sufficiently important to ground rights, which then generate a duty on others to respect our rights to our constitutive communities. These ‘others’ are members of the national community and national community as a whole, on whose behalf the state acts. The duty to include requires members of the national community to recognise fellow members’ equality of membership; that is, to include their constitutive communities within the national community so that they can live meaningfully as members of their constitutive communities. This entails recognising their right to their various constitutive communities.

The duty’s second ground, which the chapter focuses on, is a conception of the nation as an ethical community, and the concept of community itself. The argument consists of a few

597 This will be fleshed out in Chapter Five, Part II, 222–245.
components. First, following David Miller, the nation is an ethical community where members owe each other special obligations; I will call this ethical conception ‘the national community’, which is also one of our constitutive communities. In the national community, members feel a special concern and loyalty for each other that is similar to the concern and loyalty that they feel towards those to whom they are closely and personally related, such as their family and friends. This feeling of special concern, or what Bernard Yack calls ‘social friendship’, explains why co-nationals often believe, and are often thought to, owe special obligations to each other.

However, relations between members of the national community are unlike personal relationships because the national community is an impersonal, ‘imagined’ community; as such, a further argument is needed to properly conceive of the nation as the national community. Otherwise, it could be said that co-nationals are misguided in having feelings of social friendship, and hence special obligations, towards each other. In Part I section (b), I establish the second component of the duty to include: co-nationality is sufficiently like those personal relationships of which social friendship and special obligations are characteristic. Hence, co-nationality is a type of such personal relationships, which justifies, first, the ethical conception of the nation; and second, special obligations between members of the national community. This is because members of the national community share a constitutive national identity which creates a mutual identification and recognition, and so a sense of familiarity, between members who are otherwise strangers to each other. This sense of familiarity transmutes co-nationality into the type of relationship characterised by special obligations, such that the relationship of co-nationality itself ought to justify these special obligations. Nonetheless, I provide a further basis for these special obligations: they are animated by the notions of identification, intrinsic in the concept of constitutive communities; and reciprocity, fundamental to the concept of community.

In Part II, I will establish the duty to include: it is the baseline obligation that members of the national community owe to each other. The final ground of the duty, then, is the inherently inclusive nature of community: it includes as members those who possess the

598 David Miller, On Nationality (Clarendon 1995).
600 Benedict Anderson, Imagined Communities (Verso 2016).
601 As in Chapter Three, ‘constitutive’ means ‘partly constitutive’.
morally relevant criterion for membership, and excludes those who do not. The inclusion of those who fulfil the membership criterion is also an acknowledgement that the community’s constitutive way of life is meaningful; hence, the community should include as members all those who possess the morally relevant criteria for membership. In the national community, a shared *civic* national identity is the morally relevant criterion. Since members usually display social friendship towards each other, the duty to include enters the fray when social friendship reaches its limit. This typically happens in the cases of conflict mentioned earlier.

The duty to include, then, essentially exhorts members to continue to recognise and respect each other’s equality of membership in the national community in cases of conflict. Members are required to demonstrate special concern for each other’s interest in living meaningfully as members of their various constitutive communities. Given the importance of constitutive communities to our self-understanding, members of the national community have a duty to include each other’s constitutive communities in the national community, so as to allow everyone to live meaningfully as members of the national community and their constitutive communities, as they themselves are able to do. The duty, of course, is not absolute. It ceases to apply if a constitutive community’s constitutive beliefs violate the duty itself, in which case the national community can justifiably ban the existence of a constitutive community. If a constitutive community’s peripheral beliefs and/or practices violate the duty, the national community can place restrictions on the community.

Finally, the duty to include advances the second conceptual claim about communitarianism made in Chapter 2: communitarian politics of the good can promote only a thin theory of the good. In light of the theory developed so far, this thin theory is the good of *inclusiveness*. Part II concludes by considering the role of the state in promoting this good.

### Definitions and Assumptions

Due to the complexity of the concepts explored in this chapter, a few words on definitions and assumptions are in order. Following the constitutive communities theory developed in Chapter 3, my use of ‘nation’ presupposes *civic* nations in which a multitude of identities flourish within the borders of a state. By this I mean ‘a community of equal, rights-bearing citizens, united in
patriotic attachment to a shared set of political practices and values;' 602 as opposed to ethnic nations that emphasise a commonality of native culture and ethnicity. 603 A civic national identity is ethnically and culturally neutral, and is derived from the civic national community’s shared history, common everyday practices and way of life, and principles of justice. Generally, civic nations have the following characteristics: it is tied to a particular geographical location; 604 it is inter-generational and members share a common history, however long or short; 605 and co-nationals share a common national character, public culture or cultural heritage, 606 or a national identity, as I call it. I also assume a congruence between the civic nation and the political boundaries of the state in which it is situated.

While I do not have in mind ethnic nations where the national identity is derived from the dominant ethnicity in the political state, 607 it does not mean that the duty to include does not apply in these nations. Indeed, since diversity inevitably exists in modern nation-states, the civic nation, and the civic national identity, are normative ideals. The duty to include, in turn, being derived from the civic nation, should apply regardless of whether a nation is ethnic or civic, so long as diversity, however minimal, exists within the nation. The question then becomes how it should be applied. Space constraints prevent me from discussing this question in too much depth, though I briefly discuss an ethnic nation to illustrate the importance of a civic national identity.

The nationalist ideas that I explore in this chapter are ‘universalist’ ideas, i.e. ‘the view that all people ought to be partial toward their own nation and conationals’; 608 as opposed to the view that only one’s own nation deserves special loyalty. Hence, I assume that ‘all people

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602 Yack (n 599) 26.
603 Anthony D Smith, National Identity (University of Nevada Press 1991) 11–12. Advancing an ethnic national identity would be at odds with the constitutive communities theory, and hence the Inclusive Communitarian Approach, both of which aim to celebrate and promote the diversity of identities in modern pluralistic societies.
604 ibid 9; Yack (n 599) 70; Miller (n 598) 24.
605 Yack (n 599) 68; Miller (n 598) 23.
606 Yack (n 599) 69; Miller (n 598) 25.
607 Examples include the PRC, Malaysia and Indonesia.
608 Thomas Hurka, ‘The Justification of National Partiality’ in Robert McKim and Jeff McMahan (eds), The Morality of Nationalism (Oxford University Press 2014) 139.
are morally entitled to value their own nation, to seek to ensure its self-determining character, and to show partiality to its members’. 609

Finally, I use the terms ‘co-national’ and ‘members of the national community’ interchangeably.

I. SPECIAL OBLIGATIONS AND NATIONAL IDENTITY

a. The Nation as an Ethical Community: the National Community

i. Miller’s Ethical Conception of the Nation

The first component of the duty to include adopts Miller’s conception the nation as an ethical community, i.e. the national community, where members owe each other special obligations. Miller’s ethical conception begins with the claim that acknowledging a national identity also ‘[acknowledges] that I owe special obligations to fellow members of my nation which I do not owe to other human beings’, 610 and that ‘[the] duties we owe to our fellow-nationals are different from, and more extensive than, the duties we owe to human beings as such’. 611 Miller derives these special obligations from what he calls ‘the ethics of community’ 612 which assume that ‘memberships and attachments in general have ethical significance’. 613 The ethics of community usually arise in immediate, intimate communities, 614 which include family, friendships, colleges, and so on. Membership in these communities is ethically significant, Miller says, because my identification as a member of these groups gives rise to my feeling a special loyalty towards my fellow members. This loyalty manifests itself ‘in my giving special weight to the interests of fellow-members’ and acknowledging ‘obligations to [them] that are distinct from the obligations I owe to people generally’. 615

609 Jeff McMahan, ‘The Limits of National Partiality’ in McKim and McMahan (n 608) 108.
610 Miller (n 598) 50.
611 ibid 11.
612 ibid 66.
613 ibid 65.
614 I do not distinguish between personal relationships and intimate communities; hence, my use of ‘personal relationships’ should be taken to include intimate communities and vice versa.
615 Miller (n 598) 65.
The ethics of community mandate that the loyalties and obligations between members are mutual and reciprocal; other members of these communities should give special weight to my interests, too. Failure of this mutuality, Miller says, will call into question whether the community to which I think I belong really is a community, or simply an association of self-interested individuals. If I am under the impression that the Law PhD cohort at Cambridge is a community, then this impression would be shaken when fellow ‘members’ of the ‘community’, save for my group of friends, demonstrate scant interest in the events that I organise despite my supporting their events in the past. On the other hand, if I make special allowances for a member of my group of friends at Cambridge—for instance, I read Raffael’s PhD thesis in two days so that he can submit by his desired deadline when I am trying to finish my own—and Raffael reads something of mine when he has a deadline, then the mutuality that we exhibit cements the community nature of our friendship.

What are the special obligations that we should acknowledge? Miller says that the precise content of the obligations is ‘likely to be coloured by the general ethos of the group or community’. The group’s general ethos also determines the interests that members can be called upon to promote—interests which are ‘interpreted in the light of the community’s values’. Miller illustrates this with Walzer’s example of medieval Jewish communities. Members of these communities recognised an obligation to provide for each other’s needs, which were ‘understood in relation to religious ideals’, such as distributing food to the poorest members of society, and viewing education as a need for boys but not girls.

The ethics of community, Miller argues, have significant motivational strengths for a few reasons. First, my identification with the group or community entails that ‘there need be no sharp conflict between fulfilling my obligations and pursuing my own goals and purposes’ because ‘the group’s interests are among the goals that I set myself to advance’. Contributing to the group’s welfare thus becomes ‘a form of goal-fulfilment’. Second, the loose reciprocity of the ethics of community means that those who contribute to the community can expect to be benefited by fellow members at some point as well. As such, ‘the act of making a

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616 ibid 66.
617 ibid.
618 ibid.
619 ibid.
620 ibid 67.
contribution is not a pure loss … because he is helping to sustain a set of relationships from which he stands to benefit to some degree’.621 This helps to lessen the tension between the individual’s interests and the group’s interests ‘so that ethical behaviour becomes easier for imperfectly altruistic agents’.622 Finally, groups and communities usually consist of people ‘who are already well disposed to one another in certain respects’ which makes it easier to establish ‘more formal systems of reciprocity’.623 This further blurs the distinction between the individual’s private interests and her communal obligations.

Although Miller presents an accurate description of the ethics of community, his account fuses two concepts which ought to be distinguished. This is Yack’s distinction between justice on the one hand, and ‘social friendship’ on the other. For Yack, the partiality that we display towards our family, friends, and members of our communities (including the national community) are not obligations as such, but social friendship. They are not obligations, Yack argues, because friends ‘do what they can for each other, rather than what they are obliged to do’; and this, in turn, is because ‘they mark each other out as objects of special concern and loyalty’.624 This echoes what Miller calls ‘feelings of special loyalty’ that arise when one identifies with a group.

In the same vein, community is ‘a group of individuals who imagine themselves connected to each other as objects of special concern and loyalty by something that they share’.625 The social friendship immanent in communal bonds is one of ‘mutual commitment’626 and ‘a sense of mutual concern and loyalty’.627 While this echoes Miller’s requirement of mutuality, for Yack, members of a community display such mutuality not because they feel obliged to do so, but out of feelings of social friendship. Obligations, in contrast, belong in the realm of justice. Although both are aspects of social morality,

[b]eliefs about justice move us to give people what they deserve, what we believe that they are owed given their distinctive qualities and efforts; feelings of social friendship, to do what we can for the people to whom we feel connected. The former moves us to do things for others by

621 ibid.
622 ibid.
623 ibid.
624 Yack (n 599) 51.
625 ibid 48.
626 ibid 51.
627 ibid 51–52.
promoting the sense that we owe them things; the latter, by promoting special concern for their well-being.628

The distinction, of course, is not as sharp as it seems; we are motivated by feelings of social friendship and obligation when we do things for our family and friends. Nonetheless, the distinction is salient, especially for the duty to include, because it highlights the complex interplay between concern and obligation that motivates our ethical behaviour towards our intimates. While we are ordinarily moved to do things for our family and friends out of social friendship, these feelings are finite—and justice-mandated obligations fill the void opened up by the limits of our special concern, directing us to act as we would have ordinarily done.

To give a prosaic example, when my friend John asks me to read his article, I set aside time from my busy thesis completion schedule to read it even though I do not really want to—and I do so out of obligation. During this busy period, my concern for my own well-being overrides the special concern that I would ordinarily have for his well-being. Yet, because he stands in a special relationship to me as a friend, and since it has been a practice between my group of friends at Cambridge to comment on each other’s work, I feel obliged to read his article—and this feeling reflects an actual obligation that exists independently of my feelings. I am obliged to John to read his article in a way that I am not to most others because of the type of mutually beneficial friendship that we have created: we support each other in our academic lives, and we both stand to gain from each other’s academic expertise. This obligation is thus constituted by two things: the special concern that we feel for each other, and the relationship of reciprocity and mutual benefit that we have established. Special obligations, then, step in to direct us to act as we ordinarily would have acted if our feelings of special concern are not misguided. I will return to the latter point in section (b)(ii) below.

To return to Miller’s ethical conception of the nation: he observes that the special obligations immanent in the ethics of community are often expressed towards the national community. This is because nationality, for many, is ‘powerful source of personal identity’629 and often invokes strong loyalty in those that embrace a national identity. The most extreme example of this strong loyalty, Miller says, is some people’s willingness to die for their country.

628 ibid 164.
629 Miller (n 598) 67.
Co-nationals are also likely to say that they have a special responsibility towards each other which justifies giving them priority when acting as individuals and in public policy decisions.

However, and as Miller acknowledges, there are important differences between the national community and intimate communities. Unlike intimate communities where members interact with each other on a personal, face-to-face basis, the national community is an imagined community where members are, strictly speaking, strangers to each other. One important implication is that, in an intimate community, we can specify the content of our obligations towards fellow members because we can ascertain their needs and wants through our daily interactions with them. In the national community, however, we are often unable to specify the content of our special responsibilities towards our co-nationals because ‘we are in no position to grasp the demands and expectation of other members directly’.

Nonetheless, despite our inability to ask every member of the national community directly what their demands and expectations are, Miller argues that we can determine the content of these obligations through the national community’s public culture, ‘a set of ideas about the character of the community which also helps to fix responsibilities’. For instance, a communitarian society that emphasises collective goods would have a public culture that produces an obligation of some form of national service. This public culture, disseminated by the mass media, is shaped by public debate—which means it is open to interpretation, its content underwritten by a fluidity that responds accordingly to changes in the community. That the public culture can change over time shields Miller’s national community from the criticism that he is merely sanctifying traditional relations that have not been rationally scrutinised, because these national obligations that we acknowledge have been affirmed and justified with reasons in public debate over time.

Miller’s description of the ethical significance of the national community plausibly captures existing intuitions of what national identity means to those who claim one. However, two questions arise. First, if there are important differences between the national community and intimate communities and personal relationships, how can the ethics of community be applied to the national community? Second, even if the precise content of special obligations owed between co-nationals is determined by the national community’s public culture, can we

630 ibid 68.
631 ibid.
632 ibid 70.
not ascertain a baseline obligation that is owed between co-nationals? As stated in the introduction, I will argue in Part II that this baseline obligation is the duty to include. The next section (b) addresses the question of how Miller’s ethics of community can be applied to the national community. I will argue that it is the sharing of a constitutive national identity that allows the ethics community to be applied to the national community, such that co-nationals’ feelings of special concern for each other do reflect actual special obligations owed to each other. First, however, it is necessary to explain why this justification is necessary.

**ii. The Need to Justify Special Obligations Within the National Community**

It may seem unnecessary to justify special obligations between co-nationals within my communitarian framework. The national community, being a type of community, can be assumed to generate special obligations between members because special obligations are integral to the concept of community. Miller, for one, seems to assume this when he applies the ethics of community, which usually hold in immediate, intimate communities, to the national community. Hence, special obligations within a community ought to be taken as a given within my communitarian framework, which means that these obligations within the national community needs no further justification, too.

Tempting as this route is, the national community differs from other communities in an important way: it is a political community that imposes binding political obligations on its members, on whose behalf the state enacts policies that affect how the national community treats outsiders. Hence, the special obligations owed within a national community are sometimes political obligations. If these special obligations prefer members over non-members in, for instance, employment or wealth redistribution, then it is necessary to justify why membership in the national community per se entitles members to preferential treatment that disadvantages non-members who, some might say, are equally deserving simply by virtue of our shared humanity. Other types of communities, in contrast, lack a political dimension; as such, we can generally accept that these other communities generate special obligations without much more.

The tension that I am alluding to is that between, as Miller puts it, ethical universalism and ethical particularism. For the ethical universalist, special obligations between co-nationals are an unwarranted display of bias towards a group of strangers based on an arbitrary and
morally irrelevant characteristic: nationality. We ought to discard the idea that we owe special obligations to our co-nationals, the criticism goes, because it is our common humanity that should determine what we owe to each other. Special obligations based on what is essentially an incidence of birth cannot be rationally defended, and so nationality is morally irrelevant in determining what we owe to each other. This is further underscored by the devastating consequences of wars and atrocities committed in the name of nationalism, such as the conflicts in the former Yugoslavia in the 1990s.

There are two ways to read this criticism. The first is that all forms of bias in ethical behaviour are bad because they are based on arbitrary contingencies, such as the family and place we were born into, the school we went to, and so on. The extreme universalist position essentially objects to any form of ethical behaviour motivated by agent-relative reasons. However, this position is clearly problematic and deeply counter-intuitive because, followed to its logical conclusion, it would require us to give up our personal relationships. We display bias towards our family and friends and confer on them preferential treatment that we would not confer on acquaintances and strangers because of who they are in relation to us. If all agent-relative reasons for ethical behaviour are objectionable, then the extreme universalist would either have to revise his position, or bite the bullet and declare that it is also wrong for us to favour our family and friends. If the ethical universalist chose the latter route, her position would be thoroughly unattractive because it would be intolerable for us to give up our personal relationships, which are fundamental human goods that enhance our lives and well-being. As such, agent-relative reasons for ethical action are ‘special moral reasons that arise from our relations with one another’633 that supplement our basic duties to one another. These special relationships constitute, in John Finnis’ term, basic reasons for action.634 As Jeff McMahan describes it,

the moral significance of special relations … constitutes an autonomous area within the domain of morality, so that the existence of these relations and the forms of behaviour that are appropriate within them do not require justification in terms of anything else. It is part of the meaning or significance of these relations that they legitimize certain forms of partiality. The

633 McMahan (n 609) 110.
634 Friendship is one of the eight Finnisian basic goods, i.e. human goods that provide reasons for action in and of themselves, without the need for justification with reference to other goods: John Finnis, Natural Law And Natural Rights (Oxford University Press 2011).
relations themselves are fundamental or foundational sources of moral reasons, including permissions and requirements.635

Our partiality towards those to whom we are intimately related is such a deeply ingrained component of our ethical thinking that an account of ethics that fails to take it seriously would fail to understand the full range of what motivates our ethical behaviour. The extreme universalist position, then, is untenable.

Another problem with this reading of the criticism is that it is at odds with the communitarian conception of the self, developed in Chapters Two and Three. By trying to divorce us from our personal relationships, the criticism implicitly advances a disembodied, unencumbered self capable of practical reasoning without the emotional tethers of personal relationships. Having already shown in Chapter Two that such a conception of the self is both descriptively false and normatively undesirable, the universalist account of ethics that presupposes or depends on this conception of the self is similarly undesirable. In other words, given the communitarian conception of the self, our account of ethics has to be particularistic to some extent—namely, it has to account for our special obligations to those to whom we are intimately related.

The second, more plausible, reading of the criticism is that some agent-relative reasons for ethical action are unacceptable—such as those based on nationality.636 This version of the criticism accepts that there is a realm of morality, termed ‘common-sense morality’ by some,637 that, although impervious to rational scrutiny, is nevertheless acceptable for the reasons already stated. However, the criticism still objects to national partiality because of the fundamental differences between intimate relations and co-nationality. These differences are underscored by the unconvincing attempts to justify special obligations based on nationality by likening the national community to the family. As Thomas Hurka argues, familial relationships are ‘rich and intense’ because family members care deeply about each other, such that ‘[their] interactions have been as close as people’s typically ever are’.638 Relations between co-nationals, on the other hand, are nothing like familial relationships. We will likely never meet

635 McMahan (n 609) 118.
636 Race-centric reasons are another form of unacceptable agent-relative reasons.
638 Hurka (n 608) 147.
most of our co-nationals, let alone know who they are; hence, ‘the causal links between our lives are tenuous at best’. Moreover, the fanaticism and xenophobia that such partiality has produced also render national partiality objectionable. So even though it is acceptable for us to display partiality towards our intimates, doing the same towards our co-nationals cannot be justified even as a form of common-sense morality.

The force of the moderate reading of the criticism is why special obligations between co-nationals need to be justified. If giving preferential treatment to our co-nationals unfairly disadvantages non-nationals, then an ethical theory that allows for this without further justification is unattractive. In section (b)(ii) below, I will justify special obligations between co-nationals, and applying Miller’s ethics of community to the nation, by arguing that membership in the national community falls within the range of acceptable agent-relative reasons for ethical action. In other words, I assume that partiality towards our intimates is morally acceptable, and argue that partiality towards members of our national community is a type of such morally acceptable partiality.

b. The National Community as a Quasi-Intimate Community

A shared constitutive national identity lies at the heart of special obligations within the national community. It creates a sense of familiarity between co-nationals so that relations between them become sufficiently like personal relationships. This sense of familiarity, in turn, transmutes the national community into a quasi-intimate community, which explains feelings of social friendship between co-nationals. Since relations between co-nationals are sufficiently like personal relationships and intimate communities, Miller’s ethics of community can then be applied to the national community. Accordingly, the notions of mutuality and reciprocity justify special obligations within the national community.

The idea that sharing a nationality gives rise to special obligations is arguably implicit in Miller’s idea of a national identity. Miller says that the national community is ‘constituted by belief: nations exist when their members recognize one another as compatriots, and believe that they share characteristics of the relevant kind’. The national community’s existence thus

639 ibid 148.
640 Miller (n 598) 22.
depends on ‘a shared belief that its members belong together’ and a ‘mutual recognition’ between co-nationals of this shared belief. Hence, a national identity requires that co-nationals have something in common, a set of shared characteristics; Miller calls this a ‘common public culture’, and it is this common public culture that gives rise to the sense that the people belong together.

Miller’s description of a national identity suggests that it is doing the normative work when he applies the ethics of community to the national community. One could say that it is the sense that the people of the national community belong together and their mutual recognition of each other as members that give rise to special obligations. However, Miller does not state this and assumes that the ethics of community can be applied to the national community in a more or less seamless fashion. As Charles Beitz notes, Miller takes an ‘indirect’ route to his ethical conception of the nation by distinguishing between ethical universalism and ethical particularism, and inviting the ‘inference … that, because [ethical particularism] is the more plausible position, it can be justifiable to allow duties to compatriots to trump duties to outsiders’. The inference, that is, that special obligations between compatriots is an instance of ethical particularism. However, without an explicit argument for why special obligations between co-nationals are captured by ethical particularism given the obvious differences between intimate relationships and co-nationality, these special obligations could be attacked as a ‘moral error [and] the intrusion of irrational emotional attachments into an arena that ought to be governed by impartial reason’. I will argue that they are not moral errors because of the significance of the shared constitutive national identity.

i. A Civic Constitutive National Identity

What does it mean to share a constitutive national identity? I use ‘national identity’ broadly to include a range of concepts: Miller’s public culture, Hurka’s shared cultural history, Bell’s shared national history from which moral lessons have been drawn, and so on. Miller’s idea

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641 ibid 23.
642 ibid 25.
644 David Miller, ‘The Ethical Significance of Nationality’ (1988) 98 Ethics 647, 647.
645 Hurka (n 608) 151.
646 Bell, Communitarianism and Its Critics (n 351) 130.
of a public culture is a good starting point to expound on my notion of a shared constitutive national identity. A public culture, for Miller,

may be seen as a set of understandings about how a group of people is to conduct its life together. This will include political principles such as a belief in democracy or the rule of law, but it reaches more widely than this. It extends to social norms such as honesty in filling your tax return or queueing as a way of deciding who gets on to the bus first. It may also embrace certain cultural ideals, for instance religious beliefs or a commitment to preserve the purity of the national language. Its range will vary from case to case, but it will leave room for different private cultures within the nation. Thus, the food one chooses to eat, how one dresses, the music one listens to, are not normally part of the public culture that defines nationality. 647

A shared constitutive national identity encompasses matters as profound as political principles, and social norms as trivial as queueing for the bus, because its content is determined by the national community’s way of life, broadly understood. This way of life includes what Hurka calls ‘a shared cultural history’: ‘this is the culture they grew up in, that their [co-nationals] share with them a history of being shaped by, participating in, and sustaining this culture’. 648 ‘Culture’ here does not refer to a particular ethnicity, but the civic culture that has emerged from a civic national community. It is the amalgamation of members’ participation in public life as members of the national community and other constitutive communities, which has determined the national community’s norms and practices. In this regard, certain aspects of private cultures can be as constitutive of the national identity as public ones. For instance, an integral part of the Singaporean national identity is an obsession with food. Yet, there is not just a single Singaporean national dish, but several, and they come from the different ethnic cultures that thrive within the Singaporean national community.

Sharing a constitutive national identity thus encompasses a range of things, from the profound (a commitment to the rule of law) to the trivial (an obsession with food, queueing for the bus), all essentially derived from the national community’s way of life. However, the values that constitute the national identity must not be evil or morally objectionable. As Robert George argues, ‘[the] integration of human beings around shared principles of injustice or other forms of wickedness is an undesirable integration’. 649 A national identity that asserts its own

647 Miller (n 598) 26.
648 Hurka (n 608) 151.
superiority and denigrates other national identities would not be morally defensible. Any special obligations that arise would be similarly tainted by the national identity’s moral odiousness; hence, if Donald Trump’s racist vision for the United States were to take root such that the American identity became a far-right white supremacist one, special obligations between Americans would be tainted. In this regard, a shared cultural history should be one of ‘reciprocal benefit … where people have jointly benefited others’ such as creating a national health care system to provide affordable health care to all members of the national community.

Note, however, that an egalitarian and hence arguably more stable national identity would be one that is not substantively based on any comprehensive doctrines of the good (such as a religion); in other words, it would be a civic national identity. This necessarily follows from the constitutive communities theory defended in Chapter Three: if we are constituted by many communal attachments, then the national identity must be civic in order not to privilege some constitutive communities over others. Of course, it is sometimes difficult to divorce religion and ethnicity from the national identity; Greek Orthodoxy, for instance, is an integral part of the Greek national identity. The deep entrenchment of religious and/or ethnic influences on a civic national identity, however, should not be taken to mean that ‘there is a set of necessary and sufficient conditions’, such as membership in a specific religious or ethnic constitutive community, for possessing a constitutive national identity ‘that everyone who belongs to the nation must display in equal measure’. Rather, a constitutive national identity ought to be elastic and encompass all the constitutive communities that exist in the civic national community. This means that members of Greek national community who do not

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650 I leave open the question whether the sharing of objectionable beliefs and/or way of life defeats special obligations entirely, or raises a rebuttable presumption that special obligations exist. Yael Tamir, for one, takes the latter route, arguing that special obligations arising from morally questionable associations (such as the Mafia) exist, but can be overridden by ‘sound moral reasons’: Yael Tamir, Liberal Nationalism (Princeton University Press 1995) 101–102. For the purpose of the thesis, and unless stated otherwise, I assume that the constitutive national identity shared between members of the national community is valuable and morally worthy, which then forecloses McMahan’s objection that merely sharing something is not intrinsically valuable because some forms of sharing are worthless and others wicked: McMahan (n 609) 124–126.

651 Hurka (n 608) 151.

652 Miller (n 598) 26–27.
identify with the Greek Orthodox church, but identify with the Greek national community, are not lesser members of the Greek national community, and ought not be seen as such.

A civic national identity is also crucial in shielding nationalist theories from criticisms that they are hostile to immigrants and ethnic minorities, and that they necessitate assimilation policies that would erase ethnic and cultural minorities. Jan-Werner Müller, for instance, is deeply sceptical of nationalism and favours constitutional patriotism instead. He contends that nationalism ‘[tends] to rely on a reified core ethnic identity’ and is thus ‘contaminated with culture and ethnicity’, which breeds ‘ideals of assimilationism qua cultural conformity’. Nationalistic immigration policies tend to exhibit ‘[clear] ethnic preferences … in which certain ethnic groups are seen as more easily “compatible” with the “national culture”’. Nationalism also tends to require new immigrants to ‘[prove] membership in a national collective through knowledge and a demonstrated willingness to abandon one’s own way of life’. Constitutional patriotism, on the other hand, is animated by a commitment to the norms and values of a liberal democratic constitution. Hence, constitutional patriots are committed not to a national culture, but political principles that aid the ‘idea of citizens mutually justifying political rule to each other’, particularly the principle of fairness.

Müller’s fears about nationalism are likely to come true only if the national identity in question is an ethnic or culturally homogeneous one. A civic national identity, on the other hand, does not necessarily require immigrants to abandon their way of life, or to belong to a ‘compatible’ ethnic group. As already discussed, a civic national identity is not based on an ethnicity or religion, and does not privilege one ethnicity or religion over others; as such, it does not require immigrants to belong to any particular ethnic group. Further, since a national identity also consists of a commitment to political principles, my conception of the civic

654 ibid 92–93.
655 ibid 94.
656 ibid.
658 Müller (n 653) 82.
national identity, because it is based on the constitutive communities theory, is necessarily committed to diversity and cultural pluralism.

What about ethnic minorities within the national community? Andrew Mason has rejected the notion that a shared national identity is necessary to sustain a stable political community because fostering this identity would require assimilating minority cultures. Even if such assimilation is not necessarily oppressive because it is justified not by the superiority of the dominant culture, but by the importance of a shared national identity, it will nevertheless incur moral costs. Mason argues, first, that minorities who continue in their traditional ways of life will ‘come to feel that these are being devalued’ and so ‘suffer low self-respect or self-esteem’. Second, the disappearance of valuable parts of the minority culture because they are incompatible with the dominant culture ‘may be a loss of something potentially enriching even for members of the dominant culture’.

However, these moral costs would arguably not be incurred if ethnic minorities are required to adopt a civic national identity. A civic national identity can accommodate minority cultures because it is constituted by cultural diversity. It would require cultural assimilation only if a certain way of life violates the national community’s foundational principles. For instance, if a national community is committed to the principle of equality, then a minority way of life that treats some members unequally will be required to abandon it. Such an abandonment would hardly be thought of as a moral cost; in fact, it is arguably a moral gain.

This is not as controversial as it seems, and should not count against the civic national identity, for Müller’s constitutional patriotism would also lead to these outcomes. For one, the distinction between political values and a national culture or way of life, and his argument that citizenship tests and rituals should focus only on ‘political values’, overlook the overlaps between political values and national culture. In liberal democratic societies, political values such as fairness and mutual justification between citizens are integral components of the national culture and way of life. As Yack points out, even the liberal legacy of individual rights and political rationality is ‘a type of cultural heritage [which] imparts an inherited cultural

659 Andrew Mason, Community, Solidarity and Belonging: Levels of Community and Their Normative Significance (Cambridge University Press 2000) 126.
660 ibid.
661 Including the duty to include; see Part II, 184–196 below.
662 Müller (n 653) 94.
identity’ that cannot be easily or readily distinguished from shared political principles. Hence, for Müller’s constitutional patriots to grant citizenship to someone from a patriarchal country with a poor record of gender equality, this person would plausibly be required to abandon, or at least set aside, his old ideas about the ‘proper’ roles of the sexes and recognise women as his equals—which is precisely the cultural assimilation that Müller says is endemic of nationalist theories. If even a supposedly culturally neutral way of thinking about political membership requires some cultural assimilation, then a civic national identity cannot be objected to on these grounds.

This leads me to the final point about national identity before moving on to how a shared national identity justifies special obligations between members. It is that the moral significance of national identity should not be downplayed or dismissed because even theories like Müller’s arguably presuppose some notion of it. His constitutional patriotism primarily focuses on ‘particular, preexisting political structures, not on humanity as a whole’, which are essentially modern nation-states, or what I am calling national communities. Whatever the semantics, even Müller’s idea that constitutional patriots would be specifically committed to their political community’s constitutional culture, and not some other like-minded one, presupposes some prior identification with the political community qua nation-state in question. As Kymlicka notes, correctly, ‘What holds Americans together, despite their lack of common values, is the fact that they share an identity as Americans. Conversely, what keeps Swedes and Norwegians apart, despite the presence of shared values, is the lack of a shared identity.’

This suggests that the constitutional patriot’s commitment to her political community is motivated by something prior to a commitment to political principles. The constitutional patriot has to first identify with her political community, for instance identify as a Swede, to be committed to the Swedish political community and not the Norwegian one. The identity ‘Swede’ is a national identity—and because it is a powerful source of personal identity, as Miller correctly states, it is arguably the national identity that provides the motivational force to be committed to this set of political principles instead of that. Yael Tamir notes that there

663 Yack (n 599) 42.
664 Müller (n 653) 78.
665 Will Kymlicka, Multicultural Citizenship (Oxford University Press 1996) 188.
are ‘connections between feelings of belonging and moral obligations’, and it is arguably one’s identification with a national community, which evokes feelings of belonging to that community, that motivates one to fulfil the community’s obligations.

Undoubtedly, Mason would object to my claim that Müller’s constitutional patriotism requires some notion of national identity to work. For Mason, it can simply be explained by the constitutional patriot’s sense of belonging to her polity. A person has such a sense of belonging, Mason argues, if ‘she identifies with most of its major institutions and some of its central practices, and feels at home in them [so that] she regards her flourishing as intimately linked to their flourishing’. Mason argues, too, that Kymlicka’s characterisation of the American identity as a national identity is unconvincing because ‘Kymlicka says little about what it is for people to share an identity’. It is more plausible to say that ‘the most important factor in holding the United States together is a sense of belonging to the American polity’ because they ‘identify with some of the same institutions and practices, and feel at home in them’. Mason contrasts this to a sense of belonging together, which is required for people to share an identity; and the sense of belonging together, for Mason, is animated by the belief that ‘there is some special reason why they should associate together, such as that which might be provided by the belief that they have a common history or distinctive culture’.

The constitutive nature of the national identity provides the response to Mason’s critique, as well as the basis for the belief that co-nationals have ‘a common history or distinctive culture’. It is because members are constituted by the national community’s way of life that they identify with the polity and with each other. This is a good segue into the next section; but before that, a quick summary of the discussion so far.

I have expounded on the civic national identity on which special obligations between co-nationals are premised. It encompasses a range of concepts, both profound and trivial. Given the constitutive communities theory, the civic national identity is not based on any particular ethnic or cultural group; and if a national identity is based on an ethnic or cultural group for historical reasons, it should not require members to also belong to those ethnic or cultural

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666 Tamir (n 650) 95.
667 Mason (n 659) 127.
668 ibid 129.
669 ibid.
constitutive communities. National identities, then, should be civic, which would also shield national identities from criticisms that they are hostile to immigration and diversity.

ii. A Sense of Familiarity: Social Friendship and Special Obligations

What, exactly, is so salient about a shared constitutive national identity that it justifies special obligations between members of the national community? As alluded to previously, my argument has two components: the identification/social friendship component, and the mutuality/special obligations component.

Sharing a constitutive national identity produces a sense of familiarity, and hence feelings of social friendship, between co-nationals, such that co-nationality is like personal relationships. In other words, it becomes a type of personal relationships and immediate communities constituted by special obligations, thereby allowing us to apply Miller’s ethics of community. How does this sense of familiarity arise? The key to the argument is the constitutive nature of the national community. As argued in Chapter Three, to be constituted by a communal attachment is to be moulded and shaped by its values, practices, way of life, etc. The constitutive community then becomes a fundamental feature of identity, providing a framework within which we make important choices; and we affirm its value when we identify as a member by living as such.

What is particularly salient for the national community, and the sense of familiarity amongst its members, is the dialogical process of identity formation.\textsuperscript{670} In this process, we form our identity in dialogue with others, using the tools and concepts provided by them. Likewise, the national community makes available to its members the same concepts, practices, values, behavioural norms, etc that constitute their identities. Hence, an individual whose identity has been constituted by her national community, and who identifies as a member, develops an understanding of herself and of her fellow members. In the dialogical process of her identity formation, she interacts with her co-nationals in her daily life (in the neighbourhood, in school, at work, etc) and recognises aspects of herself in them because their identities as members of the national community have also been constituted by the same concepts, practices, language, and so on.

\textsuperscript{670} See Chapter Three, Part III(b)(i), 150–151.
This recognition of oneself in others arguably gives rise to a *sense of familiarity* between co-nationals, which creates the impression that fellow members of the national community are more personally related to us than they really are. This impression of closeness underlies Benedict Anderson’s notion of nations as ‘imagined’ communities: ‘It is imagined because the members of even the smallest nation will never know most of their fellow-members, meet them, or even hear of them, yet in the minds of each lives the image of their communion.’\(^671\) It is this sense of familiarity, of communion, that makes co-nationality *like* personal relationships. Friendship, for instance, is underpinned by a mutual understanding that stems from commonalities (interests, values, and so on) and an intimate knowledge of the other (her likes and dislikes, her character, etc). There is thus familiarity between friends because they understand each other and know important things about each other that most others do not. This familiarity, in turn, produces feelings of social friendship, or the drive to ‘do what we can for the people to whom we feel connected’,\(^672\) because we feel, and are, connected to our friends.

Similarly, the fact that co-nationals have been *constituted* by the same national community gives them an intimate, albeit impersonal, knowledge of each other, which produces a sense of familiarity between them. Fellow members of the national community feel familiar to us because we recognise in them fundamental features of *our* identity. Hence, when Graham Greene’s accidental English spy in Havana, Wormold, encounters Carter, a fellow Englishman, Wormold finds Carter representative of ‘English midlands, English snobbery, English vulgarity, all the sense of kinship and security the word England implied to him’.\(^673\) Wormold even finds security in Carter’s ‘vulgarity’: ‘You could appeal to him as you could appeal to an English policeman, *because you knew his thoughts*.\(^674\) Hence, the constitutive nature of the national community creates ‘bonds of commonality tying us to [our national community]’\(^675\) and to each other—and it is this commonality, with which we identify, that evokes a sense of familiarity and recognition between co-nationals.

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\(^671\) Anderson (n 600) 6.

\(^672\) Yack (n 599) 164.


\(^674\) ibid 175 (emphasis added).

\(^675\) Bell, *Communitarianism and Its Critics* (n 351) 134.
This familiarity, of course, is importantly limited to a mere sense of it, which is the consequence of the imagined quality of the national community. Unless we gain a deeper understanding of fellow members as individuals, we can only ever experience a sense, an approximation, of the profound familiarity that we have with our family and friends. Nonetheless, this sense of familiarity transmutes our relations with fellow members into quasi-intimate relations because it arises from a deep and significant sharing: a constitutive national identity. This sharing signals that my co-nationals are, in an important, foundational way, ‘like oneself that primarily distinguish them from others’. As Miller says, even though people may have difficulties articulating what differentiates their national community from others, they ‘may have an intuitive sense, when confronted with foreigners, of where the differences lie’. Due to the national community’s profound constitutive influence on our identity, we feel as if we know our fellow members even though they are strangers to us. It is in this way that the constitutive national community becomes a quasi-intimate community: we feel a sense of connectedness to our fellow members, and this sense of connectedness, of familiarity, gives rise to social friendship. This sense of familiarity is sufficient to place co-nationality into the category of personal relationships characterised by special obligations, such that Miller’s ethics of community can be applied to the national community.

So far, I have explained the basis of co-nationals’ social friendship towards each other: it is the sense of familiarity produced by sharing a constitutive national identity. This also gives rise to feelings of obligation, in largely the same way that I feel obliged to read John’s paper even when I am too busy to do so. But are the sense of familiarity and feelings of obligation enough to ground the special obligations that Miller argues we owe to our co-nationals? Tamir thinks that they are. Membership obligations, she argues, ‘are not grounded on consent, reciprocity, or gratitude, but rather on a feeling of belonging or connectedness’. Social friendship, in other words, is enough to give rise to special obligations; feeling obliged, on this account, is the same as being obliged.

While feelings of obligation towards those we care about usually reflect an obligation, Tamir’s position is vulnerable to a formidable challenge. Dagger, for instance, has countered that ‘[t]he fact that people feel themselves to be under an obligation to their polity does not

676 McMahan (n 609) 124.
677 Miller (n 598) 27.
678 Tamir (n 650) 137.
mean that they are under such an obligation’. After all, we can be mistaken in our feelings of obligation: a woman may feel obliged to protect her abusive husband from the law, but she does not owe him any such obligation. Likewise, even though I feel obliged to John to read his paper, if he has done something to undermine our friendship, then I may no longer be obliged to do anything for him.

We therefore need to establish special obligations within the national community on firmer grounds—and we can do so by applying Miller’s ethics of community to the nation. Recall that Miller says that the ethics of community mandate that loyalties and obligations between members are mutual and reciprocal. The second component of my argument, then, is based on the idea of reciprocity: those who contribute to the community can expect to be benefited by fellow members, and those who have benefited are obliged to extend the benefit to their fellow members. Not only has the national community provided us with the concepts, practices, language, way of life etc with which to form our identity as its members; but it is also the overarching political community within which our various constitutive communities have flourished, thereby enabling us to become the multifaceted individuals that we are. The national community has enabled us to form our identity, to lead meaningful lives as members of our various communities, through interactions with fellow members of the national community. It is thus a mutually beneficial community: to recall the Constituted Autonomous Self, our identity is formed in a dialogical process with others, and we need these others—other members of the national community—to flourish.

To share a national constitutive community is to identify as a member of the national community; this, in turn, entails caring for fellow members’ well-being, and seeing their successes and failures as our own. Since we have benefited, and continue to benefit, from the national community’s framework, we have an obligation to ensure that our fellow members receive the same benefits and advantages that we have received so that they can live meaningfully as members of their constitutive communities. Given the fact of the modern nation-state and my stipulation of the civic nation, constitutive communities need the national community to thrive. This impacts on us as individuals because these constitutive communities delineate the context in which our identity is formed, and so we need the national community to form our identity and live meaningful lives as members of our constitutive communities.


680 I am grateful to John Adenitire for this suggestion.
Having benefited from the national community’s framework, we are obliged to sustain the national community as a mutually beneficial community in which members are able to live meaningfully as members of their constitutive communities. This is also an obligation to enable fellow members to live meaningfully as such.

To whom are our special obligations owed? While I do not discount the notion that we owe special obligations to the national community as a whole, it seems more to meaningful to say that these obligations are owed to the individual members who comprise the national community. A community, after all, is a gathering of individuals. As Mark C. Murphy has argued, when we give reasons to promote some state of affairs that is good for a community, these reasons are derived from ‘the good of the persons whose lives that association affects’. In the same vein, our obligation to sustain the national community is an obligation to fellow members of our national community to do so, in order that they may benefit, like we have, from the national community. We are thus obliged to sustain the national community in a particular way: as a mutually beneficial community where everyone can live meaningfully as members of all their constitutive communities.

What happens when the national community is not mutually beneficial but oppressive? Do the repressed constitutive communities in a national community—black people in racist America, say—owe any obligations to the repressive national community? In such instances, it could be said that whatever feelings of obligations that black Americans may have are mistaken. More importantly, it would be incumbent on those in a better position who identify as members of the national community to discharge their obligations. This relates to the duty to include which I will discuss in Part II.

To sum up the discussion: I have argued that the sharing of a constitutive national identity justifies special obligations between co-nationals. First, it gives rise to a sense of familiarity such that co-nationality is sufficiently like personal relationships. Second, since the national community is a quasi-intimate community, Miller’s ethics of community apply—and the notion of reciprocity justifies special obligations between members. Given that we have received advantages from the mutually beneficial national community with which we identify, we are obliged to sustain the national community so that fellow members can receive the same benefits as well.

II. THE DUTY TO INCLUDE

How can we derive the normative duty to include from the account of social friendship and special obligations? Special obligations, to reiterate, direct members to act in a manner that they ordinarily would towards each other but for their social friendship reaching its limit. In other words, special obligations inform members what they *ought* to do given their ordinary feelings of special concern towards fellow members: since members ordinarily care about the well-being of their fellow members, they *ought* to still demonstrate this concern when their social friendship runs out.

What is the content of these special obligations? The examples that Miller gives include a duty to defend the nation and its ancestral territory, a duty to preserve the community’s culture and territorial integrity, and a special responsibility towards their co-nationals which would justify giving them priority when acting as individuals and when making public policy. As mentioned, however, the precise content of these special obligations is ultimately determined by the national community’s public culture, or the core features of what I call the national identity. Hence, if one feature of the national identity is a strong valuation of national defence, then an obligation might be compulsory national service for its members.

But is there a baseline special obligation that members in a national community owe to each other, one that holds true regardless of the core features of the national identity? I will argue that this baseline obligation is the duty to include. I call it the *duty*, and not obligation, to include because ‘duty’ more strongly connotes a sense of a responsibility that cannot be shirked at will, without good reasons, and thus carries greater binding force. ‘Duty’ also corresponds to the interest theory of rights that the thesis presupposes. How does this duty come about, and what does it mean to include?

a. Community and Inclusiveness

The duty to include is essentially derived from the inherently inclusive concept of community. A community is a group of people who associate with each other based on some commonalities, which are the criteria for membership. A community is thus an *inclusion* of individuals who

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682 Miller (n 598) 68.
meet the relevant membership criteria. This inclusion is augmented by the flip side of the coin, exclusion: individuals who do not possess the relevant membership criteria are excluded from the community.

The community’s exclusionary effect and power heighten the moral significance of its inclusiveness. Members of the community include only those who meet the membership criteria because they enjoy a shared way of life based on these criteria. This way of life is valuable to the community’s members because it gives meaning to their lives; and this quality is intensified by the fact that outsiders—those who do not fulfil the membership criteria—cannot ordinarily grasp or understand the meaning and value of this way of life. It is because members value this way of life that they include as fellow members all the individuals who meet the membership criteria so that they can enjoy this way of life, too. To take it further, it is because this way of life is meaningful that the community should include as fellow members those who meet the membership criteria, because they ought to be able to enjoy it as well.

The above contains two concepts of community: community in the descriptive sense, and community in the normative sense. The duty to include moves from the descriptive to the normative. The descriptive concept, obviously, describes what it means for a group of people to form a community. As Mason puts it, community in the descriptive (what Mason calls ordinary) sense is ‘constituted by a group of people who share a range of values, a way of life, identify with the group and its practices and recognize each other as members of that group’. The constitution of a community by a shared range of values and way of life is an inclusion of people who share these values and way of life, and who recognise each other as members of the community.

We can move from the descriptive to the normative conception of community by considering what a community whose way of life is valued by members should do. This community should include as members all individuals who meet the membership criteria because this way of life is valuable to them as well—and this is certainly true for constitutive communities. As discussed in Chapter Three, our constitutive communities are morally valuable because they provide the framework in which we form our identity and make choices about things of value. Given the moral significance of these communities to our lives, the only

683 Mason (n 659) 21.
684 See Chapter Three, Part III(a), 144–149.
morally relevant factor in determining who counts as a member is whether the individual meets the membership criteria. If she does, then she should be included as a member, and ought not be excluded for morally irrelevant reasons. A morally irrelevant reason to exclude someone who meets the membership criteria is one based on stipulations that have nothing to do with the criteria for membership. For instance, if the morally relevant criterion for membership in the X community is only that members must possess X, then someone who possesses X cannot be excluded because she also possesses Y. Nothing in the membership criterion—that one has to possess X—states that one cannot simultaneously possess Y. The possession of Y would only be a morally relevant reason to exclude the individual if possessing Y fundamentally conflicts with the X community’s foundational principles; this will be explored further below.

The above is the first step of the normative conception, which works at the level of entry: it obliges the community to admit as members those who possess the morally relevant criteria for membership. But the notion of including entails more than mere club entry. The second step spells out what it means to include—and it essentially involves a recognition of and respect for members’ equality of membership so as to foster their sense of belonging to the community in the long run, which also sustains the community as a whole. Members recognise each other’s equality of membership in the substantive sense by displaying social friendship towards them, and demonstrate special concern for fellow members’ interests by giving ‘each other’s interests some non-instrumental weight in their practical reasoning’. 685 This also means that, according to Mason’s moralised concept of community, 686 there must be an absence of systematic exploitation and injustice between members. One is only counted as an equal member of the community if other members give her interests due concern in their decision-making process. Similarly, a community that exploits some members to further its own goals in the public sphere does not respect their equality of membership because, in virtue of the exploitation, these members are treated unequally as lesser members whose interests are unworthy of special concern. As John Baker says, relationships of exploitation ‘mock the very idea of community’. 687 Recognising equality of membership in this way fosters members’ sense of belonging by taking their membership in the community seriously. Because it is taken

685 Mason (n 659) 27.
686 ibid 27–30.
seriously, they count as integral members of the community; indeed, they *belong* to the community.

In sum, community in the normative sense should include all who possess the membership criteria by, first, admitting them as members; and second, recognising and respecting their equality of membership so as to foster a long-term sense of belonging. One way to do this is to show particular concern for their interests by not sacrificing some members’ interests in a utilitarian calculus to advance the community’s overall interest. Community in the normative sense is thus an inclusion of all individuals who possess the morally relevant criterion for membership despite their differences. As Yack succinctly puts it, ‘communities are composed of individuals who focus their attention on something that bridges, rather than erases, their differences’. 688

As mentioned previously, however, social friendship is finite. Social friendship tends to reach its limits when members’ interests come into conflict, or when they simply dislike some other members’ interests for whatever reason. In such circumstances, members would have to ask, ‘What do we owe to each other given our special relationship with each other as members of the same community?’ Since members ordinarily exhibit mutual concern for each other’s interests, they owe each other an obligation of mutual concern for each other’s interests. More generally, given that, by virtue of their membership in the community, they ordinarily include each other, it follows that they owe each other a minimal duty to include when social friendship runs out.

The duty to include can now be formulated as follows. Given that the community’s shared way of life based on the morally relevant criteria for membership is valuable to those who meet the criteria, the community ought to include all of them as members. The community should thus admit as members those who possess the morally relevant criteria for membership, and recognise and respect their equality of membership. This requires members to take into account each other’s interests when making collective decisions in a manner that is commensurate with these interests’ value to fellow members. Members of the community ought also to ensure that fellow members are not exploited or treated unjustly. This duty, however, is not absolute; it ceases to apply if members hold beliefs or act in a manner that

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688 Yack (n 599) 49.
violates the duty itself and/or the community’s foundational principles. I now turn to the duty to include in the national community.

b. The National Community’s Duty to Include

To recall my justification of special obligations in the national community,689 members have an obligation to enable fellow members to receive the same benefits that they have received from the national community: the ability to live meaningfully as members of their respective constitutive communities. The duty to include seeks to do precisely this by, first, requiring members to confer membership on those who bear the constitutive national identity; and second, to respect each other’s equality of membership so as to foster a long-term sense of belonging in the national community. To respect each other’s equality of membership is to allow everyone the ability to live meaningfully as members of their constitutive communities.

How, then, should the duty be discharged? I will first provide a negative answer. Members of the national community should not exclude fellow members for morally irrelevant reasons: their membership in other constitutive communities. These reasons are morally irrelevant because the national identity criterion for membership does not stipulate that members can only, or cannot, belong to a certain constitutive community. More importantly, the Inclusive Communitarian Approach, because premised on the constitutive communities theory, does not allow for any such stipulation, and asserts that the only morally relevant membership criterion in the national community is the shared national identity. This protects members from the social harms associated with their constitutive communities by requiring that they cannot be excluded from the national community, and hence treated unequally, simply because of these various memberships.

It may be objected that the duty to include is unnecessary because it is self-evident that the national community would include everyone who is a citizen or a permanent resident. It is also conceptually trivial because a community is obviously an inclusive gathering of individuals who share commonalities, as I have described. The duty to include, then, far from being any kind of basic obligation, is a banality that merely states the obvious. While the objection is right in that the duty to include is self-evident in a descriptive sense, it does

689 See Part I(b)(ii), 179–183.
not automatically translate to an ethical obligation to actively and continuously include all members in the national community. A sexist national community, for instance, could decree that women are subject to the total control of their husbands or fathers; another national community organised along racial lines could deny their racial minorities the right to receive an education, or their religious minorities the right to worship; and so on. In these instances, special obligations between members plausibly still exist. The sexist national community could still promulgate welfare redistribution policies that benefit its poorest instead of the even poorer in a foreign land. The women in that country, and the minorities in the racist country, could plausibly still be willing to defend their countries against attacks by other countries.

These kinds of national communities, however, are the sort that undermine the idea of community because of their sanctioned domination and exploitation. They are also contrary to the Inclusive Communitarian Approach by denying the constitutive communities of some of its members. Furthermore, the measures enacted by these national communities are precisely the social harms that we face which the duty to include aims to mitigate. Since the basic ethical duty to include cannot be taken as a given, it has to be formulated so as to confer equality of membership on all that possess the morally relevant criterion for membership in the national community, and protect them from the social harms associated with their other constitutive communities. The duty exhorts members of the national community to see each other as fellow members who share a common commitment to the national community, and to use their shared national identity to bridge their differences, thereby disallowing unequal treatment of some members based on morally irrelevant reasons.

The duty, then, consists of two steps. The first, threshold step is determining who possesses the morally relevant criterion for membership; and the second step is the recognition of, and respect for, each other’s equality of membership.

i. Who Bears the National Identity?

The first step is relatively straightforward: one’s citizenship is prima facie evidence that one bears the national identity. Although citizenship serves an evidentiary role in my theory, it has been given normative significance by some authors. It has been argued, for instance, that citizenship has a ‘normative component which includes the acceptance of national and societal values’ because citizenship ‘is about participation in social life … [and in] its most developed
form, it is real membership of a real community’.\(^{690}\) Since my theory ascribes normative and ethical significance to the national community, however, it is a shared national identity, evidenced *prima facie* by citizenship, that gives rise to special obligations in the national community. That said, the question of who bears the national identity is not determined by citizenship alone. Individuals who identify with a national community but are not citizens, perhaps because they were born elsewhere but have spent most of their lives in the national community, certainly fulfil the membership criterion, and should be formally recognised as members of the national community by being granted citizenship.

The question may arise, however, whether national identity is a subjective or objective criterion. That is, is national identity something that is ascribed to an individual by others based on her citizenship, or does she have to identify as a member of the national community? The answer is a mix of both. Following from the discussion in Chapter Three about the significance of constitutive communities to identity,\(^{691}\) the national identity is both objectively determined and subjectively affirmed or rejected, as the case may be. An individual’s national identity is usually apparent from external facts about her; but, to recall the Fundamental Feature of constitutive communities, the extent to which she identifies as a member of her national community is a subjective matter. That said, because the national community is one of our constitutive communities, it is likely that its influence on our sense of identity and self-understanding is deeper than we think. As Miller observes, ‘the attitudes and beliefs that constitute nationality are very often hidden away in the deeper recesses of the mind, brought to full consciousness only by some dramatic event’,\(^{692}\) such as the national community winning its first gold medal at the Olympics. In such momentous events, even those who profess their indifference to nationality … are very likely to find that, at those exceptional moments when the fate of the whole nation is determined collectively, their sense of identity is such that they see their own well-being as closely bound up with that of the community.\(^{693}\)


\(^{691}\) See Chapter Three, Part III(a), 144–149.

\(^{692}\) Miller (n 598) 18.

\(^{693}\) ibid 14–15.
Miller’s claim could be challenged for overlooking the exceptional few who genuinely do not feel any sense of belonging to a national community because, for instance, they have spent their lives in many different countries and do not identify with any of them. Imposing a national identity on these individuals would be inappropriate because, say, it contradicts their identity as a cosmopolitan. Since bearing a national identity has ethical consequences, these individuals may be unfairly called upon by a national community with which they do not identify, which claims them as members simply based on their citizenship, to contribute to and make sacrifices for the national community.

This may not be entirely unfair, however, for two reasons. First, it is doubtful whether anyone can feel no special concern at all for the national community or communities in which they grew up. At a minimum, there are likely to be certain aspects of the national community’s way of life, even trivial ones, that have made a lasting imprint on the individual. Hence, a Nigerian-Italian living in Cambridge who does not identify with any national community may find himself eating a plantain in the Cambridge market square and reminiscing about how it reminds him of his childhood in Nigeria. Of course, this is not to claim that it amounts to a special concern for the Nigerian national community; the point is merely that, as Miller rightly states, the national community’s influence on identity is arguably often hidden away at the back of our minds. It may be, then, that, after some triggering event, such individuals would find themselves feeling a stronger sense of belonging with a particular national community than they had hitherto acknowledged.

Second, even if conceding that such individuals will never identify with any national communities, it is still not entirely unfair for the national community whose citizenship they have to claim them as members. To begin with, if these individuals are not resident in the national community’s political territory, this imposition of the national identity and its political obligations—save, perhaps, for the obligation to vote—are unlikely to have any practical consequences. Even if some political obligations are binding, it is arguable that they are not unjustly imposed. Having benefited from the national community in the past, these individuals should reciprocate to some degree. For instance, someone who has benefited from her national community’s universal healthcare system ought not complain about paying taxes to her national community, even if she does not identify with it. That said, some obligations are more onerous than others; the obligation to fight in a war for the national community would clearly be too onerous for someone who does not identify with it.
In sum, the individual’s citizenship *prima facie* determines whether she bears the national identity. In this regard, it is largely an objective question, though it is also subjective because citizens have to affirm the national identity as an integral part of their identities. This subjective aspect requires that non-citizens who identify with the national community be legally recognised as members by being granted citizenship.

### ii. Equality of Membership

How should members of the national community recognise and respect each other’s equality of membership? Essentially, this entails displaying special concern—that is, social friendship—for each other’s interest in their constitutive communities by not sacrificing them in a utilitarian calculus to advance the community’s overall interests, and enabling all members to live as members of their various constitutive communities—including the national community. Simply put, the duty to include aims to enable the national community’s members to live meaningfully as members of *all* their constitutive communities. The duty is thus directed at two aspects of members’ identities: as members of the national community, and as members of other constitutive communities.

How can members of the national community recognise each other’s equality of membership? They ought to *accept* each other’s constitutive communities even if some profess beliefs that are diametrically opposed to their own. Acceptance can be demonstrated in two ways. First, members should not ordinarily have to choose between living as a member of the national community and as members of other constitutive communities because these memberships, *ceteris paribus*, are equally valuable. For instance, members of a religious constitutive community should not be forced to choose between two valuable constitutive communities if the national community imposes obligations that conflict with their beliefs. Second, members of the national community ought not be refrained from living as members of their other constitutive communities simply because some other members object to their identity or beliefs. The LGB community, for example, ought not be restricted merely because some religious communities object to their sexual orientation.

These potential conflicts between constitutive communities (including the national community) are the problems faced by pluralistic societies alluded to at the start of this chapter; they are also instances when social friendship reaches its limit. The duty to include then steps
in to resolve these conflicts. Unlike a strand of liberal nationalist thought that solves conflicts between the national community and ‘communities below the level of the state … in favour of the former’, the duty to include requires that members of the national community be slow to impose their will on the constitutive communities under fire. The duty exhorts members to display special concern for their fellow members by appreciating the importance of their constitutive communities to their lives. This trades on the fact members have their own valued constitutive communities, and thus can appreciate the value of these constitutive communities to their fellow members, and accept a reasonable compromise in cases of conflict.

For example, a national community that imposes political obligations that conflict with a religious community’s beliefs ought to accommodate these religious members by providing an alternative way for them to fulfil their obligations without violating their religious beliefs. Likewise, the religious community opposed to homosexuality has to accept that the LGB community, being fundamentally important to their fellow members, has as strong a right to an equal existence in the national community as the religious community. The duty to include is then discharged because accepting these positions demonstrates respect for fellow members’ equality of membership. They take members’ interest in their constitutive communities seriously by allowing them, as far as possible, to live meaningfully as members of their constitutive communities, instead of sacrificing them to serve a collective interest, or to sacrifice one (e.g. the LGB community) to please another (e.g. the religious community). This also recognises that, ceteris paribus, all constitutive communities are equally valuable and thus have the space to thrive within the national community.

However, the duty to include is not absolute. The national community’s members owe no such duty to a constitutive community whose constitutive beliefs violate the duty to include, in which case the national community can justifiably ban its existence. A white supremacist community, for instance, is constituted by the belief that the white race is superior to all other races, and denigrates other races as inferior to promote this belief. This belief is deeply violative of the duty to include because it excludes some members for morally irrelevant reasons and denies their equal moral worth. Hence, the duty to include ceases to apply to the white supremacist community: its violation of the duty is a morally relevant reason to exclude it from the national community. Consequently, the national community would be justified in banning the community altogether. The same argument applies to a constitutive community that is

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694 Mason, Community, Solidarity and Belonging (n 659) 115.
constituted by homophobia, or some other ideology that is rooted in a belief that denies the equal moral worth of some members. Hence, a religious community constituted only by the belief that LGB members are inferior to non-LGB members can also be banned.

What happens when the beliefs and/or activities that seem to violate the duty to include are more nuanced than my account so far? This is especially pertinent when it comes to the tension between religious communities and LGB communities. Many religious communities hold the view that homosexuality is a sin, and religious leaders often preach exactly that to their congregation. But what if these religious communities do not call for LGBs to be driven out of the national community, but instead, tell its members to treat LGBs with compassion even if they consider homosexuality a sin? In such cases, to hold that these religious communities violate the duty to include, such that the national community can justifiably ban them, would be too hasty because it would fail to notice that, unlike the white supremacist or homophobic communities, these religious communities are not constituted by the duty-violating belief. Put another way, the belief that homosexuality is an abomination is not the raison d'être of the religious communities’ existence, as it is constituted by other beliefs as well: the existence of a god, the god’s goodness, love for your neighbours, and so on. The white supremacist/homophobic communities, on the other hand, are constituted by the duty-violating beliefs. The very definition of these communities is a denigration of other members of the national community.

A distinction must be drawn, then, between a violation of the duty to include arising from the raison d'être of the constitutive community, and a violation that forms part of a wider set of beliefs. The national community can ban the existence of the former constitutive community; and if this distinction is sound, what ought to be done about the religious community that preaches compassion towards LGBs? While these communities ought not be banned because their raison d'être does not violate the duty to include, their activities can justifiably be restricted. The national community can, for instance, require the religious constitutive community to confine its preaching to its private place of worship, and its leaders barred from speaking publicly against homosexuality. The national community would have to justify, first, the restrictions to the religious community; and second, the fact that the religious community can continue to preach that homosexuality is a sin to the LGB community. Such justifications should appeal to the special significance of membership in the national community.

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695 See also Chapter Five, Part II(a)(ii), 231–236.
community and the feelings of social friendship that ordinarily exist in the national community. The justification could be something like this: even though some aspects of your fellow members’ constitutive communities are fundamentally opposed to yours, you should nevertheless give them some latitude to carry out the objectionable activities. Since they are fellow members of your national community, you should show them special concern by appreciating that these objectionable activities are fundamental to their identities and accept that a compromise is necessary so that you can both live meaningfully as members of your constitutive communities. This is what respect for each other’s equality of membership requires.

This solution may strike some as unsatisfactory. The very idea that the justification appeals to membership in the national community and the social friendship between members seems self-defeating because the conflict was brought about by the failure of social friendship in the first place. Why would appealing to social friendship that is already spent be successful in a situation where both groups are incurring a loss? That is, the religious community is told to restrict its activities, and the homosexual one is told to accept that the religious community can continue to preach in private that its constitutive community is sinful.

Admittedly, the solution is imperfect. Nonetheless, the social friendship that ordinarily exists in the national community, and its resulting ethical significance, must be the fulcrum of resolutions to these conflicts. This is because, as explained earlier, nationality is a powerful source of identity, which makes the national identity a potent motivator for ethical behaviour. In cases where social friendship has failed, the duty to include steps in to direct members to take the right ethical action; but it does not mean that social friendship has failed entirely. In the process of discharging the duty to include towards each other, members could be reminded that the opposing constitutive community is composed of fellow members of the national community, a fact that is easy to overlook in the heat of controversy. Reminding them of their shared national identity could revitalise their feelings of social friendship and motivate them to accept the compromise. In any event, this imperfect solution is arguably more plausible than each side trying to convince the other of the truth of their positions, which, given the deep-seated nature of the clashing constitutive communities, is unlikely to be successful.

I have argued that the duty to include requires members of the national community to recognise and respect each other’s equality of membership by displaying special concern for each other’s interest in their constitutive communities. In cases where conflicts arise between
constitutive communities (including the national community) and social friendship reaches its limit, the duty steps in and directs members to the appropriate ethical action. The duty does so by requiring members of the national community to appreciate that their fellow members’ constitutive communities are important sources of meaning to their lives, and to demonstrate special concern for them by accommodating those that clash with their own. Where there are compromises, the losses incurred on both sides should be mutually justified by reminding them of the social friendship within the national community.

c. A Thin Theory of the Communitarian Politics of the Good

The duty to include relates back to the second conceptual claim about communitarianism that I made in Chapter 2: communitarianism promotes only a thin theory of the good of inclusiveness. How can the communitarian state promote this good? I will consider this question in relation to 1) members of the national community; and, very briefly, 2) the state’s treatment of non-members.

i. Members of the National Community

The good of inclusiveness ultimately aims to enable everyone to live meaningfully as members of their various constitutive communities within the national community. As already argued, this requires the national community to confer equality of membership on all its members, and to recognise and respect this equality of membership. The good of inclusiveness, then, is a recognition of the ‘full membership of fellow citizens wrongly excluded from the common life’ of the national community. Hence, to achieve equality of membership, the communitarian state should first confer equal citizenship on all who fulfil the national identity criterion for membership. De jure equality of citizenship, however, does not always guarantee de facto equality. Equality of membership is undermined when certain constitutive communities are singled out for criminalisation, for instance, based on the prejudices of the majority in the national community. The role of the communitarian state in promoting the good of inclusiveness is to ensure that equality of membership is not unduly undermined by a tyrannical majority trying to exclude unpopular constitutive communities for morally irrelevant

696 Sandel, Public Philosophy (n 359) 153–154.
reasons. This can be done by repealing laws that target unpopular constitutive communities, or by enacting laws to protect them.

Legal recognition of membership equality is but the first step towards promoting the good of inclusiveness. Its substantive promotion involves assisting members of the national community to discharge their duty to include by putting in place the necessary measures to facilitate an understanding of what it means to recognise and respect each other’s equality of membership. Given that the national community is constituted by its members’ shared national identity, the communitarian state can adopt nation-building measures that promote this national identity. It can, first, mould public education to inculcate in students the importance of the duty to include by emphasising that, despite differences, every member of the national community is an equal member. This can be done by teaching students about the national community’s shared history: its formation as a community with its unique identity, constituted by its members’ diverse and oft-conflicting constitutive communities which it has accepted and accommodated. Historical instances of mutual aid and concern, when members of different constitutive communities came together to help each other in times of need, are especially salient in illustrating the plausibility and importance of commonality in plurality, of forging a common national identity that encompasses members’ different identities.

The second measure that the communitarian state can take in its nation-building efforts is to mould public education in a way that nurtures students’ respect for, and acceptance of, each other’s constitutive communities. This means that the state should adopt educational policies that actively promote the equal status of all constitutive communities, especially historically marginalised ones. For instance, Bell’s suggestion that legislation be enacted to “[promote] schoolbooks which portray homosexuals in a positive light” would help to reverse historical and socially entrenched prejudices against LGBs. This would also ameliorate the conflict, discussed earlier, between the religious and LGB communities. The hope is that public education in the manner that Bell has suggested will, over time, lead to a greater acceptance of historically marginalised minorities.

In a similar vein, syllabi for humanities subjects such as literature and philosophy can also be designed in a way that promotes the contribution of historically marginalised constitutive communities, and which portray them in a less stereotypical and more holistic

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697 Bell, Communitarianism and Its Critics (n 351) 169.
light. For instance, canonical literary texts, selected and reinforced by a specific class of individuals, should be interspersed with works by women and non-white authors so that students are exposed to a diverse range of views and experiences. Classics that are (rightly) judged racist, sexist, homophobic, etc by today’s standards should be taught alongside works that counter the viewpoints expressed in those classic texts. This is to enable students to gain a deeper understanding of the experiences and struggles of fellow members of the national community. All in all, public education should be moulded in a way that ‘[equips] students to become good citizens, capable of contributing meaningfully to public deliberations and pursuits’. The chief pursuit is, of course, the good of inclusiveness.

Moving away from education, the third thing that the communitarian state can do in its nation-building efforts is to refrain from interfering with the national community’s determination of its identity, stepping in only when the duty to include is violated. The national identity is a deeply social phenomenon; its content is shaped and re-shaped by its members based on, among other things, their daily practices, their interactions with each other, and their ideas about what the national identity is. As such, the communitarian state has to respect the right to freedom of speech and expression, including freedom of the press. As Miller says, the national community’s ‘public culture is to some extent a product of political debate, and depends for its dissemination upon mass media’. The same applies to the national identity: its content is, to some extent, a product of public debate, which requires that members have the freedom to express their views on what the national identity is. The details of the debate, as well as its outcome, are then transmitted by an independent media. The communitarian state, then, ought to promote public debate about what the national identity is, what it means to bear it, and so on, particularly when it detects social fault lines, such as animosity towards an unpopular minority constitutive community. In such instances, the communitarian state should initiate official dialogue between opposing camps about the contentious issues so that members of the national community can be reminded of each other’s equal membership and social friendship.

The fourth consideration for the communitarian state in its nation-building efforts is that it ought not impose a top-down conception of the national identity. In other words, the communitarian state should avoid the temptation of defining the national identity and foisting

698 Sandel, Public Philosophy (n 359) 154.
699 Miller (n 598) 68.
it on the national community through, for instance, education. Such top-down imposition of a state-defined national identity is particularly objectionable when the national identity valorises the majority constitutive community or communities at the expense of other constitutive communities. When promoting the national identity, the communitarian state must always keep in mind that the national identity is pluralistic and multifaceted through and through; that it encompasses all the constitutive communities within the national community by embodying none of them. The national identity that the state promotes must be one that is true to members’ self-understanding, and which enables all of them to flourish in the national community as members of all their constitutive communities. To do otherwise would be to co-opt the national identity to serve statist interests, which would be illegitimate under the Inclusive Communitarian Approach.

These are but some ideas about how the communitarian state can promote the good of inclusiveness within my framework of civil-political rights. There may be socio-economic measures that the state ought to take to promote inclusiveness, such as a fair redistribution of wealth that enables the poorest segments of the national community to have access to the same resources as other members. Such considerations, however, are beyond the scope of the thesis, and so I will leave them aside.

**ii. Treatment of Non-Members**

Before concluding this chapter, it is necessary to comment, albeit too briefly, on how the communitarian state should treat non-members. As argued previously, our special obligations to our co-nationals does not exhaust all our ethical obligations. Hence, the duty to include does not allow us to violate our general ethical obligations to non-members.

How should the communitarian state deal with this issue? To begin with what the communitarian state can do, the tension between special and general obligations arguably does not arise when the state denies non-members the right to vote, and when it adopts policies that favours members for employment. Arguably, too, the communitarian state can place reasonable restrictions on non-members’ right to freedom of expression on issues that exclusively concern the national community, especially if non-members are trying to stir up inter-community tension. The assumption here is that non-members do not have a stake in the national
community and its way of life, and so their right to expression on issues that concern the national community is comparatively less important.

What, then, of the measures that the communitarian state cannot adopt against non-members within its territory? The general principle is that the laws and policies that the communitarian state adopts to promote the good of inclusiveness cannot discriminate against, or disadvantage, non-members in a way that conflicts with our obligations to human beings as such. Undoubtedly, the question of what exactly these obligations are is a protracted one, and it would be vastly beyond the scope of the thesis to discuss it in depth. At the risk of oversimplification, then, our general ethical obligations to human beings are determined by how we ought to treat them as moral beings; to invoke Kant, as if they were ends in themselves. This, in turn, requires us to respect and protect the basic interests that they have as moral beings, such as life, bodily integrity, the avoidance of physical pain, and so on. For instance, we treat someone as an end in herself when we prohibit the use of torture because we recognise that torture is a ‘consequentialist [trade-off] of one person’s welfare or liberty for the sake of others [which fails] “to take seriously the plurality and distinctness of individuals”’. In this light, the policies and laws that the communitarian state adopts to promote the good of inclusiveness cannot violate these basic interests and the rights that protect them. For instance, it would be illegitimate for the communitarian state to violate non-members’ right to life by imposing the death penalty on non-members but not members.

Ultimately, however, where exactly the communitarian state ought to draw the line when promoting the good of inclusiveness can only be determined based on specific situations with which the state is confronted. Nonetheless, the general guiding principle is that, in promoting its national community’s good of inclusiveness, the communitarian state must ensure that it does not treat non-members within its territory in a manner that undermines them as subjects of our moral consideration. This would also enable members of the national community to discharge their obligations to each other without violating their general ethical obligations to human beings as such.


701 It should go without saying that, as a general matter, the communitarian state cannot enact laws or adopt policies that violate the rights of non-members regardless of whether they are adopted to promote the good of inclusiveness.
CONCLUSION

This chapter has established the second element of the Inclusive Communitarian Approach to rights: the duty to include. I began by arguing, following Miller, that the nation should be conceived of as the national community, i.e. an ethical community where members owe each other special obligations. Following Yack, I drew a distinction between two concepts: social friendship and special obligations. I argued that we are ordinarily motivated by social friendship in our ethical behaviour towards those to whom we are intimately related; but we act out of obligation towards them when social friendship reaches its limits. Hence, special obligations should be understood as filling the gap when social friendship runs out.

I then addressed the question of how special obligations flowing from nationality can be justified given the important differences between the national community and intimate communities. I assumed that particular obligations to friends, family and so on are morally acceptable, and provided an argument for why special obligations between co-nationals can be classified as a type of particular obligations. I argued that it is the sharing of a constitutive national identity which gives rise to a sense of familiarity between members, such that the national community is a quasi-intimate community, and our relations with our fellow members sufficiently like our intimate relations. From this, I applied Miller’s ethics of community to the national community; specifically, the principle of reciprocity. I argued that, because we have benefited from the framework established by the national community within which we have thrived in our constitutive communities, we are obliged to our co-nationals to sustain the national community so that they, too, may live meaningfully as members of their constitutive communities.

I went on to argue that the duty to include is a basic obligation that we owe to fellow members of the national community. I derived the duty from the inherently inclusive concept of community. In the national community, the duty to include applies as long as individuals meet the morally relevant criterion for membership, i.e. a shared national identity. The duty requires that members recognise and respect each other’s equality of membership, which entails demonstrating special concern for members’ ability to live meaningfully as members of their constitutive communities within the national community. I concluded the chapter by reiterating that communitarian politics can promote only a thin theory of the good, i.e.
inclusiveness; then suggested a few ways in which the communitarian state can, and cannot, promote this good.

I have now established the two core elements of the Inclusive Communitarian Approach. It re-conceptualises the important interests that constitutional rights protect as our constitutive communities and our interest in them. Hence, when conflicts arise, members should discharge their duty to include and continue to demonstrate special concern for the importance of fellow members’ constitutive communities by not unduly restricting or prohibiting the existence and/or activities of the contested constitutive communities, so that every member of the national community can live meaningfully as members of their various constitutive communities.

In the final chapter, I revisit Singapore and apply the Inclusive Communitarian Approach to the cases discussed in Chapter 1. It will be shown that, the Inclusive Communitarian Approach will produce a successful outcome in the cases.
Chapter Five

Singapore Revisited

INTRODUCTION

This chapter refocuses on Singapore and does two things: it demonstrates the relevance of the Inclusive Communitarian Approach to Singapore and applies it to the cases discussed in Chapter One. As shown in Chapter One, Singapore’s ‘collective over individual’ communitarian approach to rights has led to a disjunction between the elevated status of rights and their scant protection in practice. This suggests that Singapore’s ‘collective over individual’ approach is problematic—and so in Chapter Two, I showed that ‘collective over individual’ could not survive a normative critique in light of both ‘Asian’ and ‘Western’ communitarianism; as such, Singapore’s ‘collective over individual’ communitarianism should be abandoned. In Chapters Three and Four, I developed the two core elements of the Inclusive Communitarian Approach, designed to protect rights within a communitarian framework. In this chapter, then, I will show that the Inclusive Communitarian Approach will lead to a successful outcome in the cases discussed in Chapter One.

I precede the reinterpretation exercise by establishing, in Part I, how the Inclusive Communitarian Approach is relevant to Singapore. Although the Approach has general applicability, demonstrating its relevance to Singapore would ameliorate, if not remove, the sting of potential criticisms that it is irrelevant because it does not take into account Singapore’s unique context. I will show that applying the Inclusive Communitarian Approach would not be foisting an alien theory to Singapore because the two elements of the Approach are already present, albeit minimally, in Singapore’s communitarianism. The constitutive communities theory is implicit in Singapore’s definition of community, and the duty to include’s emphasis on the nation can be found in some of Singapore’s constitutional rights cases.

Most of all, the normative core of the duty to include—that members of the national community should recognise each other’s equality of membership—is arguably the essence of one of Singapore’s foundational principles: multiracialism. I will argue that Singapore’s multiracialism, even though couched in terms of racial equality, has at its core the ideal of equality simpliciter. As such, the duty to include bolsters Singapore’s existing philosophical commitments. This will be followed, in Part II, by the application of the Inclusive
Communitarian Approach to the cases discussed in Chapter One. I will demonstrate how an emphasis on the values that the Approach advances will produce a successful outcome in the cases.

I. THE INCLUSIVE COMMUNITARIAN APPROACH AND SINGAPORE

I make three claims in this Part to establish the relevance of the Inclusive Communitarian Approach to Singapore. First, I will show that Singapore’s definition of community contains a trace of the constitutive conception of community developed in Chapter Three. Second, I will show that the emphasis on the nation is evident in some of Singapore’s constitutional rights case law. Third, I will argue that the normative core of the duty to include—essentially equality of membership—underpins one of Singapore’s foundational principles: multiracialism. I will show how multiracialism *qua* racial equality is premised on equality *simpliciter*, and argue that it should be extended as such; hence, the duty to include is consistent with Singapore’s multiracialism.

a. Singapore’s Definition of Community

To demonstrate how the first element of the Inclusive Communitarian Approach, constitutive communities, already exists in Singapore’s communitarianism, we have to recall the White Paper on Shared Values,\(^\text{702}\) discussed in the Introduction.\(^\text{703}\) In fleshing out Singapore’s communitarianism, the White Paper makes a few references to community. Community is explicitly mentioned in the first and third values: ‘nation before community and society above self’, and ‘regard and community support for the individual’. What does the White Paper mean by community?

Its definition of community can be gleaned from its elaboration of the third value, community support for the individual. The White Paper’s idea of community support refers specifically to the various ways in which the different *racial groups* can help its members.

\(^{702}\) White Paper (n 37).

\(^{703}\) See Introduction, 8–11.
There are four official racial groups in Singapore: Chinese, Malays, Indians and Others. The White Paper suggests that the different racial groups can help its members in the following ways. The Chinese community can draw inspiration from the Chinese clan associations’ strong sense of social responsibility during the colonial period when they helped the newly arrived ethnic Chinese establish themselves. The Malays’ tradition of gotong royong (mutual help) and their ‘kampung’ (village) spirit are examples of the Malay community’s way of undertaking projects for the general good. The Indians are organised in ‘sub-ethnic’ groups, and the Singapore Indian Development Association ‘has been formed to provide comprehensive social services to all Indian groups’. Such ‘community support’ for individuals, the White Paper concluded, ‘will keep Singapore a humane society … [and] avoid the dependent mentality and severe problems of a welfare state’.

As conceptualised by the White Paper, community support refers specifically to how each racial group can help its members; it does not refer to how other types of community, such as religious groups, schools, and even the nation, can support the individual. Its narrow definition of community is also evident from the meaning of community in the first value, ‘nation before community’. The White Paper states that this value seeks to ensure that the ‘parochial concerns’ of the racial communities do not come before the nation’s interests as a whole. There is thus a conceptual bifurcation of the racial group and the nation; to this end, the White Paper’s designation of the former as a community but not the latter once again points to a narrow definition of community—one that excludes the nation.

Nonetheless, it is arguable that the White Paper adopts a constitutive understanding of community, albeit a very narrow one. By defining it as the Singaporean’s racial group, its definition is minimally constitutive because it refers to one of the suggested type of constitutive

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704 For an example of how the population is classified, see e.g. Singapore Department of Statistics, ‘M810671 – Singapore Citizens By Age Group, Ethnic Group And Sex, End June, Annual’ <www.tablebuilder.singstat.gov.sg/publicfacing/createDataTable.action?refId=15689> accessed 3 September 2019.

705 White Paper (n 37) [35].

706 ibid [36].

707 ibid [37].

708 ibid [38].

709 ibid [21].
communities set out in Chapter Three: ethnicity.\textsuperscript{710} It can be said that the White Paper’s race-based definition of community recognises the importance of the ethnic community to the individual’s self-understanding. It calls upon the ethnic constitutive community to provide assistance to its members that are specific to the ethnic constitutive community’s customs and traditions, such as the Malays’ tradition of gotong royong. In this limited sense, the White Paper’s definition of community as the racial group is minimally constitutive because it marks out one important communal attachment that has constituted our identity: ethnicity. Hence, the first element of the Inclusive Communitarian Approach is already present in Singapore’s communitarianism.

Nonetheless, Singapore should adopt the Inclusive Communitarian Approach because the White Paper’s minimally constitutive definition of community fails to capture the plurality of all our constitutive attachments. Given the importance of all our constitutive communities to our self-understanding, a constitutive conception of community is both necessarily and ought to be pluralistic. Since the White Paper already recognises one form of constitutive community, the spirit of this recognition, and its minimally constitutive definition of community, should be expanded to include all our constitutive communities. This is because, first, if it seeks to emphasise the importance of community in supporting its members, then its neglect of other, non-ethnic sources of support overlooks many potential sources of support. Churches, for instance, can be a potent avenue for support for less well-off individuals. Second, it should not be assumed that any single constitutive community is meaningfully constitutive for everyone. As argued in Chapter Three, the Constituted Autonomous Self is able to stand at some distance from its constitutive communities and critically affirm or reject them. Singaporeans, then, ought not be compelled into community support based on a constitutive community that they may not have affirmed.

Third, and most importantly, the White Paper’s narrow definition of community as the racial group, particularly its exclusion of the nation from this definition, is inappropriate for multiracial Singapore. Its narrow definition of community suggests that there is a special bond between members of the same racial group simply by virtue of their shared ethnicity, which motivates them to support the less privileged members of their racial group. However, ethnicity arguably should not do so much normative work in multiracial Singapore. By suggesting that a special bond exists only between members of the same race, the White Paper is implicitly,

\textsuperscript{710} I use race and ethnicity interchangeably.
and perhaps inadvertently, undermining the national community as a potent source of bonding and mutual assistance between members. Similarly, the suggestion that only the racial group is a community implies, dangerously, that only race invokes feelings of social friendship that inspires community support for the individual, while other communal attachments, including nationality, do not. The risk here is that, by defining community as the racial group only, it undermines an inter-racial—indeed, Singaporean—sense of community that is arguably crucial in multiracial Singapore.

Furthermore, it inappropriately divides the national community into four discrete enclaves when the focus ought to be on what is shared: national identity. This ought to be the logical inference of Singapore’s ‘collective over individual’ communitarianism and the first value, ‘nation before community and society above self’: we can only accept that we should place the interests of the collective—that is, the nation—above our own if we see our own good as intimately bound up with the collective’s good. But we are unable to adopt this point of view and the burdens that it imposes on us if our experience with Singaporeans from other racial groups is less meaningful because it is not a communal experience. The trouble, then, is that we focus too much on what separates us—our different ethnicities—instead of what unites us: our shared national identity.

In sum, because the first element of the Inclusive Communitarian Approach is in line with the White Paper’s minimally constitutive definition of community, the Approach is relevant to Singapore. Hence, Singapore ought to adopt the Approach and expand the spirit of its definition of community—the importance of the ethnic constitutive community to our self-understanding, and the potency of the constitutive communities to offer support to its members—to all constitutive communities. This is particularly important in recognising the significance of the constitutive national community, and the shared national identity, as the force that brings together Singaporeans in multiracial Singapore.

711 As Chua notes, the government’s ‘regrouping and discursive homogenization’ of the diversity that existed within the four racial categories—the ethnic Chinese consisted of many dialect groups; the Indians spoke different languages; and the Malay group also had linguistic differences—is ‘an enforced erasure of differences, so as to facilitate the ease of government and administration’: Chua, ‘Communitarianism without Competitive Politics in Singapore’ (n 13) 87.
b. Significance of the Nation in the Constitutional Case Law

It may be recalled that the analysis of the Singapore judiciary’s communitarian approach to rights conducted in Chapter One revealed an occasionally nationalistic bent in the decisions. In this regard, the second element of the Inclusive Communitarian Approach, the national community’s duty to include, coheres with the courts’ emphasis on the nation’s importance. In these cases, the courts referred, variously, to the nation, the national interest, national unity, and so on in justifying why a claimed constitutional right was not violated. These references, however, are shaped by Singapore’s ‘collective over individual’ communitarianism; as such, they fail to appreciate the full normative force of the national community as argued in Chapter Four. This can be redressed by adopting the Inclusive Communitarian Approach.

*Colin Chan v PP*\(^ {712}\) involved a number of constitutional challenges made by a group of Jehovah’s Witnesses alleging that the ban on their congregation and religious materials violated the Article 15 right to religious freedom. The Court of Appeal (CA) rejected their claim and asserted that the paramount mandate of the Singapore Constitution was the ‘sovereignty, integrity and unity’\(^ {713}\) of Singapore. As such, any exercise of an individual right, such as the Witnesses’ right to religious freedom, that threatens to undermine this unity cannot be supported. In the related *Colin Chan v MITA*,\(^ {714}\) the CA also rejected their claim and stated that ‘[a] refusal to do National Service which is required by law is disruptive of the national ethos and is unquestionably a matter in “the public interest”’.\(^ {715}\)

Similarly, in *Peter Williams Nappalli*,\(^ {716}\) a case in which a Jehovah’s Witness trainee teacher was dismissed for refusing to carry out the Ministry of Education’s (MOE) directive that all teachers must participate in the pledge and anthem ceremony, the High Court (HC) cited the MOE’s objective of ‘preserving the sovereignty, integrity and unity of Singapore’ as an additional reason for holding that his dismissal did not violate Nappalli’s Article 15 right. This is because ‘Singapore’s success depends on, among other things, the unity of its multi-racial and multi-cultural population’.\(^ {717}\) When the case went on appeal in *Nappalli Peter*

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\(^{712}\) *Colin Chan v PP* (n 84).

\(^{713}\) ibid [64] (emphasis added).

\(^{714}\) *Colin Chan v MITA (CA)* (n 103).

\(^{715}\) ibid [36].

\(^{716}\) *Peter Williams Nappalli* (n 125).

\(^{717}\) ibid [46].
Williams, the CA rejected Nappalli’s Article 15 violation claim again, and declared that ‘Article 15 as a whole demonstrates that the paramount concern of the Constitution is a statement of citizen’s rights framed in a wider social context of maintaining unity as one nation’. 718

This nationalistic flavour of the courts’ reasoning is also present in two District Court (DC) cases. In Benjamin Koh,719 two individuals were convicted under the Sedition Act (SA)720 for posting offensive anti-Malay remarks on an Internet forum. In convicting them of the offence, the District Court asserted, ‘Each individual living [in Singapore] irrespective of his racial origin owes it to himself and to the country to see that nothing is said or done which might … plunge the country into racial strife and violence.’721 These comments were echoed by the DC in Ong Kian Cheong,722 a case where a Christian couple was prosecuted under the Sedition Act for distributing evangelical tracts that partly denigrated other religions—including Islam—to Muslims. The DC asserted that, ‘[as] citizens of Singapore’,723 the couple had the responsibility to ensure that the evangelical tracts do not have a tendency to ‘cause social unrest thereby jeopardizing racial and religious harmony’724 before distributing them. Recall that the SA considers such a tendency to be an existential attack on Singapore. Viewed in this light, the DC’s comments in Ong Kian Cheong is nationalistic in wanting to preserve the country’s racial and religious harmony.

Finally, the nationalistic element of the courts’ communitarian reasoning can be found in Chee Siok Chin.725 The applicants were barred from carrying out a four-person peaceful political protest because they ran afoul of regulations relating to public protests. They alleged that the regulations violated their Article 14 right to freedom of expression. In rejecting their allegations, the HC emphasised the importance of safeguarding the integrity of public governance in Singapore. It stated, ‘To spuriously cast doubt on that would be to improperly undermine both a hard-won national dignity and a reputable international identity.’726

718 Nappalli Peter Williams (n 122) [26].
719 Benjamin Koh (n 190).
720 Sedition Act (n 187).
721 Benjamin Koh (n 190) [8].
722 Ong Kian Cheong (n 192).
723 ibid [82].
724 ibid [31].
725 Chee Siok Chin (n 207).
726 ibid [49] (emphasis added).
These excerpts show that the nation and related concepts played an important role in the courts’ communitarian constitutional rights adjudication, and so the importance that the Inclusive Communitarian Approach ascribes to the national community is relevant to Singapore. But due to the courts’ ‘collective over individual’ communitarian adjudication, the nation is merely a collective, not a community. As we have seen in Chapter Four, the normative conception of community requires members to show special concern for each other’s interests by, minimally, not sacrificing these interests in a utilitarian calculus that advances the community’s overall interest. This utilitarian calculus is precisely the force that drives ‘collective over individual’. By prioritising the collective interest over the individual from the outset, this approach cannot properly account for the individual’s interests that the collective sacrifices for its overall good. As shown in Chapter One, the courts’ constitutional rights adjudication does not evince any special concern for the claimants’ constitutionally protected interests. Resultingly, the nationalistic element of the courts’ communitarian reasoning protects the nation as a collective, not a community.

Nonetheless, we can cast the courts’ nationalistic sentiments in a more positive light by asking: what is the underlying spirit of these sentiments? Is there a normative reason to emphasise the importance of the nation? The reason is that, in diverse, multiracial Singapore, the nation, and the identity that it creates, are what hold Singaporeans together. It is a site of commonality at which Singaporeans—be they Chinese, Indian, Malay or other—converge, interact with each other, and live harmoniously with each other. The ideal of national unity is a helpful fiction that inspires us to overlook our surface differences and focus on what is common: national identity, also a fundamental feature of personal identity. The sharing, then, is deep and meaningful enough to provide the motivation for us to look past our differences. Since a stable and peaceful nation is beneficial for all, in the sense that lives would be disrupted if the nation were in a state of strife, it is important to emphasise national unity and harmonious relations between the races when dealing with constitutional issues that threaten to undermine them.

The ideal of national unity, however, ought not be pursued as an end in itself, with no regard to those that it tramples upon along the way. This, unfortunately, appears to be the approach that the courts have taken. By sacrificing the interests of some at the altar of national unity and the nation, the courts sully not only the ideal of unity—for how can unity, defined as

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727 See Chapter Four, Part II(a), 185–187.
‘the state of being joined together or in agreement’,728 exist if some members are severed from the whole in disagreement?—but the very concept of community itself. Instead, the fiction of national unity should be geared towards an equality of membership of all in the nation, for it is only when there is such equality that it can be said that Singaporeans are united. Equality of membership is undermined and denied when some members’ interests are sacrificed in the aforementioned utilitarian calculus. Hence, in the Colin Chan cases, the Jehovah’s Witnesses were denied equality of membership because their interest in their religious constitutive community was not given due consideration; this will be explained further in Part II below. In Benjamin Koh and Ong Kian Cheong, the accused persons were given deterrent sentences upon conviction. It is thus arguable, though admittedly less so, that equality of membership is undermined when some members, even if they have contravened the duty to include and the national community’s foundational principles (in this case, multiracialism) are used as a means to send a message to the national community about the severe consequences of undermining racial and religious harmony. As argued in Chapter Four, equality of membership requires that every member’s interests be given ‘some non-instrumental weight’729 in the community’s practical reasoning.730

To properly harness the national community’s normative force, Singapore should adopt the Inclusive Communitarian Approach. This is especially so given that the duty to include aims to foster a sense of belonging by recognising and upholding the equality of membership of all members of the national community. Accordingly, then, the second element of the Inclusive Communitarian Approach already exists in the courts’ communitarian approach to rights, and so the Approach is relevant to Singapore.

c. Singapore’s National Community and Multiracialism

In this section, I will argue that the normative core of the duty to include, equality of membership, is the underlying philosophical commitment of one of Singapore’s foundational principles: multiracialism. I will begin by briefly explaining why multiracialism is a


729 Mason, Community, Solidarity and Belonging (n 659) 27.

730 See Chapter Four, Part II(a), 185–187.
foundational principle of the Singaporean national community, and thus, a foundational feature of the Singaporean national identity. I will then argue why multiracialism *qua* racial equality has at its core the ideal of equality *simpliciter*, such that the duty to include is consistent with multiracialism; further, multiracialism should be extended to equality *simpliciter*. Accordingly, the Inclusive Communitarian Approach is wholly relevant to Singapore.

i. **Multiracialism as the Foundational Principle of the Singaporean National Community**

It is widely acknowledged that multiracialism is a foundational founding myth of the Singaporean nation and ‘a central element in … Singapore’s “national culture”’. Multiracialism essentially confers equal status on all Singaporeans regardless of race. Before explaining how multiracialism forms the foundation of the Singaporean national community, it is worth pointing out that multiracialism is as much an ideology as it is policy. That is, not only has the state made a philosophical commitment to it, but it is also a conscious policy adopted by the state to serve various ends. One such end is the ‘depoliticization of ethnicity’, or what Chua terms a ‘[mechanism] of the government’s instrument of social control’. By instituting formal equality between the four racial groups in Singapore, the argument goes, no one racial group can attempt to promote its own language to the detriment of others. If any group or individual tries to do so, the state, as a neutral party between the four groups, is able to ‘police inter-racial boundaries’ and impose sanctions. This theoretical possibility has certainly borne out in practice, as we have seen in the *Benjamin Koh* case.

Regardless of the ways in which the state has operationalised the multiracialism ideal, taken purely as ideology, it is a powerful one with a normative commitment worthy of respect.

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731 Although frequently expressed as multiracialism, in Singapore, race and religion are often treated as going hand-in-hand. Hence, multiracialism/racial equality should be understood to include religious equality.


733 Hill and Fee (n 690) 14.

734 ibid 95.

735 ibid 99.


737 ibid.
It is the foundational principle of the Singaporean national community because the question of racial equality was chief amongst the many reasons Singapore split with Malaysia in 1965.\textsuperscript{738} Although a Malay-majority country, Malaysia had (and still has) its own minority Chinese and Indian (among others) populations, whereas Singapore was (and still is) a Chinese-majority state with minority Malay and Indian (among others) populations. Michael Hill and Fee Lian Kwen claim that Singapore’s expulsion from Malaysia ‘was essentially over the [Singapore government’s] intransigent stand on multiracialism’:\textsuperscript{739} the Singapore government advocated for multiracialism, a ‘Malaysian Malaysia’,\textsuperscript{740} whereas the federal government in Kuala Lumpur insisted on a Malays-first policy to recognise the Malay population as Malaysia’s indigenous people.

The two governments’ ideological split remains to this day. Multiracialism is constitutionally entrenched in Singapore; Article 12(2) of the Constitution prohibits discrimination on the grounds of race.\textsuperscript{741} This points to the fundamental importance of multiracialism and ‘indicates the type of community the Constitution is designed to sustain, reflecting the goal of nurturing the ethos and practice of ethno-religious pluralism’.\textsuperscript{742} Likewise, pro-Malay affirmative action is constitutionally entrenched in Malaysia: the ‘special position of the Malays’ is safeguarded in Article 153 of the Malaysian Constitution by way of quotas reserved for Malays in public service, scholarships, universities and similar educational institutions, and licences for trade or business.\textsuperscript{743} Such affirmative action is at odds with the

\textsuperscript{738} For a brief overview of Singapore’s separation from Malaysia, see National Library Board, ‘Singapore Separates from Malaysia and Becomes Independent’ (History SG: An Online Resource Guide) <http://eresources.nlb.gov.sg/history/events/dc1efe7a-8159-40b2-9244-cdb078755013> accessed 3 September 2019.

\textsuperscript{739} Hill and Fee (n 690) 93.

\textsuperscript{740} ‘Malaysian’, the nationality, should not be confused with ‘Malay’, the race. ‘Malaysian Malaysia’ refers to a Malaysia for all Malaysians regardless of race.

\textsuperscript{741} Article 12(2) states: ‘Except as expressly authorized by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding, or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.’

\textsuperscript{742} Thio, \textit{A Treatise on Singapore Constitutional Law} (n 16) 693.

\textsuperscript{743} Federal Constitution of Malaysia, Article 153(2). In contrast, Singapore’s Article 152, which also safeguards the Malays’ special position, only states in general terms that ‘[the] Government shall exercise its functions in such manner as to recognize the special position of the Malays, who are the indigenous people of Singapore, and
ideal of multiracialism on which the Singaporean nation is founded and which constitutes an integral part of the Singaporean national identity. In his address to the newly independent Singapore on 9 August 1965, founding Prime Minister Lee Kuan Yew declared, ‘We are going to be a multi-racial nation in Singapore. We will set an example. This is not a Malay nation; this is not a Chinese nation; this is not an Indian nation. Everyone will have his place, equal: language, culture, religion.’ In other words, Lee proclaimed a ‘Singaporean Singapore’.

Multiracialism is thus an integral part of the state’s nation-building efforts. It is a central feature of the National Pledge, recited in schools every morning until the age of 18: ‘We, the citizens of Singapore pledge ourselves as one united people regardless of race, language or religion.’ Schools observe Racial Harmony Day on 21 July to commemorate the race riots that took place on the same day in 1964, and to ‘teach students the importance of maintaining racial and religious harmony in Singapore’s multicultural and multi-ethnic society.’ Further, the red on the Singapore flag symbolises ‘universal brotherhood and equality of man’, while one of the five stars on the flag depicts Singapore’s ideal of equality. Multiracialism is also reflected in the fifth shared value of the White Paper, racial and religious harmony. Multiracialism has been augmented, at least in theory, by Singapore’s other foundational principle: meritocracy. Meritocracy ‘facilitates social mobility purely on the basis of hard work and achievement’, hence promoting the idea that success in Singapore is based on individual merit—which, as an ideal, is colour-blind. Combined with meritocracy, Hill and Fee argue that the ‘essence of multiracialism was the ability of all to advance, in whatever field, on the basis not of ascriptive criteria such as race, family, or sex, but rather solely on the basis of achievement, merit, and hard work’.

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748 Hill and Fee (n 690) 101.
Laudable as Singapore’s multiracialism is for its commitment to racial equality, it nevertheless has its limits. Its biggest flaw is its intimate relationship with race consciousness, such that it has entrenched Singaporeans’ racial identity rather than diminished it. Due to the peculiar way in which the state has implemented its conception of multiracialism as formal equality between the four racial groups, Hill and Fee argue that multiracialism has led to a ‘hyphenated’ national identity that is ‘simultaneously ethnic and national’. In other words, multiracialism is not conceived as a colour-blind ideal; one’s race is as integral to the national identity as one’s Singaporeanness. While this is not a problem in itself, as we need to be able to live meaningfully as members of our various constitutive communities (of which race is one) to flourish, it is arguably a problem for the notion of equality that underpins Singapore’s multiracialism, and for fostering a sense of belonging to the national community. I will illustrate with two examples.

One obvious flaw of the emphasis on race in Singapore’s multiracialism is that it undermines the ability of the national community to demonstrate social friendship to each other qua members of the national community, and provide assistance to less well-off members. Singapore’s current model of colour-conscious multiracialism, as explained in section (a) above, delegates social assistance to the racial groups themselves, which faces the problem of racialising social issues. Chua cites drug addiction as an instructive example. Drug addicts are statistically over-represented by the Malay population, and because of Singapore’s racial self-help scheme, the Malay community is asked to assist in solving this problem. But Chua points out that drug addiction is ‘overwhelmingly a problem among lesser-educated and lower-income individuals’. Reducing it to a Malay problem, which the Malay self-help groups should solve, not only denies the Malay population the funds that they would otherwise have if

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749 An example is the Ethnic Integration Policy that imposes racial quotas for public housing. This was implemented in 1989 to tackle the formation of racial enclaves in certain parts of Singapore, which was seen to impede social and racial cohesion. Given that 80% of the population lives in public housing, this is a significant tool of social engineering. See National Library Board, ‘Ethnic Integration Policy Is Implemented’ (History SG: An Online Resource Guide) <http://eresources.nlb.gov.sg/history/events/d8fe656-d86e-4658-9509-974225951607> accessed 3 September 2019.

750 Hill and Fee (n 690) 107.

751 Chua, ‘Culture, Multiracialism, and National Identity in Singapore’ (n 736) 171.
community support were centrally administered, but also creates the unfair perception that the Malays are low-achieving, lazy drug addicts. This risks undermining the ideal of equality in terms of, first, an unequal administration of funds; and second, an unequal perception of all Singaporeans’ membership in the national community, if Malays are seen as less-than-equal members due to the prejudice against them. Furthermore, it denies the national community the opportunity to display social friendship to each other and work together to solve the social problem regardless of race, thereby overlooking a potentially potent nation-building effort.

Another problem with Singapore’s hyphenated national identity is that, due to the high visibility of Chinese Singaporeans, there is a tendency to equate being Singaporean with being Chinese Singaporean. The recent discourse on ‘Chinese privilege’ highlights the latent inequalities between races in Singapore society. It is a privilege of the majority Chinese, the argument goes, to never have to justify one’s nationality to fellow Singaporeans, to never having one’s name, appearance or accent made fun of in school, to automatically satisfy job advertisements that ask for Mandarin speakers, to not being excluded from a group conversation conducted in Mandarin. To the privileged Chinese Singaporean, there is no racism in Singapore until some racial minorities are brave enough to speak out; and even then, a non-Chinese Singaporean who tries to talk about race risks being accused of over-sensitivity by Chinese Singaporeans—because the Chinese Singaporean has never had to think about the colour of her skin within the confines of her tiny island.

We could combat the implicit assumption that Singaporean is synonymous with Chinese Singaporean by either dropping the hyphen in the Singaporean national identity, or increasing the number of hyphens. The state’s emphasis on racial identity has not led to racial

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753 The social privilege enjoyed by the majority ethnic group in a society is, of course, not unique to Singapore. Indeed, the term ‘Chinese privilege’ was adapted from the ubiquitous discussion of white privilege in ‘Western’ societies and media. See e.g. Peggy McIntosh, ‘White Privilege: Unpacking the Invisible Knapsack’ Peace and Freedom (August 1989).
barriers being lowered in society, which means that the multiracial ideal remains exactly that: an ideal. To get us closer to the ideal, we ought to emphasise what is common (the national identity) and not what is divisive (the racial identity). However, this does not entail, nor should it entail, dropping the hyphen altogether. My commitment to a pluralistic constitutive conception of community requires that members of the national community are able to live as members of all their various constitutive communities—which, in turn, entails increasing the number of hyphens attached to the national identity to include all our constitutive communities. We are not just Chinese Singaporeans; we are also a woman who is a Chinese Singaporean, a gay man who is a Malay Singaporean, a Christian who is a male Indian Singaporean, and so on. Equality of membership would be a more realisable ideal in a national community where members interact with each other as members of all their constitutive communities.

That said, it would likely be objected that my suggestion that Singapore’s multiracialism really has at its core the equality ideal misconstrues Singapore’s multiracialism. Indeed, by removing the emphasis on race, one could no longer call it multiracialism. This would be unacceptable, the objection goes, because it misunderstands the inception and role of multiracialism in Singapore’s history, and because it is essentially imposing a new political philosophy on a society that has consciously adopted one specific to its circumstances; that is, multiracialism for multiracial Singapore.

I will address these objections in the next sub-section, where I also argue why multiracialism is fundamentally animated by the ideal of equality. For now, I will conclude this sub-section by noting that, despite the flaws of Singapore’s multiracialism, it is nevertheless a foundational principle of the national community and a fundamental feature of the national identity. It is fundamental because any other alternative that is not premised on the notion of equality between races is untenable. The notion of a Chinese-first Singapore fundamentally conflicts with deeply-ingrained notions of a Singaporean society where all races are formally equal. To change this fundamental term of the social contract in any way, then, would radically transform the meaning of ‘Singaporean’ to the point of distortion. To live in Singapore is to live in a multiracial society; and to be Singaporean is to be a member of this multiracial national community where everyone is an equal member regardless of race. If there were a positive outcome of the state’s top-down implementation of multiracialism, it would be that any other alternate conception of Singapore as anything other than a multiracial state in which all races are equal is, quite simply put, an impossibility.
iii. The Duty to Include, Equality and the Singaporean National Community

As demonstrated in Chapter Four, the normative core of the duty to include is equality of membership within the national community so long as an individual possesses the morally relevant criterion for membership: national identity. The notion of equality is clearly present in, and arguably forms the normative core of, Singapore’s multiracialism. As such, the duty to include, and the Inclusive Communitarian Approach, are relevant to Singapore. To establish an even stronger case for its relevance, though, I will argue in this section that Singapore’s multiracialism is underpinned by the notion of equality and thus should be extended to equality simpliciter.

How is multiracialism qua racial equality essentially premised on the notion of equality when multiracialism seems to adopt a narrow definition of it as racial equality only? I will begin my argument with multiracialism’s normative claim. It is that Singaporeans are equal regardless of race, and ought to be treated as such, thus calling upon Singaporeans to recognise members of other races as their equals. Race, then, is irrelevant in determining whether a Singaporean has this equality of status—and this suggests that the only thing that establishes her equality of status is her identity as a Singaporean. In other words, if one bears the Singaporean national identity, then one is a member of the Singaporean national community within which everyone will be treated equally regardless of race. The notion of equality thus underpins the multiracialism ideal.

While this is a laudable ideal, there does not appear to be any normative reason why race alone ought to be discounted when conferring equality of membership on all who bear the national identity. At the heart of racial equality is the notion that only one criterion, the Singaporean national identity, qualifies an individual for equal treatment. This suggests that, so long as one meets the national identity criterion, one cannot be denied equal treatment on some other basis that is similar to race, but not race per se. Put another way, if we cannot treat a Singaporean unequally based on race, it suggests that other race-like factors are also prohibited grounds of unequal treatment. What are these other factors?
To get a grip on what they are, and how they are similar to race, we can refer to the prohibited grounds of discrimination contained in Article 12(2).\footnote{I am grateful to John Adenitire for this suggestion.} Article 12(2) states that ‘discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth’ is prohibited. The significance of these traits is that they are either immutable (race, descent, place of birth) or constructively immutable (religion). Immutable characteristics are those that cannot be changed, while constructively immutable ones are changeable only at an unacceptable personal cost.\footnote{See Chapter Three, Part III(a), 147–148, especially footnote 569.} Other immutable and/or constructively immutable characteristics, then, include gender, sexual orientation, nationality and conscience.

We can further underscore this point by recalling the Fundamental and Social Harm Features of constitutive communities discussed in Chapter Three.\footnote{See Chapter Three, Part III, 144–154.} The Fundamental Feature points out that these traits are integral to identity and inseparable from our self-understanding, and mark out our deepest moral commitments without which we would cease to be this particular individual. Since they are immutable and/or constructively immutable, trying to change these features of identity would come at a great personal cost. The Social Harm Feature, in turn, identifies the social harms, such as discrimination, to which these traits frequently expose us. Given the Fundamental Feature, it is unjust for us to be at the receiving end of these social harms from which we cannot escape because these traits cannot be changed, or are changeable only at a great personal cost.

Since factors like gender, sexual orientation, conscience and nationality are either immutable or constructively immutable in the same way that race and religion are, there is arguably no morally relevant difference between these traits that would justify treating a Singaporean unequally based on, say, gender. From this, we can say that these ‘other factors’ that should be as irrelevant as race in determining Singaporeans’ equality of status are our membership in our constitutive communities: gender, for instance, or sexual orientation, or conscience, and so on. These constitutive features fall into the same categories as those protected by Article 12(2) and hence Singapore’s multiracialism; as such, there is no morally relevant difference between them. If we cannot treat a Singaporean unequally on the basis of race, we also cannot treat a Singaporean unequally on the basis of her membership in her other constitutive communities. If it is claimed that we can treat a Singaporean unequally on these
other grounds, a further argument is needed because, from a normative perspective, there is no morally relevant difference between race and gender or religion or sexual orientation that would justify unequal treatment on these latter grounds, but not race.

Singapore’s multiracialism is thus underpinned by the notion of equality, and should be extended to equality *simpliciter*. This is also because the Singaporean national community has designated national identity as the *sole* criterion for membership in the national community. If unequal treatment based on gender or sexual orientation were permitted, it would arguably contaminate the multiracialism ideal. It would permit us to see fellow Singaporeans as less than equal because they are women or gay, when the point of racial equality is to treat other Singaporeans equally and with respect simply because they are Singaporeans. The best way to achieve the aim of multiracialism—essentially, equality amongst Singaporeans—is therefore to extend it to equality *simpliciter*.

There are, however, some non-normative counters to my argument, and I have already alluded to one of them in the previous sub-section. A critic would say that my argument fundamentally misconceives Singapore’s multiracialism which came about also as a geopolitical necessity. Since Singapore is a Chinese-majority country nestled within the Malay archipelago, with Malaysia to the north and Indonesia to the south, any overt, official favouring of the Chinese ‘would have generated great difficulties with these trading partners’. As such, Singapore had to institute formal equality between the races. A less cynical reading of the politics of multiracialism has been put forward by Hill and Fen. They argue that, during the period of Singapore’s self-governance in 1959 leading up to merger with Malaysia in 1963, when the ruling People’s Action Party was trying to consolidate its influence and stabilise society, multiracialism served to

[send] a clear signal to both Malays and Chinese that ethnic chauvinism would not be tolerated. On the other hand, it could be viewed as a reassurance for the Chinese and the other ethnic communities, who feared Malay domination after merger, that their interests would be safeguarded.758

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758 Hill and Fee (n 690) 98.
Since race was the only point of contention in Singapore’s early history, which can also be seen from the 1964 race riots, race is thus a special issue in Singapore in a manner that other race-like factors are not. As such, my argument could be said to fundamentally misunderstand the politics of Singapore’s multiracialism.

However, the attractiveness of Singapore’s philosophical commitment to racial equality ought not be undermined by the geopolitical reasons for its coming into being. The mere fact that Singapore’s multiracialism was proclaimed also because of certain exogenous factors is not a logical impediment to recognising that it is underpinned by equality, and that it should be extended to equality simpliciter. The normative core of Singapore’s multiracialism is commendable for its own sake regardless of why it was instituted; and the goodness of its underlying principle ought not be restrained by non-normative reasons for its proclamation. It would be so restrained if the geopolitical reasons for instituting multiracialism were to become a bar to a more inclusive interpretation of its underlying principle—equality.

Alternatively, this objection to my argument suggests that we ought to allow geopolitics to dictate our normative commitments. This leads to the unacceptable claim that, if Singapore were situated in the middle of, say, China, Taiwan and Hong Kong, it would be acceptable for multiracial Singapore to adopt a pro-Chinese policy since it would be necessitated by Singapore’s geopolitical realities. This would lead to a normative gap where some members of the national community are denied equal status based on what should be a morally irrelevant factor: race. As such, even if Singapore’s multiracialism ideal was partly motivated by its geopolitical situation, how we choose to interpret its underlying ideal of equality should not be similarly constrained.

The second non-normative objection to my argument is that it is precluded by a plain reading of Article 12(2). If I rely on it to support my claim that multiracialism is Singapore’s foundational principle and that it should be extended to equality simpliciter, then this claim is defeated by the fact that Article 12(2), and the rest of the Constitution, do not prohibit any other forms of discrimination, or guarantee equality other than racial equality. Article 12(2), to recap, states that ‘there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law’, etc. Since there is no mention of gender or sexual orientation in Article 12(2), my argument is constitutionally baseless.

This plain reading objection, however, misses the point of the normative argument that I am making. The normative argument seeks to identify the essence of the multiracialism ideal,
and of Article 12(2), in solidifying the Singaporean national community and the basic obligation that we owe to each other: that we should treat each other as equals regardless of race, language or religion. The essence of ‘regardless of race, language or religion’, as I have argued, is that we are equal regardless of these immutable and/or constructively immutable characteristics. As such, to deny equality on the basis of other immutable and/or constructively immutable characteristics without a morally relevant reason would be inconsistent with the multiracialism ideal. Contrary to the plain reading objection, my normative claim is constitutionally grounded.

To sum up the discussion so far: I began by arguing that Singapore’s definition of community as set out in the White Paper already is a minimally constitutive understanding of community. By defining community as the Singaporean’s racial group, it captures one type of constitutive community; as such, the first element of the Inclusive Communitarian Approach is already present in Singapore’s communitarianism. I then argued that the importance of the nation is reflected in some of Singapore’s constitutional rights cases, and so the second element of the Approach is present in Singapore’s communitarian approach to rights. Finally, Singapore’s commitment to multiracialism qua racial equality is underpinned by the equality ideal and should be extended to equality simpliciter. From a normative perspective, since there is no morally relevant difference between race/ethnicity and constitutive communities such as religion, gender and sexual orientation, there is no good reason to privilege race and religion only as prohibited grounds of unequal treatment. In this light, the duty to include, whose normative core is equality of membership, is relevant and applicable to Singapore. For these reasons, the Inclusive Communitarian Approach is wholly relevant to Singapore.

II. A REINTERPRETATION OF SINGAPORE’S CONSTITUTIONAL RIGHTS CASE LAW

This Part applies the Inclusive Communitarian Approach to the cases discussed in Chapter One. It will be shown that the Approach would vindicate the rights claims in the cases. The cases are divided into two clusters: where there is an infringement into a constitutive community, and where there is not.

A caveat is necessary. Given the thesis’ limited scope, the reinterpretation highlights only the values the Inclusive Communitarian Approach protects, and how these values differ

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from the values that the Singapore courts advanced. The Inclusive Communitarian Approach begins from the position that, contrary to Singapore’s approach which pits rights against community interests, rights are valuable to community interests because they further values and interests that promote our constitutive communities and unity within the national community. The reinterpretation of the cases will focus on the following communitarian values: our interest in living meaningfully as members of our constitutive communities; our constitutive communities themselves; and unity in the national community.

a. First cluster: encroachment into a constitutive community

The inquiry under the first cluster has the following structure. The first question is: do the members of the constitutive community alleging a legislative and/or executive impingement into their constitutive community fulfil the national community’s membership criterion? If so, then the next question is whether this community’s constitutive beliefs/practices violate the basic duty of any national community: the duty to include. If the answer is yes, then it is not entitled to constitutional protection. If the answer is no, then it is prima facie constitutionally protected.

A few things need to be said about the prima facie constitutional protection, and how it relates to the Inclusive Communitarian Approach. This maps on directly to the duty to include. Since these individuals are members of the national community, and their constitutive beliefs/practices do not violate the duty to include, the national community’s duty to include applies. This is discharged, in the first instance, by affording the constitutive community prima facie constitutional protection in recognition of their equality of membership in the national community. A failure to extend prima facie constitutional protection—i.e. a denial that the constitutive community has any rights claim at all—is a failure to recognise their equality of membership because it fails to exhibit special concern for their interest in their constitutive community. This is how the Inclusive Communitarian Approach sees constitutional rights as valuable to the national community, not just the individual: protecting the individual’s interest in her constitutive community, and hence protecting the community itself, also maintains the national community’s unity by respecting its members’ equality of membership. In this sense,

759 See Chapter Four, Part II, 184–200.

760 The constitutional protection is only prima facie at this stage because of the various constitutional limits.
then, it is plausible to think of the clash in some of the cases as between competing communal interests, and not between the collective and the individual.

This brings us to the next stage of the inquiry: does the constitutive community’s beliefs/practices fall within the constitutional limits? In assessing this question, the Inclusive Communitarian Approach emphasises the constitutive community’s profound value to its members. This stage of the inquiry maps on to the first element of the Approach: the importance of constitutive communities to our lives. Generally, the Approach requires that restrictions into a constitutive community should be commensurate with its fundamental importance to its members. What this means will depend on the individual cases.

What about when the membership question is answered negatively? As argued in Chapter Four, our special obligations to members of the national community do not exhaust all our ethical obligations. We would need to ask whether censuring a constitutive community whose members are not part of the national community would violate our general obligations to humans as such. Since I have already suggested in Chapter Four that these obligations generally require us to treat these non-members as ends in themselves by respecting and protecting their basic interests, and since this issue does not arise in the Chapter One cases, I will not dwell on it.

i. Freedom of Religion, National Security and National Unity

The Inclusive Communitarian Approach would vindicate the Jehovah’s Witnesses various Article 15 freedom of religion claims. To briefly recapitulate the facts: in the Colin Chan cases, Article 15 challenges were mounted against three executive orders, one of which effectively banned the Singapore Congregation of the JWs (SCJW), while the other two were blanket bans on publications by the Watch Tower Bible and Tract Society and the International Bible Student’s Association. I will refer to these three bans as ‘the blanket bans’. In the Nappalli cases, a Jehovah’s Witness teacher who refused to take part in the daily pledge and anthem ceremony, which he claimed was contrary to his religious beliefs, sued the Institute of Technical Education (ITE) for wrongful dismissal. The blanket bans encroached into the Jehovah’s Witnesses’ religious constitutive community by denying them access to, and

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\[761\] See Chapter Four, Part II(c)(ii), 199–200.

\[762\] See Chapter One, Part I, 25–35.
participation in, their religious community, which also undermines their ability to live meaningfully as Jehovah’s Witnesses.

Since the Jehovah’s Witnesses are Singaporeans, they are members of the national community. Based on the facts established in the cases, their beliefs and practices do not violate the duty to include: nothing in the judgments suggested that they exalt themselves at the expense of other religions or seek to establish a Jehovah’s Witnesses state. Hence, the national community’s duty to include applies, which means that the national community must recognise their equality of membership, thereby entitling their religious constitutive community to *prima facie* Article 15(1) protection.

The more crucial question is whether their Article 15(1) right can be justifiably limited by the Article 15(4) public order exception. Recall that the courts, in rejecting the Article 15(1) claim, accepted the government’s position that the Witnesses’ objection to military service was a national security issue, which prevented the courts from interrogating whether the objection to national service actually threatened national security and public order. The courts accepted the government’s determination that the very existence of a group like the Jehovah’s Witnesses that ‘preached … that military service was forbidden was contrary to public peace, welfare and good order’. As such, the Jehovah’s Witnesses’ Article 15(1) right was held to be limited by the public order exception in Article 15(4), and the blanket bans were justified.

In contrast, the Inclusive Communitarian Approach would fully account for the value of the Jehovah’s Witnesses religious community to its members and respect their equality of membership in the national community. The Approach would thus require that any restriction adopted should encroach as little as possible into the religious constitutive community. In this light, the blanket bans are unconstitutional because they are overly restrictive and impose a burden disproportionate to the perceived threat to public order. Recall that it was stated in *Colin Chan v PP* that ‘there had never been a suggestion that the Jehovah’s Witnesses were not otherwise law-abiding citizens. The contention that they were respectable citizens was not in

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763 Article 15(1) reads: ‘Every person has the right to profess and practise his religion and to propagate it.’

764 Article 15(4) reads: ‘This Article does not authorise any act contrary to any general law relating to public order, public health or morality.’

765 *Colin Chan v PP* (n 84) [68].
dispute either’. 766 If the only problem that the Jehovah’s Witnesses pose is their religious objection to military service, banning the entire congregation and all their religious materials is disproportionate in two ways. First, as the CA accepted in Colin Chan v MITA, Jehovah’s Witnesses not liable for national service (i.e. women and senior citizens) are also affected by the blanket bans even though their objection to military service does not directly affect the smooth operation of national service. 767 The blanket bans therefore impose a disproportionate burden on Jehovah’s Witnesses not liable for national service. Simultaneously, this disproportionality shows that the blanket bans are overly restrictive for burdening this group of Jehovah’s Witnesses. As such, the blanket bans fail to properly appreciate the value of the Jehovah’s Witnesses’ religious constitutive community to their lives.

Similarly, the blanket bans cannot be salvaged by restricting them to only male Jehovah’s Witnesses because they would still be disproportionate for the second reason. The Jehovah’s Witnesses’ religious beliefs encompass more than just an objection to military service. Hence, a blanket ban on the entire congregation and their religious materials is disproportionate for also outlawing aspects of the religion that do not threaten national security. The blanket bans completely deny the Jehovah’s Witnesses the right to have access to and participate in their religious constitutive community because of one aspect of their religious beliefs. To be sure, it is a fundamental aspect, both to the adherents and to Singapore’s national service regime. However, the courts’ respective weightage of the importance of this objection to the adherents and to Singapore skews too heavily in the latter’s favour. It is noteworthy that the CA in Colin Chan v MITA was ‘prepared to accept that there could well be other less restrictive methods which the Minister could conceivably adopt’, 768 which implicitly acknowledges that the blanket bans were not the least restrictive methods to adopt. Perhaps more egregiously, the blanket bans were justified as a form of administrative efficiency. In Colin Chan v MITA, the HC stated that ‘[any] order other than a total blanket order would have been impossible to monitor administratively’. 769 Similarly, in Liong Kok Keng, the HC justified the blanket bans by asserting that

766 ibid [37].
767 Colin Chan v MITA (CA) (n 103) [47].
768 ibid [45].
769 Colin Chan v MITA (HC) (n 99) [32].
any order other than a total blanket order would be administratively inconvenient. It would be absurd to expect every published material to be vetted. Hence a total blanket order was the only possible administrative solution.\textsuperscript{770}

Given the fundamental importance of their religious community to their lives, the Inclusive Communitarian Approach considers administrative efficiency an inadequate reason to completely deny the Jehovah’s Witnesses’ right to access and participate in their religious community. The blanket bans are thus overly restrictive and unconstitutional.\textsuperscript{771}

In contrast, the Inclusive Communitarian Approach protects three interests: the Witnesses’ interest in their religious community, the religious community itself, and the national community’s unity and other interests. It would recognise that the Jehovah’s Witnesses have a right to conscientious objection based on their religious beliefs because it is important for them to live meaningfully as Jehovah’s Witnesses. This protects their interest in their religious community. Simultaneously, the religious community itself is protected because, by allowing conscientious objection, the religious community is also allowed to legally exist which preserves it as an entity.

How does recognising a right to conscientious objection protect the unity of the national community and its interest in safeguarding its national service regime? To begin with, the Inclusive Communitarian Approach would adopt an interpretation of what threatens public order, and when it is threatened, that is commensurate with the value of the religious community to the Jehovah’s Witnesses’ lives, and safeguards Singapore’s national service regime at the same time. The Approach would first suggest that it might be an exaggeration to claim that the objection to military service of a very minor portion of Singapore’s population\textsuperscript{772} constitutes a threat to public order, especially given the lack of evidence that they intend to abolish the national service regime altogether. That said, it is possible that, due to their evangelical nature, the Jehovah’s Witnesses might convert enough of Singapore’s population to fundamentally undermine Singapore’s national service regime. In such a scenario, the

\textsuperscript{770} Liong Kok Keng (n 109) [27].

\textsuperscript{771} It is noteworthy that Seventh Day Adventists, who also object to military service, are not banned. In this light, the blanket bans on the Jehovah’s Witnesses seem even more disproportionate.

\textsuperscript{772} There are no official statistics from Singapore. However, a US Department of State report on religious freedom in Singapore states that the Witnesses constitute less than 1% of the population: ‘2017 Report on International Religious Freedom: Singapore’ (United States Department of State, Bureau of Democracy, Human Rights, and Labor 2018) 2.
Witnesses’ right to propagate their beliefs may be restricted, but they would still be allowed to freely practise and profess their beliefs.

More importantly, even if there were a substantial number of male Jehovah’s Witnesses objecting to military service, it still does not justify the blanket bans because, as already stated, the blanket bans do not sufficiently account for the value of the religious community to the Jehovah’s Witnesses. In contrast, carving out an exemption for conscientious objectors from military service and offering civilian service as an alternative would safeguard the national community’s unity and interest in maintaining national service. It protects national unity by not forcing an artificial choice between the religious and national communities for the Jehovah’s Witness: they can discharge their obligations to both communities in a harmonious way instead of ‘choosing’ to be sent to military detention (which is the current practice for Jehovah’s Witnesses who refuse to undertake military service) because of their religious beliefs. It signals to them that, despite differences in beliefs, they are still integral members of the national community, and their equality of membership is respected by allowing them to live meaningfully as members of both the religious and national communities. Forcing them to ‘choose’ to be sent to military detention punishes them for their religious beliefs, which arguably undermines their equality of membership and hence national unity.

The exemption policy that the Inclusive Communitarian Approach advocates preserves Singapore’s national service regime in another way. Although Singapore’s regime focuses on military self-defence, national service can serve an equally compelling interest of nation-building by ‘[strengthening] the moral bonds holding the nation together’.\(^{773}\) The exemption policy would contribute to this aspect of national service because it respects and upholds the Jehovah’s Witnesses’ equality of membership, and includes them in the nation-building project despite their fundamentally different religious beliefs.

There may be scepticism regarding whether the compromise preserves Singapore’s national service regime. It may be said that allowing for some conscientious objection would lead Singapore down a slippery slope of spurious or false conscientious objections. As the current Prime Minister Lee Hsien Loong said in Parliament in 1990, conscientious objection is not recognised in Singapore because ‘the whole system of universal National Service will come

\(^{773}\) Bell, Communitarianism and Its Critics (n 351) 141.
unstuck [as many] other people will ask: why should I also not decide to have conscientious objections and therefore exempt myself from National Service? 774

The slippery slope argument, however, can be countered. The Inclusive Communitarian Approach would preserve members’ religious (or some other ethical beliefs that conscientiously object to military service) communities and Singapore’s national service regime by requiring a high level of commitment to the relevant belief before an exemption is granted. The claimant would have to demonstrate, for instance, that the belief is deeply and sincerely held; and the courts would test and certify, as it were, the veracity of these beliefs. The slippery slope argument, then, is not a good reason to deny conscientious exemptions to those members of the national community whose religious community is a fundamental aspect of their identity. Indeed, to allow the slippery slope argument to triumph over these members’ interest in their religious (or ethical) constitutive community would be to deny their equality of membership, for the outcome of the slippery slope argument—the blanket bans, for instance—is not the least restrictive measure that the state could have adopted to achieve its aims. 775

What about the teacher, Nappalli Peter Williams? Recall that his wrongful dismissal claim was rejected by the courts because, inter alia, he had entered his employment contract voluntarily with the knowledge that he had to participate in the pledge and anthem ceremony. This ceremony takes place every morning in schools; teachers and students are required to sing the National Anthem while the Singapore flag is raised, and place their right fist over their heart to recite the National Pledge. Nappalli refused to participate in the ceremony because, in his view, it amounted to an act of worship. Since his objection to the ceremony stems from his religious beliefs, his dismissal impinges upon his membership in his religious constitutive community.

How would the case be decided under the Inclusive Communitarian Approach? Contrary to the CA’s assertion in Nappalli Peter Williams that ‘there was no valid religious

774 Singapore Parliamentary Debates, 23 February 1990, vol 54, col 1181.
775 For pacifists who object to war as such, the nation-building and community-focused aspect of civilian service could be emphasised. In any event, pacifism is not opposed national service per se; it is opposed to war and violence. Pacifists, then, could contribute to non-military aspects of national self-defence. See Andrew Fiala, ‘Pacifism’, The Stanford Encyclopedia of Philosophy (Fall 2018) <https://plato.stanford.edu/archives/fall2018/entries/pacifism> accessed 3 September 2019.
belief protected by the Constitution, the duty to include would apply: because Nappalli is a member of the national community and his religious beliefs and practices do not violate the duty to include, his interest in his religious community—especially his ability to live meaningfully as a member by not taking part in the pledge and anthem ceremony—is *prima facie* protected under Article 15(1). The question, then, is whether his dismissal is a proportionate measure to resolve the issue.

The Inclusive Communitarian Approach would give due weight to Nappalli’s ability to live meaningfully as a member of the Jehovah’s Witnesses’ religious community, and his equality of membership in the national community. The competing interests in this case are, on the one hand, Nappalli’s objection to the ceremony because it interfered with his ability to live meaningfully as a Jehovah’s Witness; and on the other hand, the MOE’s interest in inculcating a sense of national unity in schools, which, as stated in Chapter Four, is a legitimate interest for a communitarian state to pursue. The question, then, is this: does Nappalli’s dismissal serve the interest of promoting national unity?

The Inclusive Communitarian Approach would conclude that it does not, and hence, violates Article 15(1). Part of national unity is the national community’s duty to include each other as members, which involves a recognition of each other’s equality of membership. This, in turn, requires an appreciation of the value of each other’s constitutive communities to their lives. Dismissing Nappalli for wanting to live meaningfully as a member of his religious community by objecting to the pledge and anthem ceremony, as his religious community requires, fails to demonstrate this appreciation.

On the other hand, the national community’s interest in promoting national unity would be served by vindicating Nappalli’s Article 15(1) claim under the Inclusive Communitarian Approach. It interprets national unity as the national community’s acceptance of each other’s constitutive communities. As such, the MOE’s legitimate interest in promoting national unity would be served by educating students on religious diversity in the national community, and the importance of conscientious objections to some members of the national community. In this connection, rather than dismissing Nappalli for not taking part in the pledge and anthem ceremony, he could be required to explain his reasons for objecting to it. This would help

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776 *Nappalli Peter Williams* (n 122) 29.
777 See Chapter Four, Part II(c)(i), 197–198.
students develop an understanding of those amongst them who do not conform to the norm, which is important in a pluralistic national community whose constitutive national identity encompasses a range of things, as argued in Chapter Four. This is arguably the true spirit of the National Pledge that exhorts Singaporeans to ‘pledge ourselves as one united people, regardless of race, language or religion’.

It may be objected that this solution is utopic at best. The ITE and the MOE would presumably not want Nappalli to explain his reasons because they would consider it detrimental to national unity. It would allow ‘subversive’ views to be promulgated, subversive because contrary to an important nation-building tool (i.e. the pledge and anthem ceremony), thereby undermining national unity. To be sure, the question of what benefits or harms national unity is a value judgement. In this sense, then, the Inclusive Communitarian Approach values unity in diversity, and deems national unity meaningful only if members of the national community are able to live meaningfully as members of their various constitutive communities. In the same vein, inoculating students to the extant diversity of the national community would affect an artificial ‘unity’ that is unlikely to withstand fault lines that are inevitable because of this diversity. Thus, instead of forcing everyone to conform to a particular mode of nation-building or face the consequences (such as dismissal from a job), the Inclusive Communitarian Approach considers national unity better served when there is an appreciation and understanding of the different constitutive communities within the national community and their value commitments. For these reasons, Nappalli’s claim would be vindicated under the Inclusive Communitarian Approach.

\[ ii. \textit{Sexual Orientation and Public Morality} \]

Section 377A of the Penal Code, which criminalises sex between men only, was held in \textit{Lim Meng Suang}\textsuperscript{779} not to have violated the Article 12(1) right to equality. This is because it satisfies the ‘reasonable classification’ test: 377A prescribes an intelligible differentia of men who have sex with other men, which is rationally connected to its purpose of criminalising sex between men.\textsuperscript{780}

\textsuperscript{778} See Chapter Four, Part I(b)(i), pages 172–175.

\textsuperscript{779} \textit{Lim Meng Suang} (n 6).

\textsuperscript{780} See Chapter One, Part II, 38–39. I leave out the Article 9 analysis due to space constraints.
The Inclusive Communitarian Approach would hold that 377A violates Article 12. The duty to include would apply to extend *prima facie* Article 12 protection to the gay community because the applicants in *Lim Meng Suang* are members of the national community, and their beliefs and practices do not violate the duty to include. The next question is whether there are any good reasons to defeat the duty to include—and this would necessitate that 377A serves a legitimate purpose. This is necessary because a law, such as 377A, that treats some of the national community’s members unequally *qua* members of a particular constitutive community must serve a legitimate purpose in order to respect these members’ equality of membership. For 377A, the question is whether the conservative national community can criminalise the intimate manifestation of a fundamental aspect of its gay members’ identity for two reasons. First, because it holds the view that homosexuality is immoral (the Immorality Reason). Second, because it thinks that homosexuality disrupts family lineage since gay men do not biologically procreate and so cannot carry on the family name (the Family Lineage Reason).

Under the Inclusive Communitarian Approach, these are not good reasons to defeat the national community’s duty to include, especially when weighed against the importance of the gay constitutive community to its members. The guiding principles are the notion of equality of membership inherent in the duty to include, and that the criterion for membership in the national community is national identity *only, prima facie* evidenced by citizenship. First, the Immorality Reason is neither here nor there because this view is contested at best, and mistaken at worst. According to the former, there is no consensus on whether homosexuality is immoral; indeed, the fierce divide in Singapore between the two opposing camps on the 377A issue demonstrates that there is significant support for the view that homosexuality is not immoral. Since the moral status of homosexuality is undetermined at best, it is irrelevant to membership in the national community; that is, it cannot be a basis to undermine gay men’s equality of membership. Membership in the national community requires only that one bears the Singaporean national identity (‘Singaporean Singapore’); it does not require that one must not be gay. Since homosexuality is not indisputably immoral, the Immorality Reason is irrelevant.

The Family Lineage Reason is also irrelevant. Again, membership in the national community requires only that one be Singaporean; it does not require that the male should be

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able to carry on the family name. Furthermore, this reason is strongly peculiar to the Chinese community in Singapore,\(^{782}\) which makes it even less legitimate that non-Chinese gay men are denied the ability to live meaningfully as members of their constitutive community based on a cultural tradition to which they do not belong. 377A thus does not have a legitimate purpose and violates the right to equality.

Unlike Singapore’s communitarian approach that retains 377A to preserve a certain heterosexual conception of the good, the Inclusive Communitarian approach would repeal it and vindicate gay men’s right to equality to protect three communitarian values: first, gay men’s ability to live meaningfully as gay men; second, the gay community’s existence and its members’ ability to legally form sub-groups; and third, the unity of the national community. That a 377A repeal would protect the first two values is pretty straightforward. First, it would allow gay men to live legally and meaningfully as gay men, which they are currently unable to do despite Parliament’s non-enforcement policy. As the ECtHR noted in *Dudgeon*, the ‘very existence’ of a legislation such as 377A ‘continuously and directly affects’ gay men’s private lives:

> [Either they respect] the law and [refrain] from engaging – even in private with consenting male partners – in prohibited sexual acts to which [they are] disposed by reason of [their] homosexual tendencies, or [they commit] such acts and thereby [become] liable to criminal prosecution.\(^{783}\)

Having this Hobson’s choice at the back of their minds arguably impedes gay men from living meaningfully as gay men. As the CA noted in *Tan Eng Hong*,\(^{784}\) 377A, even if not proactively enforced, reduces gay men to ‘unapprehended [sic] felons in the privacy of their homes’.\(^{785}\) This is likely to induce a sense that they are less-than-equal members of the national community because of a fundamental aspect of who they are. A 377A repeal, in contrast, would remove the legal impediment to their living meaningfully as gay men. This would protect the gay constitutive community because it would remove the legal basis on which to deny LGB

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\(^{782}\) See *Lim Meng Suang* (n 160) [128]: ‘…the Chinese portion of Singapore society was still largely traditional, with parents looking forward to their children marrying and producing offspring … to carry on the family name…’

\(^{783}\) *Dudgeon* (n 7) [41].

\(^{784}\) *Tan Eng Hong* (n 1).

\(^{785}\) ibid [184].
groups legal registration under the Societies Act,\textsuperscript{786} and allow the formation of sub-communities based on the LGB constitutive community as registered groups and societies.

But how would a 377A repeal protect the national community’s unity? From one perspective, it would promote gay men’s sense of belonging to the national community, thereby strengthening unity in this way, because a repeal would allow gay men ‘access to structures that enable them to express their identity’.\textsuperscript{787} As Bell argues, a society that fails to provide these structures will mostly ‘have a high percentage of frustrated and alienated homosexuals’.\textsuperscript{788} To prevent the undesirable outcome of alienation, accepting the gay community by repealing 377A would foster gay men’s sense of belonging to the national community, which is also a part of the duty to include as expounded in Chapter Four.\textsuperscript{789} This fits better with Parliament’s position that homosexuals are ‘our kith and kin’\textsuperscript{790} than its current non-proactive enforcement of 377A.

It may be objected that repealing 377A would divide, rather than unite, the national community, because it would alienate those that oppose homosexuality, particularly the religious camp. Yvonne Lee, for instance, has argued that repealing 377A would lead to a ‘persecution … [of] those who hold contrary religious or moral viewpoints’ as well as a ‘[chilling of] the free speech rights of others, in the name of pro-homosexual state enforced orthodoxy’.\textsuperscript{791} Instead of alienating LGBs, the objection goes, a 377A repeal would alienate those that oppose homosexuality, and so it is unlikely that a 377A repeal would lead to the unity that the Inclusive Communitarian Approach claims to protect.

There are two responses to this objection. First, Lee’s objection arguably overstates the practical implications of a 377A repeal. The only type of anti-homosexuality speech that the Inclusive Communitarian Approach would prohibit is speech that violates the duty to include, such as religious preaching that undermines LGBs’ equality of membership in the national community. Statements such as ‘we must not allow any activist or gay-affirming group … to interfere with our national interests, defy our shared values and push their permissive credo on


\textsuperscript{787} Bell, Communitarianism and Its Critics (n 351) 169.

\textsuperscript{788} ibid 47.

\textsuperscript{789} See Chapter Four, Part II(a), 186–187.


\textsuperscript{791} Lee (n 25) 383.
our conservative society thus violate the duty to include. This statement, issued by a controversial pastor in Singapore, violates the duty because it unilaterally redefines the terms of membership in the national community. Since the only morally relevant criterion for membership is that one is Singaporean, whether or not a constitutive community has a ‘permissive credo’ is irrelevant to its members’ equality of membership. Furthermore, the contention that affording equal rights to the gay community is against Singapore’s national interests also violates the duty to include because it suggests that gay members of the national community do not deserve equal rights, thereby diminishing their equality of membership. In short, religious conservatives expecting a carte blanche to speak out against homosexuality and LGBs in a pluralistic national community where members owe each other the duty to include would find themselves disappointed. In contrast, a preacher who tells his congregation that homosexuality is a sin according to the Bible, but they should still be respected as equal members of the national community would not run afoul of the duty to include. The rule of thumb, then, is that statements against homosexuality must be calibrated to respect LGBs’ equality of membership in order to be accommodated by the Inclusive Communitarian Approach.

The second response to the objection focuses on the ideal of equality of membership that underpins the duty to include, and which a 377A repeal seeks to achieve. First, though, it is important to reiterate the point of the duty to include. The duty directs the national community’s members to the ethical action that they would have taken if their social friendship had not reached its limit. This ethical action, as explained in Chapter Four, is the obligation to accept fellow members’ constitutive communities as a source of meaning to their lives. This entails, minimally, acceptance as formal status; and more substantively, that members opposed to homosexuality accept the gay constitutive community as a source of meaning to their fellow members’ lives, given that there are no legitimate reasons to retain 377A. Only a 377A repeal can achieve equality of membership in this way. A repeal would remove a symbol of exclusion that denies some members’ equality of membership based on a morally irrelevant factor: sexual orientation. A repeal would thus safeguard unity in the

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793 See Chapter Four, Part II(b)(ii), 192–196.
national community, even if tenuously at first, by equalising the status of gay men without denying equality of membership to other members of the national community. In contrast, retaining 377A, which undermines gay men’s equality of membership for reasons already stated, will always be a fault line within the national community. Hence, a 377A repeal, by conferring equality of membership on gay men, brings the national community closer to unity than retaining 377A. Since the Inclusive Communitarian Approach seeks to allow everyone in the national community to live meaningfully as members of their constitutive communities, any measure that frustrates this meaningful living—as would not be permitted. This solution between clashing constitutive communities strives for unity in the long run by safeguarding the equality of membership of all in the national community. For these reasons, the Inclusive Communitarian Approach would hold that 377A violates the right to equality. I now move on to the second cluster of cases.

b. Second cluster: no encroachment into a constitutive community

The inquiry under the second cluster of cases is as follows. The first question is whether the individual challenging the constitutionality of a legislation and/or executive order censuring her action is a member of the national community. If she is, and her action violates the duty to include, then she is not entitled to constitutional protection. If she is a member, and her action does not violate the duty to include, then she is prima facie constitutionally protected. In the latter scenario, the question is how to strike a balance between the individual right and the community’s interests protected either by the constitutional limits, or by the purpose of the impugned legislation.

In calibrating the balance between competing interests, the Inclusive Communitarian Approach is guided by the notion of equality of membership inherent in the duty to include. This notion is fundamental to the Approach because it is derived from the very concept of community itself. It requires members of the national community to display special concern for each other’s interests; one implication of this is that members’ interests should not be sacrificed in a utilitarian calculus to advance the community’s overall interests. In this regard, the Inclusive Communitarian Approach emphasises the importance of not treating the individual as a means to an end, which would undermine the individual’s equality of

794 See Chapter Four, Part II(a), 184–188.
membership. In instances where the only appropriate balance has a utilitarian element (e.g. deterrent sentences for certain types of crimes), there must be only minimal interference with the individual’s equality of membership.

If the individual is not a member of the national community, then we need to ask whether the national community’s treatment of her violates our general ethical obligations towards human beings as such. If it does not, then the individual is not entitled to constitutional protection; but if it does, then the individual is prima facie protected, and the question then becomes how to strike a balance that upholds these general ethical obligations.

i. Multiracialism and Sedition

How would the Inclusive Communitarian Approach handle the Sedition Act (SA) and the two prosecutions that were brought under it? Let us first analyse the actions of the accused in Benjamin Koh and Ong Kian Cheong. To briefly recap the facts:795 in Benjamin Koh,796 two individuals were charged and convicted under the Act for posting anti-Muslim remarks online; and in Ong Kian Cheong,797 an evangelist Christian couple was charged and convicted under the SA for distributing evangelist tracts that promoted Christianity partly by insulting other religions, including Islam and Catholicism. These actions were held to be seditious because they ‘promote feelings of ill-will and hostility between different races or classes of the population of Singapore’.798

The Inclusive Communitarian Approach would first determine that, because the individuals are Singaporeans, they are members of the national community. As members of the national community, they owe their fellow members the duty to include. In Benjamin Koh, the anti-Muslim and anti-Malay remarks—mocking the Malay community’s customs, for instance799—violated the duty because the remarks undermined the Malay and Muslim communities’ equality of membership in the national community. In Ong Kian Cheong, there is an arguable prima facie case that the evangelical tracts also violated the duty because the

795 See Chapter One, Part III(a), 44–48.
796 Benjamin Koh (n 190).
797 Ong Kian Cheong (n 192).
798 Sedition Act (n 187), section 3(1)(e).
799 See Chapter One, Part III(a), 45.
tracts denigrated other religions, including Islam, which were deliberately sent to Malays, who are generally also Muslims. However, since the purpose of the tracts was not to denigrate these other religions per se, whether or not the couple in Ong Kian Cheong can be held liable under the SA depends on their intention; this will be discussed later. Hence, on its face, the two cases properly fall under the SA.

This conclusion may seem unsatisfactory to those who oppose the rather draconian SA; in particular, the fact that the mere promotion of feelings of ill-will and hostility is enough to be a seditious tendency. As analysed in Chapter One,800 this is a much lower standard than anti-hate speech legislation such as the UK’s Public Order Act which requires ‘threatening, abusive or insulting words’ intended to ‘stir up racial hatred’.801 However, equating the promotion of feelings of hostility between different races with sedition, i.e. an existential attack on the state, is consistent with the Inclusive Communitarian Approach if we reconceptualised the state as the national community. Indeed, the Approach would expand the definition of sedition to include such promotion between all constitutive communities. Under the Approach, an attack against a constitutionally protected constitutive community is an existential attack against the national community as a whole. This is because the Inclusive Communitarian Approach considers these constitutive communities integral parts of the national community whole—and so not only does an attack on a constitutive community unjustifiably undermines its integral nature, but it is also an attack on the national community itself. Hence, the Inclusive Communitarian Approach would expand the Sedition Act’s definition of a seditious tendency as one that promotes ill-will and hostility between the different constitutive communities in the Singaporean national community.

Furthermore, because the Inclusive Communitarian Approach protects every member’s equality of membership, it would require a seditious intention before someone can be held liable under the SA. The Inclusive Communitarian Approach, then, would amend the SA and change ‘seditious tendency’ in section 3 to ‘seditious intention’,802 and it would do so for two

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800 See Chapter One, Part III(a), 44–45.
801 UK POA Section 18(1)(a). Although there are offences under the POA that set a lower threshold, such as section 5(1)(a)’s ‘threatening or abusive words or behaviour … within the hearing or sight of a person likely to be caused harassment’, I am comparing the respective threshold set in regulating race relations, not disturbances to public order per se.
802 The provision currently reads: ‘A seditious tendency is a tendency … to promote feelings of ill-will and hostility between different races or classes of the population of Singapore.’
reasons. First, intention is necessary to constrain the broad reach of the SA’s low threshold. Without the intention to promote feelings of ill-will and hostility, the SA would capture speech that seems seditious, but which has other intention; for instance, social commentary, satire, and artistic expression. Capturing speech without a seditious intention, where the seditious effect is incidental, does not further the aim of the Inclusive Communitarian Approach to safeguard equality of membership because the speech is intended to do something other than to deny the equal membership of some in the national community. Punishing such speech under the Act would cast too wide a net.

Second, the point of legislating against speech that attacks constitutive communities is not to protect feelings from offence; it is to safeguard equality of membership, or what Jeremy Waldron calls dignity: ‘a person’s basic entitlement to be regarded … as someone whose membership of a minority group does not disqualify him or her from ordinary social interaction’. Hence, even though the unintentionally seditious act or speech may still offend the targeted individual and/or group, it would not be punished by the Inclusive Communitarian Approach. The producer of such speech does not intend to deny the targeted individual and/or group’s equal membership in the national community, but seeks to do something else; for instance, artistic expression and social commentary, as was the case with Salman Rushdie’s *The Satanic Verses*. Without the intention to deny or undermine some members’ equality of membership, the speaker would not be deemed to have violated the duty to include. In cases where the speaker’s motive is mixed—satire or artistic expression with a seditious intention, for instance—then the speaker would have violated the duty to include. In short, so long as a seditious intention is present, the duty to include would be violated. As such, the evangelical couple in *Ong Kian Cheong* arguably did not violate the duty because, based on the facts, their intention was to promote Christianity, not to denigrate other religions; hence, they would not be liable under the amended Sedition Act. In contrast, individuals like the accused in *Benjamin Koh* who mock a particular racial and/or religious community intend to undermine the equal membership of the religious community and its members, thus violating the duty to include and being guilty of a seditious offence.

Finally, because the SA sets a low threshold, the Inclusive Communitarian Approach would adjust the punishment accordingly. The SA prescribes a maximum fine of S$5,000 and/or a maximum jail term of 3 years for first-time offenders, and a maximum jail term of 5

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883 Waldron, *The Harm in Hate Speech* (n 189) 105.
years for subsequent offenders. Even though individuals who commit a seditious offence would have violated the duty to include and are thus not entitled to constitutional protection, so long as they remain members of the national community, they possess a residual equality of membership. Hence, the punishment for such individuals must account for the importance of this residual equality; and in Singapore’s context, also of racial and religious equality which is a central tenet as explained earlier. A deterrent sentence would be justified as it accounts for the severity of the offence and the seriousness with which the national community treats flagrant attempts to undermine some members’ equality of membership. However, a deterrent sentence should be at the lower end of the scale to account for the offenders’ residual equality of membership depending on the severity of their actions. The Inclusive Communitarian Approach would also prescribe community service (e.g. the Chinese offenders in Benjamin Koh helping out at a Malay community centre) and some form of classes on the importance of the duty to include as ‘punishment’. This would help to rehabilitate the offenders and hopefully correct their misconceptions about their fellow members.

ii. Political Protest and Public Order

Although the political protest case, Chee Siok Chin,804 appears hard to vindicate because of the wording of Article 14, the Inclusive Communitarian Approach could plausibly vindicate the claim by emphasising the values that it advances. To recap the case,805 the applicants held a peaceful four-person political protest outside the Central Provident Fund (CPF) Building against rumours of corruption in the CPF and demanded more public accountability. They wore t-shirts bearing slogans such as ‘Be Transparent Now’ and stood in a row along the walkway leading to the CPF Building. Subsequently, the police ordered them to disperse because their protest constituted a public nuisance under the now-repealed Miscellaneous Offences (Public Order and Nuisance) Act (MOA). The applicants alleged that their Article 14(1) right to freedom of speech and assembly had been violated.

As Singaporeans, the applicants are members of the national community. Since they protested against the rumoured corruption in public institutions, the protest does not violate the duty to include, and is thus prima facie protected under Article 14. However, Article 14(2)

804 Chee Siok Chin (n 207).
805 See Chapter One, Part III(b), 48–53.
confers a broad constitutional leeway to Parliament to enact ‘necessary or expedient’ laws that restrict free speech, assembly and association in the interest of public order. The low threshold of expedience—the Cambridge Dictionary, for instance, defines it as ‘helpful or useful in a particular situation, but sometimes not morally acceptable’—is an initial stumbling block to the Inclusive Communitarian Approach’s possible vindication of the applicants’ claim. Expedience does not impose a normative standard, such as non-arbitrariness, that Parliament has to meet for a restriction on Article 14(1) to be constitutional. Rather, its broadness appears to sanction just about anything—including, at least prima facie, defining a peaceful assembly as no more than four persons. It seems, then, that the Approach has come up against the broadness of the constitutional text itself.

While this is one plausible way to reinterpret the case, there is an alternative reinterpretation that reads down the ‘necessary or expedient’ limitation in light of the values that the Inclusive Communitarian Approach advances. In this context, the value is the national community as a source of meaning to its members. Political protest can preserve this value if it highlights instances where the government is acting against the national community’s interests, or when the national community itself has failed to discharge its duty to include towards a particular constitutive community. In such situations, protesting against the state’s alleged impropriety and the national community’s failure can strengthen the bond between members of the national community: by generating a vivid sense of shared fate, that everyone has a stake in the national community’s future. Thus, if the impugned protest advances the national community’s interests, then ‘expedient’ ought to be read out of ‘necessary or expedient’, such that the question becomes whether the restriction on the protest is necessary instead.

In Chee Siok Chin, the MOA’s regulatory framework disallowing political protests of five or more persons without a police permit was upheld by the High Court as falling within the ‘necessary or expedient’ limit. Given the value of political protest to the national community, however, the Inclusive Communitarian Approach would read down the ‘necessary or expedient’ limit and contend that, given the importance of political protest, restrictions on


807 I am grateful to Dr Kirsty Hughes for this suggestion.

808 An example is mass protests in India for women’s rights after egregious incidents of rape.
the rights to speech and assembly have to be *necessary*, not merely expedient. Further, the Approach would question whether it is necessary to require protests of more than just five persons to be licenced by the police. All things remaining equal, it seems unlikely that a group of five, even twenty, peaceful protesters would disrupt public order. This is not to say, of course, that political protests can take place unregulated; it is only to say that setting the limit at five persons is arguably an overly broad restriction on the right to protest, given its value to the national community.\footnote{The Inclusive Communitarian Approach would thus decide that the MOA does not fall within Article 14(2).}

iii. *The Death Penalty and Drug Trafficking*

The relevant provisions challenged in the Misuse of Drugs Act (MDA) death penalty cases are unconstitutional under the Inclusive Communitarian Approach. This may seem a surprising conclusion since no constitutive community is involved: the drug traffickers are not claiming an infringement into a constitutive community of drug traffickers, and their censured activity—drug trafficking—does not violate the duty to include. For some cases, however, there is a constitutive community involved: the national community. The reinterpretation, then, relies heavily on the duty to include.

To briefly summarise the salient issues,\footnote{See Chapter One, Part IV, 53–66.} section 33B(2) of the MDA provides that anyone who traffics, *inter alia*, more than 15g of heroin (the 15g Differentia) will be sentenced to death *unless* he proves, on a balance of probabilities, that he is a drug courier or mentally impaired; *and* if he successfully proves that he is a drug courier, he has to have received a certificate of substantive assistance from the Public Prosecutor. If these conditions are satisfied, he will be sentenced to life imprisonment in lieu of the death penalty and a certain number of strokes of the cane. These provisions were variously challenged for violating Article 9(1), the right to life and liberty, and Article 12(1), the right to equality.

\footnote{Note that, under Singapore’s Public Order Act (Cap 257A, 2012 rev ed) which replaced the MOA, a procession is a public procession and subject to the POA’s regulatory framework if it ‘[comprises] 2 or more persons gathered at a place of assembly to move from that place substantially as a body of persons’ to demonstrate support for or opposition to a cause, etc: section 2(1). The current law is thus more restrictive than the previous one.}
The primary issue is whether the 15g Differentia, as upheld in *Nguyen Tuong Van*\(^{811}\) and which attracts the death penalty,\(^{812}\) can be sustained under the Inclusive Communitarian Approach. There are two different answers to this question, depending on how the first question—whether the offender is a member of the Singaporean national community—is answered. I will first briefly address the situation where the offender is not a member of the national community. The offender’s non-membership does not permit the national community to impose the death penalty on him, as it would violate the national community’s general ethical obligations. As suggested in Chapter Four,\(^{813}\) these obligations require us to treat humans as subjects of our moral considerations, and we do so by upholding their basic interests. One such basic interest is the interest in life. As such, discounting offenders from constitutional protection simply because they are not members of the national community would violate our general ethical obligations, which means that they are entitled to *prima facie* constitutional protection.

What about the issue of whether the 15g Differentia violates Articles 9(1) and 12(1) for both the member and non-member scenarios? Since drug trafficking does not violate the duty to include as it does not denigrate any constitutive communities’ equal membership in the national community, the question is how the balance between the competing interests should be struck, bearing in mind the individual’s interest in life and equality of membership, and the national community’s interest in combating drug trafficking and preventing drug abuse. To state the conclusion first: under the Inclusive Communitarian Approach, both the 15g Differentia and the death penalty for drug trafficking *per se* are not ‘law’ for the purpose of Article 9(1), which requires life and liberty to be taken away in accordance with ‘law’.

Why is the 15g Differentia not ‘law’? It is not law in a substantive sense because it fails to strike a proper balance between the competing interests in both the member and non-member scenarios. This is because the 15g Differentia is only ‘broadly proportionate’\(^{814}\) to the MDA’s social object, and because, as the CA admitted in *Yong Vui Kong*, the 15g Differentia is not the best means of achieving the MDA’s objective.\(^{815}\) Imposing the ultimate punishment of death

\(^{811}\) *Nguyen Tuong Van* (n 249).

\(^{812}\) See Chapter One, Part IV(a)(ii), 57–60.

\(^{813}\) See Chapter Four, Part II(c)(ii), 199–200.

\(^{814}\) *Yong Vui Kong* (n 238) [112].

\(^{815}\) ibid [113].
based on a statutory threshold that is not the best possible means to combat drug trafficking does not accord due weight to the non-member’s interest in life, and the member’s interest in life and equality of membership. If the death penalty for drug trafficking can be justified at all, the statutory threshold that would attract it must be the best way to achieve the statutory objective. Otherwise, it suggests that there is a better way to achieve the objective, but the individual’s interest in life is not important enough to put this measure in place. This signals disrespect for the non-member as a moral being by disrespecting his interest in life and violates the national community’s general ethical obligations; hence, the 15g Differentia is not ‘law’.

For the member of the national community, the 15g Differentia is not ‘law’ also because it disrespects her equality of membership in the national community. By imposing the death penalty on a member based on a statutory threshold that is not the best means of furthering the MDA’s objective, and by imposing the death penalty at all, the national community ends up sacrificing her with such finality that calls into question its very character. As analysed in Chapter Four, a community is a group of people who display feelings of special concern towards each other and recognise each other as members. Hence, a community that sacrifices some of its members in a categorical manner by way of the death penalty feels no special concern for these members and so fails to respect their equality of membership. The national community, then, violates its duty to include even convicted drug traffickers as fellow members by, first, not ensuring that the statutory threshold is the best possible means of achieving the MDA’s purpose; and second, using them to send a warning about the serious consequences of drug trafficking by imposing the deterrent death penalty on them.

One might say that the national community no longer owes these individuals the duty to include because they are convicted drug traffickers; they are guilty of a crime that the national community has deemed serious enough to be punishable by death. But even granting that the national community’s duty to include is defeated by the crime of drug trafficking, it does not follow that the death penalty is justified. The national community can exclude these members by, for instance, imprisoning them for a number of years. More importantly, there is a residual duty to include that still applies; the duty is defeated only to the extent that is necessary to correct the effects of its members’ wrongdoing because these individuals are still members. Hence, there is a residual duty in this case to include even convicted drug traffickers—and this essentially means that their membership in the national community should

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816 See Chapter Four, Part II(a), 184–188.
be respected by not sacrificing them, by way of the deterrent death penalty, in the national community’s fight against drug trafficking. For these reasons, the death penalty for drug trafficking cannot be upheld under the Inclusive Communitarian Approach.

**CONCLUSION**

In this final chapter, I have argued for the relevance of the Inclusive Communitarian Approach to Singapore and applied it to the cases discussed in Chapter One, which has resulted in a vindication of the rights claimed in the cases. I began by arguing that the Approach is relevant to Singapore because its two elements, constitutive communities and the duty to include, are already minimally present in, first, Singapore’s definition of community; and second, the courts’ emphasis on the importance of the nation in some cases. More importantly, the normative core of the duty, equality of membership, is arguably also the normative core of Singapore’s foundational multiracialism. In this connection, I have argued that Singapore’s multiracialism is essentially underpinned by the ideal of equality, and should be extended to equality *simpliciter*, because there is no morally relevant difference between racial and other forms of unequal treatment. As such, the duty to include is consistent with Singapore’s multiracialism.

My reinterpretation of the cases has shown that Singaporeans’ constitutional rights can be vindicated within a communitarian framework that protects fundamental communitarian values: our ability to live meaningfully as members of our constitutive communities, our constitutive communities themselves, and unity within the national community resulting from recognising and respecting every member’s equality of membership. The Inclusive Communitarian Approach therefore bridges the gap, cleaved by Singapore’s ‘collective over individual’ approach, between the elevated status of the rights and their non-application in practice. What the reinterpretation exercise also shows is that constitutional rights and communitarianism do not make odd bedfellows. Constitutional rights can be vindicated by a non-liberal, communitarian reasoning process; and so a rejection of liberalism and its various individual-centric approaches to rights does not entail a correlative rejection of rights. On the contrary, communitarianism is compatible with constitutional rights when rights are reconceptualised as protecting the constitutive communities that are a source of meaning and autonomy to their individual members.
If we are serious about constitutional supremacy and communitarianism, then Singapore’s ‘collective over individual’ approach should be abandoned for the Inclusive Communitarian Approach. By placing constitutive communities as the primary subject of constitutional protection, the Inclusive Communitarian Approach succeeds in shifting the focus of rights protection from individual to community without sacrificing, as Singapore’s approach has done, the supremacy of the Constitution and the constitutionally guaranteed fundamental liberties of Singapore’s united people.
Conclusion

This thesis introduced Singapore’s communitarian approach to constitutional rights with *Lim Meng Suang v Attorney-General*, the failed constitutional challenge to section 377A of the Penal Code. Although this decision flows against the currents of LGBT rights liberalisation in many countries, including Taiwan, the first country in Asia to legalise same-sex union, it is entirely consonant with Singapore’s communitarian approach to rights. It is an approach that pits the collective interest against individual rights in a zero-sum game, one from which the collective interest has always emerged victorious.

This is the logical outcome of Singapore’s communitarianism that *a priori* valorises the collective interest over individual rights. In this thesis, I have shown how Singapore’s ‘collective over individual’ approach to rights is problematic for producing a disjunction between the elevated status of constitutional rights and their non-application in practice. Instead of prescribing an ill-fitting liberal solution, however, I have argued that the problem with Singapore’s approach is not its communitarian commitment *per se*; the problem, rather, is that it is premised on a particular ‘collective over individual’ conception of communitarianism. By attaching overwhelming weight to a collective interest pitted against an individual right, the latter inevitably faces a Herculean uphill battle for a vindication that has never happened in Singapore’s fifty-four years as an independent nation. This arguably casts a shadow on the constitutional status of Singapore’s fundamental rights.

Instead of accepting that communitarianism is synonymous with ‘collective over individual’, I subjected the latter to a normative critique in light of both ‘Western’ and ‘Asian’—that is, Confucian—communitarianism, a critique which ‘collective over individual’ failed to survive. In the course of the critique, I made two conceptual claims about communitarianism: first, it values both individual and community equally; and second, communitarianism advances only a thin theory of the good. These two claims follow from the communitarian conception of the self as a situated and relational self, and the communitarian politics of the common good. Essentially, given the multifarious communal attachments to which the self is related, the good that communitarianism promotes must account for all these various valued attachments—and it is the good of inclusiveness.
Since the normative critique shows that ‘collective over individual’ is not a necessary feature of communitarianism, we have good reasons to theorise about an alternative communitarian approach to rights that Singapore could adopt. I developed just this alternative communitarian approach, the Inclusive Communitarian Approach. Its two elements follow from my two conceptual claims about communitarianism. The first element is a pluralistic constitutive conception of community as all the communal attachments that partly constitute our identity, such that rights protect both our interest in our constitutive communities, and the constitutive communities themselves, from unjustified encroachment from the state and/or the majority. I identified two features of a constitutive community: the Fundamental Feature and the Social Harm Feature. A communal attachment possesses the fundamental feature when it is an ordinarily unchangeable and unchosen, and deep-seated aspect of identity to which the individual has made an ethical commitment, and cannot conceive of herself without it. In order for such communal attachments to be protected as constitutive communities, however, the Social Harm Feature needs to be present, too: members of these communities are exposed to social harms, particularly discrimination, simply as members of these constitutive communities. When the two features are present, a communal attachment becomes a constitutive community in which our interest is sufficiently important to justify imposing a duty on others to respect our right to it.

The second element of the Inclusive Communitarian Approach is the baseline special obligation that is owed between members of the national community: the duty to include. This duty is derived from a conception of the nation as an ethical community in which members owe each other special obligations, and the inherently inclusive nature of the concept of community itself. Given the importance of our constitutive communities to our self-understanding, members of the national community owe each other a duty to include every member’s constitutive communities within its folds, so that every member can live meaningfully as members of all their constitutive communities. The duty to include is discharged by recognising and respecting every member’s equality of membership so long as they possess the morally relevant membership criterion: national identity. Members of the national community demonstrate respect for fellow members’ equal membership by displaying special concern for their interest in their constitutive communities. Hence, the national community should not sacrifice some members’ constitutive communities in a utilitarian calculus to serve the collective interest; and in the event of clashes between constitutive
communities, the duty to include is discharged by reaching a compromise that both sides can accept.

I ended the thesis by applying the Inclusive Communitarian Approach to Singapore. I demonstrated its relevance to Singapore by showing how its two elements are already present in Singapore’s communitarianism. I then applied the Approach to the cases discussed in the thesis and showed that it led to a successful outcome in the cases analysed in Chapter One. I focused my reinterpretation exercise on the communitarian values that the Inclusive Communitarian Approach aims to protect: our interest in our constitutive communities, the constitutive communities themselves, and unity in the national community. On the Inclusive Communitarian Approach, then, constitutional rights protect not just individual interests, but community interests as well. The successful outcome of the cases that the Approach produces thus proves my initial hypothesis that Singapore’s peculiar ‘collective over individual’ approach to rights is the reason that all of the constitutional rights challenges brought to date have failed. Accordingly, Singapore should abandon its approach, and adopt the Inclusive Communitarian Approach, so that the elevated status of rights can be upheld.

Those readers whom I have managed to convince of the theoretical plausibility of the Inclusive Communitarian Approach may nevertheless have a nagging doubt: given Chapter One’s narrative of a conservative judiciary that has a long history, entrenched by stare decisis, of adhering strictly to its self-circumscribed role in the separation of powers, it seems unlikely that the Inclusive Communitarian Approach would be adopted. It would require an almost revolutionary reconfiguration of the judiciary’s constitutional interpretation and an overhaul of its constitutional case law—a possibility as remote as snow in tropical Singapore.

Admittedly, the Inclusive Communitarian Approach that I have outlined in this thesis is only the first step in what would likely be a long process of change in conservative Singapore. Whether the Approach would be taken up by the relevant actors—the judges in their constitutional rights reasoning, the political leadership in their policy-making—depends on a variety of factors, chief among them being the types of personalities involved, and their willingness not just to think outside the box, but replace the existing toolbox. My pessimistic disposition prevents me from any kind of prediction that the Approach will persuade the relevant actors; save to express a tenuous hope that, at some point, the Inclusive Communitarian Approach would at least enter the conversation about rights in Singapore, be it in public debates or between constitutional scholars.
Be that as it may, and regardless of its practical consequences, I hope to have successfully shown that the unsuccessful outcome of Singapore’s constitutional rights challenges is not an inevitable consequence of a communitarian approach to rights. If there were to be one lasting impression that I hope for this thesis to make, it is that constitutional rights can be protected within a communitarian framework, and that protecting rights is not only the business of liberalism; communitarianism can undertake the task with robustness as well.

For Singaporean readers in particular, I hope to have convinced them that we should not be resigned to the assumption that the Singapore judiciary’s non-vindication of our constitutional rights so far is the price that we have to pay for Singapore’s communitarian exceptionalism; that our rights are the prize that we have to give up for Singapore to stake its own unique communitarian identity in drawing and defining the contours of its place in the modern world. Amidst the conservative forces chipping away at our diversity by screeching at the government to ban anything that it disagrees with, I hope that my theory provides a plausible, if not convincing, counter-argument to those who would use communitarianism as an excuse for the unequal treatment of the LGB, religious, transgender, political, and so on members of our national community. To naysayers who might accuse my theory of being too radical for conservative Singapore, I hope that they would realise that there is nothing radical about treating fellow Singaporeans as equals; that, indeed, it is the basic expectation and entitlement of what we have pledged to each other: as one united people, regardless of race, language or religion—or any other constitutive community.

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