

# “Indigeneity” as Self-Determination

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*There is presently much controversy concerning the legal and political significance of "Indigeneity" in settler states. Recently, Jeremy Waldron set out to critique what he saw as the uncritical use of liberal property morality by supporters of Indigeneity. This paper argues that self-determination is a liberal principle better suited to founding Indigeneity's political significance. To this end, this paper examines self-determination as a liberal principle, and develops a historical approach to it to support the argument that it provides a firmer foundation for Indigeneity in liberal political discourse than liberal property principles.*

## I INTRODUCTION

In light of the recent renewal of the United Nations International Decade of the World's Indigenous People,<sup>1</sup> it is timely to reflect on where the concept of "Indigenous" stands. Although "Indigeneity" carries significant weight at the international level as a juridical and political concept, there is much disagreement about which peoples can properly be regarded as Indigenous (definitional), and what political consequences should flow from Indigeneity (normative significance). Benedict Kingsbury has cogently analyzed the definitional problems of the term, noting that inevitable problems of over- and under-inclusiveness are compounded by differences in opinion from governments who do not consider any peoples within their borders as Indigenous.<sup>2</sup>

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1. See online: Office of the United Nations High Commissioner for Human Rights <<http://www.ohchr.org/english/issues/Indigenous/decade.htm>>.

2. See Benedict Kingsbury, "'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) 92 Am. J. Int'l L. 414 at 416-418, 428-433. For a general discussion of the problems of definition and concept, see Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press, 2002) at 33-60; and Benedict Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 N.Y.U.J. Int'l L. & Pol. 189 at 237-246 [Kingsbury, "Reconciling Competing Structures"].

Problems regarding the normative significance of the term “Indigeneity” are often related to the wider question of how cultural difference should be accommodated by states.<sup>3</sup> These problems are further exacerbated by the predictable differences in political philosophy relating to the treatment of prior peoples by later arrivals. Thus, “[f]inding appropriate political expression for a just relationship with colonized Indigenous peoples is one of the most important issues confronting political theory today.”<sup>4</sup> Implicit in and further complicating these issues are different visions of sovereignty, citizenship, nationhood, autonomy and culture, and the question of minority and national self-determination.

In the midst of this normative controversy, Jeremy Waldron, an eminent New Zealand-born political and legal philosopher, recently gave a lecture discussing the significance of Indigeneity.<sup>5</sup> He identified two liberal property principles—“first occupancy” and “prior occupancy”—implicit in the common sense definitions of Indigeneity that usually refer to Indigenous peoples as the first occupants of a territory, or as those who lived in a territory before colonization. He then found that the claims of Indigeneity were unsupported by these liberal property principles, and argued that the concept should be regarded as a “volatile substance.”<sup>6</sup> Waldron’s contribution points out the problems in using liberal property justifications to explain the significance of Indigeneity. It also gives a sophisticated philosophical voice to non-Indigenous citizens who deny that history should dictate the present rights of individuals or groups. Although Waldron argues otherwise, his critique can be read as an attack on the political significance of Indigeneity in general; it is this implicit critique that is most important for the consideration of this article, which argues that by focusing on liberal property principles Waldron neglects the key liberal principle that would challenge his implicit critique: self-determination.

The question of Indigeneity’s political significance is crucial and pressing in settler societies, as Indigenous peoples continue their struggle for recognition of their rights, and non-Indigenous citizens and governments struggle to understand the basis of those rights. Waldron’s conclusion is that “any modern-day importance attaching to Indigeneity must be explained on some basis other than these problematic [liberal property] principles.”<sup>7</sup> My

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3. A question considered, among others, by Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995) [Kymlicka, *Multicultural Citizenship*]; Brian Barry, *Culture and Equality* (Cambridge: Polity Press, 2000); Paul Kelly, ed., *Multiculturalism Reconsidered: Culture and Equality and its Critics* (Cambridge: Polity Press, 2002).

4. Duncan Ivison, Paul Patton, & Will Sanders, “Introduction” in *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 2.

5. This lecture was published as Jeremy Waldron, “Indigeneity: First Peoples and Last Occupancy” (2003) 1 N.Z.J. Pub. & Int’l L. 55 [Waldron, “Indigeneity”].

6. *Ibid.*

7. *Ibid.* at 56.

thesis is that the principle of “self-determination” is the best liberal justification for the significance of Indigeneity, and best fits how Indigenous peoples view their claims and rights. Thus, Indigenous peoples, should they wish to use liberal arguments to justify their rights, can appeal to quite a different liberal principle than property to found their claims.

The appeal I make to self-determination is of a particular sort. It counts the historical fact of Indigenous self-determination—the fact that Indigenous peoples lived by their own laws, traditions and customs before they encountered colonizing powers—as a crucial basis for a return to that status in the present. Such a “historical self-determination” approach to explaining Indigeneity’s normative significance synthesizes various arguments previously raised by political and legal theorists such as James Tully,<sup>8</sup> J.G.A. Pocock,<sup>9</sup> Allen Buchanan,<sup>10</sup> Margaret Moore,<sup>11</sup> Dale Turner,<sup>12</sup> Patrick Macklem<sup>13</sup> and Paul Keal,<sup>14</sup> who have each examined the claims of Indigenous peoples to self-determination by using “backwards-looking” historical approaches. Because historical self-determination is a political argument derived from, and applied to, a social reality that is highly historical, it may be contrasted with both “ideal” political theory<sup>15</sup> and “presentist” theory that disregards history (in this case historical patterns of

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8. *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) [Tully, *Strange Multiplicity*]; “A Just Relationship between Aboriginal and Non-Aboriginal Peoples of Canada” in Curtis Cook & Juan D. Lindau, eds., *Aboriginal Rights and Self-Government* (Montreal and Kingston: McGill-Queen’s University Press, 2000) 39 [Tully, “A Just Relationship”].
  9. “Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the *Treaty of Waitangi*” (1998) 43 McGill L.J. 481 [Pocock, “Law, Sovereignty and History”]; “Waitangi as a Mystery of State: Consequences of the Ascription of Federative Capacity to the Maori” in Ivison, Patton & Sanders, *supra* note 4 [Pocock, “Waitangi as a Mystery”]; “The Treaty between Histories” in Andrew Sharp & Paul McHugh, eds., *Histories, Power and Loss* (Wellington: Bridget Williams Books, 2001) [Pocock, “The Treaty between Histories”].
  10. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004) at 408-421, especially 415-421 [Buchanan, *Justice, Legitimacy and Self-Determination*].
  11. “An Historical Argument for Indigenous Self-Determination” in Stephen Macedo & Allen Buchanan, eds., *Secession and Self-Determination* (New York: New York University Press, 2003) 89 [Moore, “An Historical Argument”].
  12. “Liberalism’s Last Stand: Aboriginal Sovereignty and Minority Rights” in Cook & Lindau, *supra* note 8 [Turner, “Liberalism’s Last Stand”]; “*This is Not a Peace Pipe*”: *Towards an Understanding of Aboriginal Sovereignty* (D. Phil. Thesis, McGill University, 1997) [Turner, *This is Not a Peace Pipe*].
  13. *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [Macklem, *Indigenous Difference*]; “Distributing Sovereignty: Indian Nations and Equality of Peoples” (1993) 45 Stan. L. Rev. 1311-1367 [Macklem, “Distributing Sovereignty”].
  14. *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press, 2003).
  15. See Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 55; John Rawls, *A Theory of Justice*, rev. ed. (Oxford: Oxford University Press, 1999) at 216, 308-309. See section IV, “A Developing Tradition,” below on pp. 101-103 for further discussion.

self-determination) in discussing justice.<sup>16</sup> Historical self-determination approaches look to the histories of Indigenous peoples and their interaction with settler states, and, in most cases, find that Indigenous peoples usually did not fully consent to outside governance.<sup>17</sup> In such cases, the liberal principle of self-determination cannot be considered fulfilled. The question becomes one of how previously fully self-determining people, who still claim and have memory of self-determination, can be restored to being fully self-determining in the present.

Answers to this question must contend with two fundamental themes predominant in the discourse concerning Indigenous peoples and their rights. One is that “Indigeneity,” as a concept related to particular peoples’ claims and justifications for them, is intertwined with the principle of self-determination. The other is that within Western political and international legal spheres, the question of legal and moral rights of Indigenous peoples to self-determination is highly contested.<sup>18</sup>

Historical self-determination, as a liberal principle, is built on foundations that are intuitively sturdy, but on further examination are contested. The semblance of sturdiness is provided by the fact that self-determination corresponds with the predominant liberal international relations/law principle of the equality of nations. In contrast, recent liberal discussions of self-determination have highlighted debates about the concept. In this article, I will pass over these debates and presume that the principle of self-determination does stand up to the scrutiny of, and is commensurate with, Western political philosophy.

Before we examine Waldron’s position, I want to make two preliminary points. First, examining “self-determination” takes us into the territory of international justice between peoples and nations, rather than domestic justice between individuals. However, this article will proceed on the basis that self-determination in the “external” sense, which contemplates the possibility of secession,<sup>19</sup> is not often a practical option for Indigenous peoples. (The exception is where their continued exploitation or oppression

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16. Waldron, “Indigeneity,” *supra* note 5 at 61.

17. Indigenous peoples negotiated and concluded hundreds of treaties with the colonizers, but most of these did not cede internal self-government, and most were concluded under circumstances that would have precluded both a full knowledge of the consequences of signing and representative consent. In other cases, Indigenous peoples were subjugated to the settler state without any attempt to gain consent, or were regarded as non-existent in the *terra nullius* scenario.

18. Indeed, as will be shown, there is significant debate as to which groups or peoples should be seen as the proper subjects of a moral right of self-determination. To some extent, the debate goes on external to questions of Indigeneity, and the liberal principles are merely applied when they have been fully fleshed out. See section III, “From Individual to Group Autonomy,” below on pp. 96-98.

19. Catherine J. Iorns, “Indigenous Peoples and Self-Determination: Challenging State Sovereignty” (1992) 24 Case W. Res. J. Int’l L. 199 at 268-277.

warrants it.)<sup>20</sup> The history subsequent to colonization does not make it desirable, and integration and the relationships that have built up over the years do not practically allow for secession in most cases.<sup>21</sup> Furthermore, few Indigenous peoples' claims extend to this, even when they are framed in terms of "sovereignty."<sup>22</sup> However, it must be remembered that some Indigenous peoples do demand secession,<sup>23</sup> and that the option of secession may be conceptually necessary in order to secure equal negotiation between Indigenous peoples and states: Secession is Indigenous peoples' veto.<sup>24</sup> Second, the focus on self-determination situates the deep and complex debate on "culture and equality" as peripheral to this paper. Other issues only peripherally addressed are those of definition, identity and self-identification,<sup>25</sup> cultural survival, international law, ethnic nationhood<sup>26</sup> and the important question of how self-determination might work in practice.<sup>27</sup>

This article is divided into five sections. The next section examines Waldron's discussion of Indigeneity. The third considers the significance of liberal political philosophy for the concept of Indigeneity. The fourth argues that "self-determination" is the best liberal explanation for Indigeneity's political significance, and the final section builds on this by outlining a "historical self-determination" approach.

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20. See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 319; James S. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) [Anaya, *Indigenous Peoples*]: "Secession ... may be an appropriate remedial option in limited contexts .... In most cases in the postcolonial world, however, secession would most likely be a cure worse than the disease from the standpoint of all concerned" at 85.
  21. As Miller observes, "Some nations—for instance those whose members are geographically intermingled with other groups—will have to settle for something less than full self-government." David Miller, *On Nationality* (Oxford: Oxford University Press, 1995) at 81 [Miller, *On Nationality*].
  22. Roger Maaka & Augie Fleras, "Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa" in Ivison, Patton & Sanders, *supra* note 4, 89: "To be sure, Indigenous claims to sovereignty rarely entail separation or secession but instead a reconstitutionalising of the first principles upon which Indigenous peoples–state relations are governed." See also Moore, "An Historical Argument", *supra* note 11; Jacob T. Levy "Indigenous Self-Government" in Stephen Macedo & Allen Buchanan, eds., *Secession and Self-Determination* (New York: New York University Press, 2003) 120: "[I]t is almost inconceivable that any Indigenous groups could successfully secede and establish their own states." See also Keal, *supra* note 14 at 132-134; Anaya, *Indigenous Peoples*, *supra* note 20 at 77-85.
  23. Kingsbury, "Reconciling Competing Structures", *supra* note 2 at 221-223.
  24. See generally Robert N. Clinton, "There is No Federal Supremacy Clause for Indian Tribes (2002) 34 Ariz. St. L.J. 113.
  25. For example see Manuhua Barcham, "(De)Constructing the Politics of Indigeneity" in Ivison, Patton & Sanders, *supra* note 4.
  26. See Miller, *On Nationality*, *supra* note 21; Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993).
  27. On which see Moore, "An Historical Argument", *supra* note 11 at 104-110; Levy, *supra* note 22.

## II WALDRON ON INDIGENEITY

### Waldron’s Critique: Particular or General?

Waldron’s discussion of Indigeneity was presented as the 2002 Quentin-Baxter Memorial Lecture at the Victoria University of Wellington Law School on 5 December 2002. It applied his expertise in liberal political philosophy to a particular problem in the analysis of Indigenous rights and claims. Near the beginning, Waldron sets the scope of the lecture as providing a “philosophical critique of the use that is made of the Principle of First Occupancy and the Principle of Prior Occupancy in trying to explain what is special about Indigeneity.”<sup>28</sup>

Waldron further specifies that his lecture is not meant as “a critique of Indigeneity as such,”<sup>29</sup> nor as “an exhaustive treatment of Indigeneity.”<sup>30</sup> Waldron expressly acknowledges that other principles might arguably found Indigeneity, and “any modern-day importance attaching to Indigeneity must be explained on some basis other than these problematic principles.”<sup>31</sup> His declared critique is therefore particular, directed at the use of the two liberal property principles and not at the concept of Indigeneity in general.

Yet, there is some ambiguity about the extent of Waldron’s critique in the lecture. In many instances his language and tone suggest a critique of the broader significance of Indigeneity. For example, he asks questions like the following: “What exactly does it mean to describe a people as the ‘Indigenous’ inhabitants of a land?” “Why is Indigeneity important?”<sup>32</sup> “What principles or legal or political ideas does Indigeneity invoke, which explain its importance?”<sup>33</sup> These questions of Indigeneity’s general political importance are illustrated by reference to policies of biculturalism in New Zealand’s government, the idea that injustice against Indigenous peoples *qua* Indigenous peoples is more important than general injustice, and the contemporary status of the *Treaty of Waitangi*.<sup>34</sup> These general questions of what makes Indigeneity *normatively significant* in political philosophy go beyond Waldron’s more limited stated aim of addressing the underlying question: “What is the significance of the abstract concept of Indigeneity for concrete political questions that arise in places like New Zealand, Australia, Canada, or the United States?”<sup>35</sup>

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28. Waldron, “Indigeneity”, *supra* note 5 at 55.

29. *Ibid.* at 56.

30. *Ibid.* at 59.

31. *Ibid.* at 56. Waldron points to issues of cultural rights and “the specific concern that a people may have for the preservation of their culture in its original habitat.” *Ibid.* at 59-60.

32. *Ibid.* at 55.

33. *Ibid.* at 59.

34. *Ibid.* at 57-58.

35. *Ibid.* at 57.

To raise these general questions of Indigeneity's political significance creates the impression of "a critique of Indigeneity as such." What relation does this *tacit general* critique have with his *declared specific* critique? As a matter of philosophical argument, it seems little rests on these questions—they merely frame the specific critique in a wider debate. As noted above, Waldron makes clear that he is merely "fiddling with one little piece of a complicated jig-saw puzzle"<sup>36</sup> in relation to his expertise, and that he is not offering a "critique of Indigeneity as such."<sup>37</sup>

In spite of this, and although he declares that he is not, the tone of the lecture gives the impression that Waldron is arguing that the significance of Indigeneity has no other basis than these problematic liberal principles. Consider the concluding sentence: "[I]f we are seeking to buy into the *general* discourse of Indigeneity ... then we had better be aware of the volatile substance we are playing with."<sup>38</sup> This statement implies that the general discourse of Indigeneity has no other basis than the dangerous "we were here first" argument, so that "*if* Indigeneity, *then* liberal property morality." For example, on the previous page, Waldron makes the argument that either Indigeneity aficionados must admit that they are using problematic property morality, or base the significance of Indigeneity on unique or *sui generis* claims with "ineffable, almost mystical" elements<sup>39</sup> that are not founded in any other universal (read: liberal) principles of the freedom and equality of people, or the sovereignty of self-governing nations.<sup>40</sup> The heading, "Is that all there is?", while perhaps pointing to an exhaustion of his specific critique, suggests that the wider critique of Indigeneity has also been exhausted.<sup>41</sup> Though Waldron declares that his critique is specific, other statements imply a wider critique of the political significance of the concept.

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36. *Ibid.* at 59-60.

37. *Ibid.* at 56.

38. *Ibid.* at 82 [emphasis in original].

39. *Ibid.* at 81-82. Here Waldron misquotes James Tully by attributing to him the Canadian Supreme Court's view that *he is describing*, that Indigeneity generates a set of claims that "do not derive from any universal principles, such as the freedom and equality of peoples, the sovereignty of long-standing, self-governing nations." As shown below in "Why Liberal Political Philosophy," this is not Tully's view. See also James Tully, "The Struggles of Indigenous Peoples for and of Freedom" in Iverson, Patton & Sanders, *supra* note 4, 37 at 51 [Tully, "Struggles of Indigenous Peoples"].

40. Waldron, "Indigeneity", *supra* note 5 at 81.

41. *Ibid.* If this implicit wider critique does indeed exist, it falls foul of Hegel's warning that "[t]he genuine refutation must penetrate the opponent's stronghold and refute him on his own ground; no advantage is gained by attacking him somewhere else and defeating him where he is not." G.W.F. Hegel, *Science of Logic*, trans. by A.V. Miller (London: Allen, 1969) at 581, quoted by Ernest J. Weinrib, "Why Legal Formalism" in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 360. Then again, Waldron might deny any implicit critique of the sort that I have identified, thus meaning that it is I that should heed Hegel.



Waldron’s implicit argument is that because these liberal property principles do not apply Indigeneity is without basis in the Western political tradition. This is something to refute. I argue that self-determination is the key justification for Indigeneity’s political significance. If that is so, Waldron’s critique of liberal property principles has done little that would bring into question Indigeneity’s continuing political importance.

Nevertheless, with this question of scope behind us, I will briefly outline Waldron’s argument. Waldron identifies first occupancy and prior occupancy as the normative basis of Indigeneity. These principles correspond with two commonsensical definitions that refer to people being in a territory first, or before other peoples,<sup>42</sup> and that this is how Indigeneity has been presented by its supporters.<sup>43</sup> Waldron then elaborates a critique of these principles as justifications of Indigeneity, based on standard philosophical problems with them. For example, prior occupancy is a conservative principle that precludes the overturn of existing arrangements (and thus prevents reversion to the Indigenous order),<sup>44</sup> and first occupancy is both too historically demanding and too philosophically “dodgy.”<sup>45</sup> Ultimately he finds that these justifications of Indigeneity do not adequately support the claims that Indigenous peoples make,<sup>46</sup> although it is arguable that he sets the claims far beyond what is ordinarily demanded.

### **Moving from Definitions to Justifications**

One problem with Waldron’s critique of Indigeneity is that it focuses on the principles that seem implicit in the relatively unsophisticated commonsensical definitions of Indigeneity. However, more sophisticated definitions make clear the implicit extension of “here first” arguments beyond liberal property principles. By “more sophisticated definitions” I mean those that include complex ideas such as “colonization,” “conquest,” “domination” and “dispossession,” rather than just “here first.”<sup>47</sup> These definitions do not rest on liberal property morality (except in terms of “dispossession”). The common claim that “we were here first” is only the first part of the fuller claim. The fuller claim is “we were here first, exercising sovereignty and self-determination according to our own laws and customs.” Indigenous claims for land, self-determination or sovereignty

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42. *Ibid.* at 62-65.

43. *Ibid.* at 61.

44. *Ibid.* at 73-74.

45. *Ibid.* at 75-81.

46. *Ibid.* at 81-82.

47. See the definition suggested by UN Special Rapporteur Jose Martinez Cobo in Keal, *supra* note 14 at 6-7; also *International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 I.L.M. 1382 (entered into force 5 September 1991) at part I, article 1(1)(b).

based on prior occupancy implicitly infer the rest of the argument.<sup>48</sup> Indigenous world views usually make little distinction between land, humanity, spirituality and politics.<sup>49</sup> The claim for self-determination is therefore implicit and fundamental in almost all of their claims.<sup>50</sup> Patrick Macklem's discussion of the Indigenous "prior occupancy"<sup>51</sup> argument elucidates this notion. Arguments of "here first" stand in as substitutes, or proxy arguments, for broader, more extensive arguments about Indigenous self-government.<sup>52</sup> Consider:

The legitimacy of [Indigenous] government is not based on the mere fact that Indigenous people were prior occupants of the continent, but on the fact that they were prior sovereigns. Not only were they "here first," but when they were here first, they exercised sovereign authority.<sup>53</sup>

Therefore, while it is useful to point out the problems with liberal property morality as a justification for the significance of Indigeneity, such a critique does not actually get us very far in understanding Indigeneity's significance. Although liberal property morality "corresponds" with "here first" and "here prior," there is nothing in these commonsensical definitions that precludes us from examining both more sophisticated definitions of Indigeneity and the social circumstances and world views of Indigenous peoples. Accordingly, we are not precluded from treating their "here first" justifications as proxies for justificatory arguments based on historical self-determination. As such,

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48. Turner states that "the ownership of territory is the marriage of the Chief and the land," so that the notion of "here first" cannot be seen without reference to self-determination; "sovereignty lies at the very core of Aboriginal existence": Turner, "Liberalism's Last Stand", *supra* note 12 at 144-145.

49. This is not to revert to the *sui generis* "mystical" principles that Waldron suggests found the political significance of Indigeneity. It merely shows that the claims that Indigenous peoples make that seem to be simple "we were here first" arguments are better regarded as referring not merely to land ownership but to justification based in the historical self-governance and wardship over lands as part of a wider normative order.

50. Anaya states that

[a] central demand of Indigenous peoples has been that the international community recognize that they are entitled to determine their own destinies under conditions of equality. This includes the right of Indigenous peoples to retain and develop their own systems of self-governance that are born of Indigenous cultural patterns. In promoting this set of values, which are foundational to Indigenous peoples' aspirations generally, Indigenous peoples' advocates and leaders have seized upon the rhetoric of self-determination.

James Anaya, "Superpower Attitudes toward Indigenous Peoples and Group Rights" (1999) 93 *Am. Soc. Int'l L. Rev.* 251 at 257 [Anaya, "Superpower Attitudes"].

51. Macklem here falls foul of Waldron for not making the distinction between prior occupancy and first occupancy. However, if we are rejecting the significance of liberal property morality, then this distinction is not important.

52. Macklem, "Distributing Sovereignty", *supra* note 13 at 1329-1336.

53. *Ibid.* at 1333-1334.

we can challenge the basis of liberal property morality as providing the sole philosophical significance to Indigenous peoples’ claims.

### **What Is Wrong with Using Property Morality as the Arguments Underlying Indigeneity**

Macklem’s proxy argument is compelling for other reasons. I will discuss two of these reasons below. First, some of the rights that Indigenous peoples claim—rights to self-government and jurisdiction—cannot be based on property principles and, therefore, property principles cannot found Indigeneity’s importance. Second, Waldron’s suggested justifications misrepresent the nature of most Indigenous peoples’ claims.

#### ***First Occupancy and Jurisdiction over Territory***

Waldron argues that Indigenous peoples implicitly use Lockean or Nozickian property morality by phrasing their claims as “we were here first.”<sup>54</sup> This argument makes the move from definition to justification without inferring reasonable intervening arguments; a move that was criticized above. The need for intervening arguments is made clear when we consider that a vital part of Indigenous peoples’ claims is the claim of jurisdiction over territory and/or peoples—the right to govern themselves according to their own customs and laws, and to have a “nation to nation” relationship with the state as a political entity. If Indigeneity supporters were making First Occupancy arguments, they would be incoherent, for it is highly questionable as to whether Lockean “here first” property principles can be a justification for jurisdiction over territory or peoples.<sup>55</sup>

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54. Waldron states that “[m]any who *now* talk about Indigeneity seem to believe that this venerable principle is key to understanding the importance that attaches to the description of people as Indigenous .... My fear is that theorists of Indigeneity have taken up this Principle of First Occupancy without sufficient examination”: Waldron, “Indigeneity”, *supra* note 5 at 59. The principle of First Occupancy corresponds with “here first” definitions of Indigeneity. He points to an example of “here first” in *ibid.* at 71.

55. See Allen Buchanan, “The Making and Unmaking of Boundaries: What Liberalism Has to Say” in Allen Buchanan & Margaret Moore, eds., *States, Nations and Borders: The Ethics of Making Boundaries* (Cambridge: Cambridge University Press, 2003) 231 at 232-234 [Buchanan, “Unmaking of Boundaries”]; David Miller “Liberalism and Boundaries: A Response to Allen Buchanan” in Buchanan & Moore, *ibid.*, 262 at 264 [Miller, “Liberalism and Boundaries”]. However, see Buchanan, “Unmaking of Boundaries” at 237-240; and Margaret Moore does consider Indigeneity’s “here first” claim in terms of territory. Her conclusions on this do not point to an *a priori* rejection of such a simple “here first” argument, but focus on the same practical and justice-based difficulties that Waldron points to: Margaret Moore, “The Territorial Dimension of Self-Determination” in Margaret Moore, ed., *National Self-Determination and Secession* (Oxford: Oxford University Press, 1998) [Moore, *National Self-Determination*] 141-145 [Moore, “The Territorial Dimension”].

Waldron provides some evidence of liberal property morality addressing jurisdiction to territory;<sup>56</sup> however, there are quite powerful counter-arguments. For example, Buchanan argues that such arguments confuse property in land with the jurisdictional concept of territory, which cannot be reducible to a property right.<sup>57</sup> For Buchanan, as for early liberals such as Bentham,<sup>58</sup> territorial jurisdictions are the source of property rights,<sup>59</sup> and to use property morality to justify territorial jurisdiction is to “put the cart before the horse.”<sup>60</sup> International law does provide counter-examples where property rights are protected “independent of state sovereignty,”<sup>61</sup> which casts doubt on Buchanan’s and David Miller’s arguments.<sup>62</sup> However, Indigenous peoples cannot rely on the international law references to occupation<sup>63</sup> and historic title<sup>64</sup> in asserting sovereignty as they only apply to established states.<sup>65</sup> Private title-holders cannot be converted into sovereigns.<sup>66</sup> Hence, Indigenous peoples cannot rely on the international law version of “here first” because they are not sovereigns in international law.

Instead of getting tangled in a web of whether property morality can, or should, found sovereignty, I merely want to make a simple argument. Where Indigeneity supporters have argued “here first,” we should regard these claims as proxies for larger claims for self-determination, rather than as a claim based strictly on liberal property morality. It seems highly unlikely that, given the choice between self-determination and property morality, Indigeneity supporters would choose property morality because it is a complicated and, in respect of jurisdiction, arguably inadequate foundation for Indigenous claims. This is, perhaps, Waldron’s very point—that defenders of Indigeneity do not understand that property morality may actually undermine Indigenous claims. However, the strength of the “proxy”

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56. Waldron, “Indigeneity”, *supra* note 5 at 69-70.

57. Buchanan, “Unmaking of Boundaries”, *supra* note 55 at 232.

58. See Benjamin Ederington, “Property as a Natural Institution: The Separation of Property from Sovereignty in International Law” (1997) 13 Am. U. Int’l L. Rev. 263 at 271-272.

59. Buchanan, “Unmaking of Boundaries”, *supra* note 55 at 233.

60. *Ibid.*; Miller, “Liberalism and Boundaries”, *supra* note 55 at 264: “[P]roperty entitlements depend upon the positive laws of the state.” Bentham argued that “[p]roperty and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases.” Jeremy Bentham, *Of Legislation*, trans. by C.K. Ogden & Richard Hildreth (New York: Harcourt Press, 1931) at 111-13, quoted in Ederington, *supra* note 58 at 271.

61. Ederington, *ibid.* at 265.

62. See the discussion in Ederington, *ibid.* at 266-274.

63. Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 133-138.

64. *Ibid.* at 141-142.

65. Fernando R. Teson, “Ethnicity, Human Rights and Self-Determination” in David Wippam, ed., *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998) 108-109.

66. Teson, *ibid.* at 108: “This view misconstrues the notion of territory. The rights of a group over a territory are not the sum of private property rights but the locus of the exercise of authority derived from the social contract.” See also Diane Orentlicher, “Separation Anxiety: International Responses to Ethno-Separatist Claims” (1998) 23 Yale J. Int’l L. 1 at 24-28.

argument weighs against that position: “Here first” is not about naively applying Locke, but about claiming self-determination.

### ***Prior Occupancy***

Waldron shows the problems inherent in using a prior occupancy argument to explain the political significance of Indigeneity. His arguments are a considered application of his expertise in property morality. However, aspects of his argument stultify constructive argument about Indigeneity’s significance. He presents any injustice as *merely historic* and intimates that we have no choice but between the dichotomy of a return to the pre-contact status quo ante order and retaining the current order unchanged.

Waldron argues that injustices can be superseded by historical circumstances,<sup>67</sup> and concludes that prior occupancy (as a conservative principle) protects the “prior” contemporary order.<sup>68</sup> Therefore reversion to the old order is precluded by the very principle. However, his discussion omits the possibility of a *reconciliation* of the new and old order. The injustice of colonization is the same injustice implicit in a present proposal to revert back to the pre-contact Indigenous normative order—the superseding of one normative order by another. An argument might be made that the colonial injustice occurred in the past, that those affected are dead, and therefore that the injustice can be ignored. But such an argument fails if we recognize that the injustice continues today in that Indigenous peoples are still denied their sovereignty and full economic development.<sup>69</sup> They are denied the ability to fully self-rule according to their own normative system in the present, and will continue to be in the future in lieu of some kind of intervention. The injustice continues, just as it continues when someone unjustly takes a farmer’s plow: She cannot work her fields as she ordinarily would, and she continues to feel the effects of the injustice until her plow is returned.

Once we accept this continuing injustice, we can begin to question how it can be remedied. Furthermore, acknowledging continuing injustice means that these two injustices (continuing subjugation of the Indigenous normative order and the prospective injustice against the new order in remedying it) can be weighed against each other to reach a just reconciliation, rather than simply rejecting the status quo ante and retaining

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67. See Jeremy Waldron, “Redressing Historic Injustice” (2002) U.T.L.J. 135 at 146-147 [Waldron, “Redressing Historic Injustice”] on this topic; see also Eric A. Posner & Adrian Vermeule, “Reparations for Slavery and other Historical Injustices” (2003) 103 Colum. L. Rev. 689; and Andrew Sharp, *Justice and the Maori: The Philosophy and Practice of Maori Claims in New Zealand since the 1970s*, 2d ed. (Auckland: Oxford University Press, 1997).

68. Waldron, “Indigeneity”, *supra* note 5 at 73-75.

69. Waldron gives an example of continuing injustice in “Redressing Historic Injustice”, *supra* note 67.

the status quo.<sup>70</sup> This is essentially what both Buchanan and Moore point to in their discussions of Waldron's position, although Buchanan does not make the "continuing justice" argument explicitly.<sup>71</sup> In contrast, Turner argues that this view of balancing the scales of justice is itself unhelpful, and our effort should be directed to recognizing Indigenous "sovereignty" and renewing political relationships on just foundations.<sup>72</sup> Yet, as will be seen below, the historical self-determination approach both recognizes continuing injustice and allows for renegotiation and reconciliation in roughly this way.

### *Indigenous Usage of "We Were Here First"*

If Indigeneity supporters use "here first" arguments as proxies for self-determination arguments, then the question is why have their arguments been presented in this proxy form for so long instead of being presented directly in the language of self-determination? One reason may be the simplicity of the proxy argument and its congruence with common definitions. A second reason could be that prior occupancy has been used in the past as one justification of Indigenous property rights, such as Native title, and thus spills over into other claims. Perhaps the most important point to take from these potential reasons is that land is a key aspect of Indigenous life—it is intrinsic to their physical and spiritual well-being, and to their customs and normative order.<sup>73</sup> Thus, Indigenous peoples see their

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70. Anaya observes, "[R]emedies to redress historical violations of self-determination do not necessarily entail a reversion to the status quo ante, but rather are to be developed in accordance with the present-day aspirations of the aggrieved groups" in *Indigenous Peoples*, *supra* note 20 at 83.

71. Buchanan argues that Waldron's argument against rectification means that "the claims of Indigenous peoples to restoration of some sort of territorially based self-government can be dismissed. The problem is how to reconcile the competing claims of rectificatory and contemporaneous distributive justice." Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 417. Moore argues that Waldron's point about the rectification of historical injustice is not "an argument to do nothing." Of course we cannot, without new injustice, go back to the status quo ante, but we can have "group-differentiated rights, some recognition of the needs and claims of Indigenous peoples and their aspirations to collective self-government, within the limits of a fair disposition to other peoples who now also live in these lands": Moore, "An Historical Argument", *supra* note 11 at 98-99. Moore makes the continuing injustice point explicit at 99-104, discussing the continuing moral right to self-determination.

72. Turner, "Liberalism's Last Stand", *supra* note 12 at 146.

73. See Debra M. Hoggan & World Council of Indigenous Peoples, *Indigenous Philosophy and Land* (1981), online: <<http://www.cwis.org/fwdp/International/indlnd.txt>>; Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990) at 91. Pocock observes that for Māori, control over land, or "manawhenua," stood for "the mode by which [Māori] possess not merely land but themselves, and are what they are." Pocock, "Law, Sovereignty and History", *supra* note 9; The Canadian Nishnawbe-Aski people declared in 1977, "We, the people and the land, declare our nationhood": Roger Moody, ed., *The Indigenous Voice: Visions and Realities*, vol. 2 (London: Zed Books, 1988) 57.

“responsibility” (as opposed to “right”) to land as “the law of the Creator.”<sup>74</sup> They often frame their claims to land in terms of “responsibility” to maintain its life-giving force.<sup>75</sup> The danger arises, however, when such sentiments are in turn framed as a liberal theory of property. This risks the compartmentalization of Indigenous viewpoints into Western political categories (of land ownership or jurisdiction).<sup>76</sup> Once we acknowledge that land is bound up in the normative order of Indigenous peoples, we can recognize that what *seem* to be claims to land based on priority or originality are better seen as claims to self-determination. As Moore argues, every term that describes Indigenous peoples emphasizes not only that “they were the land’s original occupants” but also “that they were once self-governing people.”<sup>77</sup> This aspect of Indigeneity confirms Macklem’s above-mentioned view that the “here first” arguments that Waldron cites look very much like proxy arguments standing in for arguments about historical self-determination.<sup>78</sup>

Non-Indigenous people sometime make similar arguments. For example, when claims of self-determination may clearly be based on historical deprivation of territory,<sup>79</sup> Brilmayer argues generally that the vindication of “we were here first” arguments rests on “the rights of people who have lived on a particular piece of land to continue to do so and to continue to regulate their affairs free from outside interference.”<sup>80</sup> Here again, claiming restoration of territory is a claim to restoration of previous self-determination, a claim that is recognized by many other international law or international relations moralists.<sup>81</sup>

This section has shown that although Indigenous peoples and their theoretical supporters are precarious in relying on “we were here first” arguments, it is most probable that they may not have thought through their (supposedly Western liberal) arguments enough to see the problems implicit within them. It is more consistent with most Indigenous peoples’ world views to see such arguments as proxies, and to restate their claims in the language of self-determination. This however only leads to the question of whether Western self-determination theory is itself susceptible to a powerful

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74. Oren Lyons, “Traditional Native Philosophies Relating to Aboriginal Rights” in Menno Boldt & J. Anthony Long, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 19.

75. *Ibid.* at 21-22.

76. Bradley Bryan, “Property as Ontology: On Aboriginal Ownership and English Understandings of Ownership” (2000) 13 *Can. J.L. & Jur.* 3.

77. Moore, “An Historical Argument”, *supra* note 11 at 92.

78. Waldron cites Maaka & Fleras as stating, “Indigenous peoples have the right of sovereignty by virtue of original occupancy” in “Indigeneity”, *supra* note 5 at 71.

79. Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10.

80. Lea Brilmayer, “The Institutional and Instrumental Value of Nationalism” in David Wippam, ed., *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998) 70.

81. Teson, *supra* note 65 at 107-109.

critique when it is used to support Indigenous peoples' claims. But before I briefly consider that question, an even bigger question confronts us.

### III WHY LIBERAL POLITICAL PHILOSOPHY?

Waldron's lecture raises the crucial question of why anybody, Indigenous or non-Indigenous, would use liberal arguments, or Western political thought in general, to support Indigenous peoples' claims. His analysis is of the way that supporters of Indigenous rights have used liberal property principles and, therefore, he is in very familiar territory.<sup>82</sup> However, Waldron's treatment of Indigenous perspectives does not address this question: "Why liberal philosophy?" In his conclusion, he notes the argument that liberal thought cannot "comprehend what is distinctive about Indigenous claims to land and self-government." This suggests that the discourse of Indigeneity is incompatible with Western political philosophy altogether.<sup>83</sup> On this view, Indigenous visions of their rights are *sui generis*, completely incommensurable and separate from universal principles such as the freedom and equality of peoples.<sup>84</sup> Ultimately, he rejects this view, arguing that the discussion cannot be over as soon as "Indigenous" is mentioned: "Such claims are not self-justifying. They are meant to be heard and understood, and subject to reason and criticism and examination ... by governments as well as by First Peoples."<sup>85</sup> On Waldron's account, then, it seems that Indigenous claims and political thought will be evaluated against the Enlightenment's gift of reason.

In making this argument, Waldron mistakes the view of James Tully. In his writings, Tully consistently presents an argument opposite to the one that Waldron attributes to him. The passage that Waldron quotes to illustrate Tully's view of Indigeneity as a *sui generis* notion is actually part of a criticism of that view on the part of the Canadian Supreme Court's characterization of Aboriginal constitutional rights as *sui generis*.<sup>86</sup> Tully's article is an examination of how Western political philosophy's almost universal appeal to freedom and equality can be extended to secure for Indigenous peoples the same kind of freedom that "Western political

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82. Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993); Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988).

83. Waldron, "Indigeneity", *supra* note 5 at 81, quoting Ivison, Patton & Sanders, *supra* note 4 at 9.

84. *Ibid.*

85. Waldron, "Indigeneity", *ibid.* at 81-82.

86. Tully, "Struggles of Indigenous Peoples", *supra* note 39 at 45-48, makes it clear that he is discussing the Court's "four main steps to define [Aboriginal] constitutional rights," and that it is the Court that is doing the recognizing of these *sui generis* rights.



theorists and citizens already enjoy.”<sup>87</sup> Consider, for example, the theme of *Strange Multiplicity*, which sees Indigenous claims as grounded in “aspirations for appropriate forms of self-government ... a longing for self-rule ... the oldest political good in the world.”<sup>88</sup> Tully’s point is that Indigenous peoples’ claims appeal to impeccable liberal principles.

Further, instead of supporting Waldron’s argument that Indigenous peoples frame their claims as *sui generis*, incommensurable with liberalism, and thus unquestionable, Tully has uniformly maintained that “intercultural dialogues,” though difficult, are possible and desirable.<sup>89</sup> He has argued further that we can either use a monological, “second best” approach by inquiring into how Western political philosophy can be criticized from within to support Indigenous claims,<sup>90</sup> or we can engage in an intercultural political dialogue between Western and Indigenous political thought.<sup>91</sup>

The merits and necessity of engaging with “liberal” arguments have been briefly addressed in a well-known quote of Will Kymlicka:

For better or for worse, it is predominantly non-[A]boriginal judges and politicians who have the ultimate power to protect and enforce [A]boriginal rights, and so it is important to find a justification of them that such people can understand. Aboriginal people have their own understanding of self-government drawn from their own experience, and that is important. But it is also important, politically, to know how non-[A]boriginal [peoples] ... will relate them to their own experiences and traditions .... Aboriginal rights, at least in their robust form, will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice.<sup>92</sup>

That is, it is predominantly liberal citizens and politicians that need to be convinced of the rights of Indigenous peoples. This is problematic to the extent that it silences unique Indigenous perspectives of their claims and justifications. While it is pragmatic in the short term to argue for Indigenous rights by way of Western political monologue, this only delays analyzing a more crucial issue: that of the importance of such thought for Indigenous peoples and their own traditions of political thought.

Indigenous and non-Indigenous peoples, like almost all peoples in our era of globalization, are “in this thing together.” This is more so for Indigenous and non-Indigenous peoples in settler states—we are in *the same state* together. If we are to peacefully and symbiotically coexist, we need to

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87. *Ibid.* at 59.

88. Tully, *Strange Multiplicity*, *supra* note 8 at 4-5.

89. *Ibid.* at 183.

90. Tully, “Struggles of Indigenous Peoples”, *supra* note 39 at 51-52.

91. *Ibid.* at 51.

92. W. Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989), cited in Turner, “Liberalism’s Last Stand”, *supra* note 12 at 136.

come to some agreement about the fair terms of that coexistence. This goal however immediately poses a problem: Given differences in perspective over a wide variety of areas—*inter alia* science, spirituality, philosophy and (especially in this case) political theory—how are we to identify what the fair terms of our relationship would be? Do we use Western political thought or Indigenous political thought? Is there a way that we can adjudicate between, or weigh up, the pros and cons of each political tradition, and then use the best tradition as it stands? Alternatively, can we reconcile the traditions and build a just relationship on some kind of inter-tradition consensus?

James Tully has applied the theory of intercultural dialogue to elucidate the practical problem of Western societies being established on the territory of pre-existing Indigenous societies.<sup>93</sup> Tully provides an examination of Western constitutionalism's organizing categories from the perspective of how claims must be phrased to even count as constitutional claims:

The language in which claims to cultural recognition are taken up and adjudicated is the language of contemporary constitutionalism. It is the terms and uses of those terms that have come to be accepted as the authoritative vocabulary for the description, reflection, criticism, amendment and overthrow of constitutions and their characteristic institutions over the last three hundred years of building modern constitutional societies ... it is the language that has been woven into the activity of acting in accordance with and going against modern constitutions ... such as popular sovereignty, people, self government, citizens, agreement, rule of law, rights, equality, recognition and nation .... [W]hen a demand for constitutional recognition is advanced, the customary uses of the terms of modern constitutionalism function as a normative foundation for the discussion in two ways. In the first steps, as you will recall, the demand is redescribed as a claim in the prevailing language of constitutionalism. This is a condition of it being recognised as a constitutional demand at all ... second, the claim for recognition as being critically adjudicated.<sup>94</sup>

In this way, Western constitutional theory, as a subset of the Western political tradition, exhibits a closed orientation to Indigenous political or constitutional claims and thought. There is no point in arguing that Western constitutionalism is only one of a multitude of ways to have governance because Western constitutionalism is the framework in which argument takes place. Nor is it wise to advance claims within Western constitutionalism in an unchanged Indigenous voice; such claims simply do not fit and will be rejected.

Tully identifies a way out of the closed practice and discourse of the organizing categories of Western constitutional thought through a challenge

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93. Tully, "Struggles of Indigenous Peoples", *supra* note 39 at 37.

94. Tully, *Strange Multiplicity*, *supra* note 8 at 35-41.

to “Westerners to see their conventional horizon as a limit.”<sup>95</sup> The next step would be to engage in political/constitutional dialogue that is open to Indigenous perspectives. Implicit in this are the notions that (1) for too long Indigenous peoples have been forced to see their horizon as a limit, rather than a resource for challenging Western ruling constitutional categories and horizons; and (2) Indigenous peoples have long engaged in intercultural dialogues, both in their everyday and political lives, and it is time for non-Indigenous citizens from the Western political tradition to open up their horizons.

James Tully regards his writings as manifestations of a “second best, monological approach” which uses “the resources of critical self-reflection available within the dominant Western language of political thought” to challenge dominant understandings of Indigenous peoples’ rights and sovereignty.<sup>96</sup> He makes it clear that the “first choice” approach would entail “intercultural dialogues” between Western and Indigenous political thought.<sup>97</sup> Dale Turner’s work is exemplary of the seeds of such an intercultural dialogue, criticizing tenets of liberalism and, at the same time, suggesting how they might be transformed to reflect tenets of Indigenous political thought.<sup>98</sup> Similarly, Maaka and Fleras examine how Western political thought’s conception of sovereignty can be transformed to reflect Indigenous, and in particular Māori, conceptions of sovereignty.<sup>99</sup>

With such breadth of academic writing on the topic, one can see why similar ideas were adopted by the Canadian Royal Commission on Aboriginal Peoples. Though it has been doubted in the past that Indigenous peoples had their own political or philosophical traditions, such anachronistic assumptions have been purged from most societies, at least in their explicit form. As Canada’s Royal Commission on Aboriginal Peoples found, “there is an Aboriginal world view” that is, of course, internally differentiated, and that “distinctively Aboriginal ways of apprehending reality and governing collective and individual behaviour are relevant to the demands of survival in a post-industrial society.”<sup>100</sup> Indeed, Chapter 15 of the *Final Report* examines how we might find intercultural understanding between Indigenous and non-Indigenous peoples. Its title asks, “Is

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95. Tully, “Struggles of Indigenous Peoples”, *supra* note 39 at 51.

96. *Ibid.* at 51-52.

97. *Ibid.* at 51.

98. Turner, “Liberalism’s Last Stand”, *supra* note 12.

99. *Supra* note 22.

100. Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996) at c. 15.1 [*Final Report*]. We might note here Turner’s criticisms of the presentation of the Indigenous voice by the Royal Commission: He argued that its focus slowly “shifted from listening and engaging Aboriginal voices to the language of public policy.” Turner, *This is Not a Peace Pipe*, *supra* note 12 at 179.

Intercultural Communication Possible?”<sup>101</sup> That a Royal Commission should take such an approach, while perhaps reflective of its multicultural constituents, shows that theoretical “trickle down” of ideas is possible.

It has taken years and many hundreds of thousands of words spoken and written in a variety of languages to even begin to undertake the intercultural dialogue on constitutional justice. Even though the various languages of Indigenous and Western political thought are not incommensurable, it is extremely hard to get dialogue. Nevertheless, it is still valuable for Indigenous and non-Indigenous commentators to use the monological, second-best approach to justify Indigenous rights from within the Western political tradition, especially if the rights that this second-best approach justifies reflect the rights that Indigenous peoples claim on the basis of their own traditions of political thought. Accordingly this paper works within the broad liberal framework, leaving the wider project of “reconciling” the various Indigenous and Western political traditions to another day.

### **Self-Determination as a Liberal Principle**

For a second-best argument for the political significance of Indigeneity to be possible, we must identify a liberal principle that can be applied to Indigenous peoples to justify their claims. This article examines the suitability of the principle of self-determination. The term “self-determination” is a label for both an international legal right and a political principle. While it would be artificial to completely separate the legal and political aspects of the concept, its importance in this article is as a political or moral principle. This section will examine the broad contours of the concept and will then identify some difficulties in application of the concept to Indigenous peoples. This analysis is crucial. It must be shown that self-determination does not fall foul of the criticisms that Waldron made of liberal property principles: that the principle is philosophically “dodgy,” or that its application does not aid Indigenous peoples’ claims.

Generally speaking, the principle of self-determination guarantees “peoples”<sup>102</sup> autonomy and freedom to govern themselves—to “determine their political status and freely pursue all aspects of their development,”<sup>103</sup> or

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101. *Final Report, ibid.* at c. 15.4.

102. Note the ubiquitous problem that the principle does not stipulate what the unit or “people” shall be: Cassese, *supra* note 20 at 326; Moore, “An Historical Argument”, *supra* note 11; Hannum, *supra* note 73 at 30-31.

103. Hannum, *ibid.* at 27.

to live by “a free and genuine expression of [their] will.”<sup>104</sup> Self-determination for all peoples is a catch-cry of international law. Cassese describes it as “one of the most important driving forces in the new international community.”<sup>105</sup> It is the basis of international law and international political relations,<sup>106</sup> with the *Charter of the United Nations* founding the international system on “the self-determination of peoples.”<sup>107</sup> The literature heralding its status as a foundational legal and political principle is vast.<sup>108</sup> Indeed, the concern for self-determination is a key factor in the moral justification of separating the world into states.<sup>109</sup> However, there are problems in applying the principle to Indigenous peoples. In terms of legality, orthodox international law analysis of the right to self-determination does not extend the right to Indigenous peoples. It is firmly entrenched only as “an anti-colonialist standard, as a ban on foreign military occupation and as a standard requiring that racial groups be given full access to government.”<sup>110</sup> However, it is morality that is my primary focus here.

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104. *Western Sahara* (Advisory Opinion), [1975] I.C.J. 12 at para. 55 [*Western Sahara*]. Cobban defines it as “the right of a nation to constitute an independent state and determine its government for itself”: Alfred Cobban, *The Nation State and National Self-Determination*, rev. ed. (New York: Thomas Y. Crowell Company, 1969) at 104; Brownlie, *supra* note 63 at 553, defines it as “the right of cohesive national groups (‘peoples’) to choose for themselves a form of political organization and their relation to other groups.”

105. Cassese, *supra* note 20 at 1.

106. See Andrew Hurrell, “International Law and the Making and Unmaking of Boundaries” in Buchanan & Moore, *supra* note 55 at 275, 282-283; Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002) at 77-80.

107. 26 June 1945 (entered into force 24 October 1945). Article 1(2) makes it a purpose of the United Nations to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” For a discussion of the history of the international concept embodied in Article 1(2), see Cassese, *supra* note 20 at 37-47. See also the common Article 1 in the *International Covenant on Civil and Political Rights*, (19 December 1966) 999 U.N.T.S. 171; and *International Covenant on Economic, Social and Cultural Rights*, (19 December 1966) 993 U.N.T.S. 3: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development” (discussed in Cassese, *ibid.* at 47-62); and the International Court of Justice decisions in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion), [1971] I.C.J. 16 and *Western Sahara*, *supra* note 104.

108. See for example Hurst Hannum, “Self-Determination in the Post-Colonial Era” in Donald Clark & Robert Williamson, eds., *Self-Determination: International Perspectives* (London: MacMillan Press, 1996) at 12-16; Moore, “An Historical Argument”, *supra* note 11 at 100; Tully, *Strange Multiplicity*, *supra* note 8 at 5-6; Iorns, *supra* note 19 at 239-241; Avishai Margalit & Joseph Raz, “National Self-Determination” in Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) [Kymlicka, *Minority Cultures*] at 85-91; Anaya, *Indigenous Peoples*, *supra* note 20 at 75-77.

109. Hurrell, *supra* note 106 at 283: “[N]ational self-determination has added powerful justification for the existence of separate nation-states . . . States, now nation-states in aspiration and in the ideology of the system, are deemed legitimate because they embody the exercise of political self-determination.”

110. Cassese, *supra* note 20 at 319.

Although self-determination can be seen as the international application of the liberal goods of liberty, freedom and self-rule,<sup>111</sup> as a moral principle the concept itself arouses theoretical controversy. This is perhaps unsurprising given that “[c]ontemporary political philosophers tend to neglect international relations,”<sup>112</sup> and international lawyers and states often, perhaps predictably, tend to forgo concerted moral theorizing.<sup>113</sup>

Self-determination’s moral ambiguity arguably flows from the fact that it is “both radical, progressive, alluring and, at the same time, subversive and threatening.”<sup>114</sup> One’s perspective is obviously conditioned by affinity with either the sub-state group seeking recognition or the encompassing state. Further, when a group is granted self-determination, it will usually become a state, jealous of its power like any other. Consequently, the question “when is self-determination just?” (or even “is self-determination just?”) has been often asked.<sup>115</sup> Theorists of secession often provide the answer. Common answers which take the ethics of secession as their starting inquiry can be broken down into three broad perspectives: “remedial right,” “choice” and “national” theories.<sup>116</sup> One key difference in these perspectives is the move from individual freedom to group autonomy.

### ***From Individual to Group Autonomy***

Self-determination can be seen as a form of the liberal goods of freedom, autonomy and liberty. James Tully connects it with the liberal value of “self-rule,”<sup>117</sup> and Daniel Philpott similarly grounds it in the value of individual moral autonomy advanced by liberal democracy.<sup>118</sup> Moore, MacCormick,

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111. Tully, *Strange Multiplicity*, *supra* note 8 at 5-6; Daniel Philpott, “Self-Determination in Practice” in Moore, *National Self-Determination*, *supra* note 55.

112. Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 17.

113. *Ibid.* at 29-35.

114. Cassese, *supra* note 20 at 5. Kingsbury states that self-determination “can be state-threatening or state-reinforcing, liberating or chauvinistic, democratic or demagogic”: Kingsbury, “Reconciling Competing Structures”, *supra* note 2 at 223.

115. Philpott, *supra* note 111 at 80.

116. See Margaret Moore, “Introduction” in Moore, *National Self-Determination*, *supra* note 55 at 4-8 [Moore, “Introduction”].

117. Tully, *Strange Multiplicity*, *supra* note 8 at 6.

118. Philpott, *supra* note 111 at 81-84:

What justifies self-determination is not the mere fact of the members’ choice, but their realization of democratic autonomy, their increased ability to steer their fate. Autonomy, here, is a realized good . . . . Democratic autonomy, then, is the ground of the right to self-determination, this legal arrangement that furthers autonomy by furthering peoples’ self-government.

Margalit and Raz, and Miller give further arguments of this sort.<sup>119</sup> In this formulation, the value of autonomy, freedom or self-rule that is enjoyed by individuals in a free and democratic society is analogously extended collectively to groups as self-determination. (I will leave to the side the question of whether groups can have rights; there are arguments both for<sup>120</sup> and against,<sup>121</sup> but I will assume that group rights can exist in Western liberal political theory.)

There have been significant criticisms of these arguments that derive group rights to self-determination from individual rights to autonomy. Both Buchanan and Horowitz have argued strongly against viewing self-determination as the collective equivalent of the moral autonomy of individuals.<sup>122</sup> While these criticisms of the ease in which theorists have made this connection are instructive, they are not conclusive in refuting such a step. It is clearly necessary to explain how self-determination derives from individual autonomy more clearly, but nevertheless this move can be justified. For there is no doubt that peoples do perceive themselves as deriving benefits from governing themselves according to their own norms; this seems a key motivation of national self-determination movements, the jealous guarding of sovereignty at the international level, and the vehement criticisms of supposedly universal norms by many societies.

The link between individual autonomy and collective autonomy can be identified in a relevant example: An Indigenous group cannot collectively provide for individual freedom to live according to Indigenous norms if it is subsumed within a democracy whose majority lives by (even slightly) different norms.<sup>123</sup> Individual freedom, in terms of the freedom to live

119. Moore talks of the “moral importance of autonomy” relating to the right to self-determination: Moore, “The Territorial Dimension”, *supra* note 55 at 150. Horowitz has succinctly pointed to the next three arguments: Donald L. Horowitz, “Self-Determination: Politics, Philosophy, Law” in Moore, *National Self-Determination*, *supra* note 55, 197. MacCormick argues that individual autonomy translates to the value of “some form of collective self-constitution”: Neil MacCormick, “Is Nationalism Philosophically Credible?” in William Twining, ed., *Issues of Self-Determination* (Aberdeen: Aberdeen University Press, 1991) 14. Margalit & Raz argue that the value of self-government (for groups important to the welfare of their members) is an extension of individual autonomy: Margalit & Raz, *supra* note 108 at 85-91. David Miller argues that self-determination is the exercise at the collective level of the individual value of autonomy in *Citizenship and National Identity* (Cambridge: Polity Press, 2000) at 164.

120. Duncan Ivison, “The Logic of Aboriginal Rights” (2003) 3:3 *Ethnicities* 321 at 329-332; Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 408-415; Moore, “An Historical Argument”, *supra* note 11 at 101.

121. Michael Hartney, “Some Confusions Concerning Collective Rights” in Kymlicka, *Minority Cultures*, *supra* note 108; Chandran Kukathas, “Are There any Cultural Rights?” in Kymlicka, *Minority Cultures*, *ibid.*

122. Allen Buchanan, “Democracy and Secession” in Moore, *National Self-Determination*, *supra* note 55 at 16-21 [Buchanan, “Democracy and Secession”]. Buchanan rejects the argument that individual autonomy or equal respect for persons are values that ground self-determination through the right to secede. Horowitz, *supra* note 119 at 197.

123. An argument of this sort is presented by Diane Orentlicher, “Separation Anxiety: International Responses to Ethno-Separatist Claims” (1998) 23 *Yale J. Int’l L.* 1 at 50-51.

according to one's own norms, is, therefore, advanced by collective self-determination.<sup>124</sup>

***“Choice,” “Remedial Right” or “National” Self-Determination***

Western liberal political theory has justified a right to secession in three perspectives—“choice,” “remedial right” and “national”—each of which can be seen as positions in the crucial debate about which peoples are entitled to self-determination.<sup>125</sup> For my argument that self-determination is the liberal principle that grounds Indigeneity to hold, one of these theories has to be defensible; otherwise, the same critique of using the property principles to ground Indigeneity could be applied to my use of self-determination. The choice theory is the least widely supported in theory and practice. It basically holds that an area can conduct a plebiscite on whether it should secede, and if the majority votes “yes,” then secession should follow.<sup>126</sup> It relies on this step from individual democratic autonomy to collective self-determination.<sup>127</sup> It does not often figure in the argument for the political significance of Indigeneity.<sup>128</sup> The reason is two-fold: Indigenous peoples will not usually be a majority in any viable territory, and they will always be able to point to other arguments—there is almost always an argument for national self-determination in a history of dispossession and human rights violations.

National self-determination (“NSD”) arguments require political and cultural boundaries to coincide, so that, ideally, every nation has its own state.<sup>129</sup> They have not found sympathy in international law.<sup>130</sup> Aspects of this

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124. This view of the importance of peoples being able to live by their own customs is reflected in Buchanan's arguments about Indigenous autonomy, where he argues that Indigenous self-government is justified to restore self-governance and to protect Indigenous peoples from “the detrimental effects of the disruption of the Indigenous customary law that defined and supported their ways of life.” Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 415-421.

125. This question is one of the key unknowns of self-determination: Moore, “Introduction”, *supra* note 116 at 2.

126. For a description of choice theories of secession, see Wayne Norman, “The Ethics of Secession and the Regulation of Secessionist Politics” in Moore, *National Self-Determination*, *supra* note 55 at 37-41 [Norman, “Ethics of Secession”].

127. See Allen Buchanan's analysis of Philpott in Buchanan, “Democracy and Secession”, *supra* note 122 at 16-21.

128. Nunavut springs to mind as a prominent counter-example to the irrelevance of choice theories of self-determination to Indigenous peoples, and many geographically isolated tribes in the Americas would benefit from an acceptance of the choice theory, as they are so isolated from others. The further problem with choice theory becomes evident where there is substantial integration, as in New Zealand and on many US reservations.

129. Moore, “Introduction”, *supra* note 116 at 7; Norman, “Ethics of Secession”, *supra* note 126 at 35-37; See Michael Freeman, “The Right to National Self-Determination: Ethical Problems and Practical Solutions” in Desmond M. Clarke & Charles Jones, eds., *The Rights of Nations: Nations and Nationalism in a Changing World* (Cork: Cork University Press, 1999).



can be seen in the theories of Tamir,<sup>131</sup> Miller,<sup>132</sup> Raz and Margalit,<sup>133</sup> MacCormick<sup>134</sup> and Kymlicka.<sup>135</sup> Despite their rejection by international law, most of these NSD theories do not fall foul of all of the following criticisms, as they are not unequivocally secessionist. Indeed, these arguments usually enter the culture/equality debate at the intrastate level,<sup>136</sup> but also intersect with the international arguments. Scholars usually reject them in the secession context,<sup>137</sup> for the reasons that Ernest Gellner has pointed to.<sup>138</sup> Nationalism has been demonized as creating separatism and contributing to the Balkanization of societies. The key problems theorists see in these arguments are (1) many national groups are not cultural groups,<sup>139</sup> (2) it would be infeasible to fully realize this principle<sup>140</sup> and (3) we can accommodate multiple nations within a single state in a way that advances the values the NSD arguments point to.<sup>141</sup>

The argument that self-determination grounds Indigeneity is not impaired by these criticisms because Indigenous peoples are invariably cultural groups and they usually seek accommodation *within* nations.

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130. See Cassese, *supra* note 20 at 131. However, see Anaya for a contrary view of developing international norms in *Indigenous Peoples*, *supra* note 20. However, as Cassese points out, the furthest that international law seems to have gone in terms of “racial” groups is guaranteeing access to government: Cassese, *ibid.* at 131.

131. Tamir, *supra* note 26.

132. Miller, *On Nationality*, *supra* note 21.

133. Margalit & Raz, *supra* note 108.

134. Neil MacCormick, “Liberal Nationalism and Self-Determination” in Clarke & Jones, *supra* note 129.

135. Kymlicka, *Multicultural Citizenship*, *supra* note 3.

136. The debate rages between those liberal/communitarian/multicultural/postmodern arguments that support differentiated citizenship to support cultures, such as Will Kymlicka’s *Multicultural Citizenship*, *ibid.*; Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, Mass.: Harvard University Press, 2000); Miller, *On Nationality*, *supra* note 21; Margalit & Raz, *supra* note 108; Tamir, *supra* note 26; Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); and liberals that reject such concessions as contrary to liberalism’s tenets of equal citizenship, for example Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003); Barry, *supra* note 3; A.M. Schlesinger, *The Disuniting of America: Reflections on a Multicultural Society* (New York: W.W. Norton, 1998).

137. Wayne Norman points to the fact that this theory, “in its full-blooded form ... has virtually no defenders in the recent philosophical literature.” Norman, “Ethics of Secession”, *supra* note 126 at 35; Moore, “Introduction”, *supra* note 116 at 7; Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 379-394.

138. “To put it in the simplest possible terms: there is a very large number of potential nations on earth. Our planet also contains room for a certain number of independent or autonomous political units. On any reasonable calculation, the former number (of potential nations) is probably much, *much* larger than that of possible viable states”: Ernest Gellner, *Nations and Nationalism* (Ithaca: Cornell University Press, 1983) at 49.

139. Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 380-381; Barry, *supra* note 3 at 82.

140. Buchanan, *ibid.* at 382.

141. *Ibid.* at 382-394.

Therefore, these cultural arguments can be seen as a basis for self-determination that explains Indigeneity's significance.

"Remedial right" or "just cause" arguments are dominant in the theory of secession, with Buchanan's arguments perhaps the most prominent.<sup>142</sup> Contrary to the previous two theories, they posit no primary right to secede, but only a remedial right to remedy injustices.<sup>143</sup> Buchanan argues that groups must be able to demonstrate either persistent and large-scale human rights violations or the unjust taking of another legitimate state's territory.<sup>144</sup> Interestingly, he further argues that the violation of intrastate autonomy agreements may also result in such a right.<sup>145</sup>

One problem with this theory is that it ignores the significance of cultural and national identity in modern international relations, which is not just about securing human rights and liberal legitimacy.<sup>146</sup> Indeed, the idea that self-determination inheres only in existing states robs the concept of much of its moral appeal, "which came from the vision of a body of people sharing a common identity and wishing to be associated with one another deciding their own future."<sup>147</sup>

Nevertheless, the remedial right argument does allow for Indigeneity's significance to be explained by self-determination. Indigenous peoples can almost always refer to historical deprivation of territory (in terms of sovereignty or self-government), to the breach of autonomy agreements, and often to grievous breaches of human rights (though this is more likely to be historical). Indeed, Buchanan gives examples of how Indigenous peoples' claims to intrastate autonomy are justified,<sup>148</sup> and situates Indigenous peoples' claims as the "strongest case for international legal support for intrastate autonomy."<sup>149</sup> He argues that Indigenous peoples can point to the denial of self-government, the violation of human rights, the necessity of implementing land claims and the necessity of rectifying the destruction of their customary laws and ways of life.<sup>150</sup>

Buchanan's elaboration of a remedial right to intrastate self-determination is a clearly reasoned argument that situates the significance of

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142. Allen Buchanan, *Secession: The Morality of Political Divorce from Fort Sumner to Lithuania and Quebec* (Boulder: Westview, 1991); Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10; Norman, "Ethics of Secession", *supra* note 126 at 41-43.

143. Norman, *ibid.* at 41. This is the position taken by the Canadian Supreme Court in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 131-139; and by Cassese in his discussion of the international legality of self-determination (in terms of racial equality in access to government), Cassese, *supra* note 20 at 319.

144. Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 353.

145. *Ibid.* at 357.

146. Moore, "Introduction", *supra* note 116 at 7.

147. David Miller, "Secession and the Principle of Nationality" in Moore, *National Self-Determination*, *supra* note 55 at 63.

148. Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 415.

149. *Ibid.* at 408.

150. *Ibid.* at 415.

Indigeneity comfortably within a self-determination justification. While his denial of prior sovereignty emphasis on intrastate accommodation of Indigenous claims might disappoint some, it is clear that in NSD and remedial right arguments, we now have two arguments that support viewing self-determination as the key justification for Indigeneity.

### ***Conclusion on Self-Determination***

If, as described above, self-determination is such a contested principle, why should we regard it as a good basis for explaining the political significance of Indigeneity? This section has shown that, despite the controversy that exists in political philosophy, self-determination is an important liberal principle, and does refer to the collective embodiment of individual goods of autonomy, freedom and self-rule. The relations between parts of the concept are not unchallenged, but it is clear that the international order is based on the basic idea of self-determination—that peoples should be able to self-rule. The question of which groups count as “peoples” is the key point of dispute. While entire populations of states are clearly peoples, there are further possible categories: majorities in a particular area (choice), nations (NSD) and unjustly treated peoples (remedial right).

In relation to Indigenous peoples, self-determination emerges as a liberal principle that can be utilized to advance claims from within the currently dominant liberal framework. Theorists such as Buchanan,<sup>151</sup> Moore,<sup>152</sup> Kymlicka,<sup>153</sup> Tully,<sup>154</sup> Daes<sup>155</sup> and Turner<sup>156</sup> have argued that Indigenous peoples do have justified claims based on self-determination, and the discussion above clearly discloses a liberal principle within which the situations of Indigenous peoples clearly fall.

## **IV THE HISTORICAL APPROACH TO INDIGENOUS SELF-DETERMINATION**

### **A Developing Tradition**

Historical self-determination is a powerful argument that can be used to justify Indigenous rights from within the Western political tradition. It draws on the liberal principle of self-determination that was discussed in the

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151. *Ibid.* at 408.

152. Moore, “An Historical Argument”, *supra* note 11.

153. Kymlicka, *Multicultural Citizenship*, *supra* note 3.

154. Tully, *Strange Multiplicity*, *supra* note 8.

155. Erica-Irene A. Daes, “The Right of Indigenous Peoples to ‘Self-Determination’ in the Contemporary World Order” in Clark & Williamson, *supra* note 108.

156. Turner, “Liberalism’s Last Stand”, *supra* note 12.

previous section, primarily in relation to the remedial right perspective, but is supplemented by aspects of the national perspective. This section is effectively an elucidation and application of these self-determination arguments to the generalized concrete situations of Indigenous peoples. Historical self-determination is not an entirely new approach, and this section builds on the substantial literature that examines the significance of Indigeneity and Indigenous rights to self-determination from a historical perspective. This approach uses history as a context for normative arguments. Consequently, it contrasts with ahistorical arguments that appeal to hypothetical situations, such as Rawls' "original position."<sup>157</sup> The historical self-determination approach asks, "If Indigenous peoples were entitled, through the same normative principle, to exercise collective self-government in the past, then how, normatively, has this right been extinguished?"<sup>158</sup> By looking at the past, historical self-determination ("HSD") arguments reject the ahistorical nature of liberal political theory.<sup>159</sup>

Moreover, consistent with the above discussion of institutional theorizing, historical self-determination allows us to get closer to our ideal theory of international justice in a non-ideal world.<sup>160</sup> We have a world divided into states and international justice has to deal with this institutional framework for the foreseeable future.<sup>161</sup> Nationalism informs international justice as we know it, even though it is considered artificial, dangerous and archaic to some.<sup>162</sup> Indigenous history, however, is a fundamental part of their group and individual identities, and is essential to accommodating Indigenous claims to self-determination. If Indigenous history were unimportant, we could map an ideal theory of international justice. But in our non-ideal world, the Indigenous demand for self-determination is a fundamental part of international justice.

What follows is an outline of the main points of the HSD approach. It identifies and develops points and arguments that have been made by other theorists; in particular, it identifies key steps in applying and articulating the argument. The three key steps are: recognizing Indigenous prior sovereignty,

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157. Rawls, *supra* note 15.

158. Moore, "An Historical Argument", *supra* note 11 at 101.

159. *Ibid.* at 89; Turner, "Liberalism's Last Stand", *supra* note 12 at 145: "[A] liberal theory of rights, in the context of Aboriginal peoples, functions ahistorically: it begins from a rationally constructed theory of distributive justice."

160. See Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 55; Rawls, *supra* note 15 at 216, 308-309.

161. Buchanan, *Justice, Legitimacy and Self-Determination*, *ibid.* at 56.

162. Gellner, *supra* note 138; Anthony D. Smith, *The Ethnic Origin of Nations* (Oxford: Blackwell, 1986); Benedict Anderson, *Imagined Communities* (London: Verso, 1983); Eric Hobsbawm, *Nations and Nationalism since 1780* (Cambridge: Cambridge University Press, 1990); Tom Nairn, *Faces of Nationalism: Janus Revisited* (London: Verso, 1997). Good collections on these points include Edward Mortimer, ed., *People, Nation and State: The Meaning of Ethnicity and Nationalism* (London: I.B. Taurus Publishers, 1999) and David Wippam, ed., *International Law and Ethnic Conflict* (Ithaca: Cornell University Press, 1998).

recognizing the parallel with decolonization, and identifying the principles of a new relationship. After elaborating on these three key steps, this section will discuss how the HSD approach shifts the justice debate from domestic to international justice, and will conclude by examining some objections to the approach. However, the first issue to examine is the argument for using the HSD approach to explain the political significance of Indigeneity.

### Why Historical Self-Determination?

The first step in the historical self-determination approach is to recognize that self-determination is a principle bound up in the concept of Indigeneity. Although Waldron argues that there is an “instructive ambivalence as to the basis of Indigeneity’s importance,”<sup>163</sup> self-determination provides an answer to that ambivalence for two reasons: Indigenous peoples’ own recourse to self-determination as their preferred conception of Indigenous–state relations, and the modern restructuring of Indigenous–state relations along these very lines.

When Indigenous peoples utilize Western liberal political discourse, they are increasingly making and justifying their claims with an explicit or implicit historical self-determination argument.<sup>164</sup> Despite the fact that the claims and justifications of Indigenous people are often phrased in their own languages and utilize different terms (“nationhood,” “sovereignty,” “inherent self-government”),<sup>165</sup> in liberal parlance what they are actually demanding is some form of self-determination: They want to be able to govern themselves according to their own norms and customs, and protect what is important to them.<sup>166</sup> In fact, Indigenous claims are usually justified in the language of

163. Waldron, “Indigeneity”, *supra* note 5 at 65.

164. See the discussion above at “Indigenous Usage of ‘We Were Here First.’” These claims have been summarized as “a reference to the idea of freedom from oppressors and the right to determine their future, their own form of government, as well as the extent of self-government.” Iorns, *supra* note 19 at 225. Browsing through the claims made throughout the history of settler–Indigenous relationships, there have always been claims to self-determination: Hannum, *supra* note 73 at 95; Roger Moody, ed., *The Indigenous Voice: Visions and Realities*, vol. 2 (London: Zed Books, 1988) [Moody, *The Indigenous Voice*]; Sarah Pritchard, *An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples* (1998), online: Aboriginal and Torres Strait Islander Commission <[http://www.atsic.gov.au/issues/Indigenous\\_rights/international/draft\\_declaration/draft\\_dec\\_five\\_a.asp#fivea](http://www.atsic.gov.au/issues/Indigenous_rights/international/draft_declaration/draft_dec_five_a.asp#fivea)>.

165. See Sharp, *supra* note 67 at 256-265; *The Dene Declaration in the Agreement in Principle between the Dene Nation and Her Majesty the Queen in Right of Canada* (Ottawa: Southern Support Group, 1976), reproduced in Moody, *The Indigenous Voice*, *ibid.* at 47-54; Pat Dodson, “Policy Statement” & Paul Coe, “Laws of the Black People, 1985” in Barbara Hocking, ed., *International Law and Aboriginal Human Rights* (Sydney: The Law Book Company, 1988) 137.

166. Keal, *supra* note 14 at 152; Maaka & Fleras, *supra* note 22 at 91-92; Maui Solomon, “The Context for Maori (II)” in Alison Quentin-Baxter, ed., *Recognising the Rights of Indigenous Peoples* (Wellington: Institute of Policy Studies, 1998) 61.

historical self-determination, as flowing from “their legitimate political sovereignty.”<sup>167</sup> For example, the pan-Indigenous vision of Indigenous rights expounded in the draft *Declaration on the Rights of Indigenous Peoples*<sup>168</sup> articulated self-determination as a key aspect.

Indigenous peoples have moved through history as victims of early international law,<sup>169</sup> exceptions to the international decolonization process,<sup>170</sup> and subjects of relatively assimilatory protection regimes.<sup>171</sup> Now, international law has developed to a point where the self-determination of Indigenous peoples is a clear concern. The draft *Declaration on the Rights of Indigenous Peoples* “has been utilised as a statement of Indigenous claims” and is “a potential future global standard for Indigenous peoples.”<sup>172</sup> Indigenous peoples have a central concern in seeing self-determination declared a right, and states have a concern that this should not threaten secession or the territorial integrity.<sup>173</sup> In some respects the debate on secession can be seen as a “red herring,” for most Indigenous peoples foresee and claim a continuing relationship with the state that falls short of secession. Certainly, the decolonization process and the related international law and declarations made it clear that secession was not automatic on self-determination.<sup>174</sup>

Further, in North America and Australasia, self-determination has in practice assumed a key aspirational position in orienting Indigenous–state relationships.<sup>175</sup> Paul McHugh’s magisterial book *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* describes the history of Anglo-American law’s management of Indigenous

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167. Turner, “Liberalism’s Last Stand”, *supra* note 12 at 136.

168. UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994), especially articles 3 and 31.

169. International law, or at least its intellectual forebear of the “natural law” law of nations, is implicated in the worst abuses of Indigenous peoples’ rights to self-determination: L.C. Green & Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989).

170. See Thomas D. Musgrave, *Self Determination and National Minorities* (Oxford: Clarendon Press, 1997) at 91. The relevant UN documents are UN GA 637(VII) (16 December 1952); UN GA 1514(XV) (14 December 1960); UN GA 1541(XV) (15 December 1960).

171. *International Labour Organisation Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 328 U.N.T.S. 247 (1957).

172. Thornberry, *supra* note 2 at 370.

173. For an interesting statement of the New Zealand government’s position in 1998, see Douglas Graham, “The New Zealand Government’s Policy” in Quentin-Baxter, *supra* note 166.

174. See UN GA Res. 2625(XXV) (24 October 1970).

175. See generally the position described by McHugh in P.G. McHugh, “Aboriginal Identity and Relations in North America and Australasia” in Ken S. Coates & P.G. McHugh, eds., *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Wellington: Victoria University Press, 1998) [McHugh, “Aboriginal Identity and Relations”]. The “Indigenous core” refers to the Indigenous peoples and their encompassing states that are recognized as clear and exemplary cases of Indigeneity, namely the North American states of the US and Canada, and the Australasian states of New Zealand and Australia.

peoples’ encounter with British settlers.<sup>176</sup> McHugh tells the Western legal history of the Crown’s acquisition of sovereignty in the New World, moving from early treaty making to exclusive and absolute Crown sovereignty,<sup>177</sup> through various schemes recognizing and delineating legal status,<sup>178</sup> to an era of Aboriginal self-determination.<sup>179</sup> The era of Aboriginal (or Indigenous) self-determination began in earnest in the mid-1970s, when the jurisdictions of North America and Australasia each acknowledged,

its [I]ndigenous peoples had an inherent right to retain their cultural identity and that their [A]boriginality somehow ... enhanced that right. Rather than being de-legitimated by national laws, Aboriginal polities now argued—and the settler state for the most part accepted—that the law should be validating their group identity.<sup>180</sup>

Despite the continuing popularity of assimilatory doctrines,<sup>181</sup> McHugh demonstrates these developments over the next 300 pages, providing ample evidence for the present importance of self-determination to Indigenous–state relations.

Indigenous peoples continue to phrase their claims in the language of historical self-determination and states have begun to acknowledge such claims. One of the problems that both of these developments run up against is the lack of a systematic examination or exposition of how self-determination relates to Indigeneity. As promised above, this section continues by examining the three key steps in the HSD approach: the recognition of prior sovereignty, making the analogy with decolonization, and the reorientation of the relationship on the basis of mutual respect, consent and continuity.

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176. (Oxford: Oxford University Press, 2005).

177. *Ibid.* at chapters 2 and 3.

178. *Ibid.* at chapter 4.

179. *Ibid.* at chapter 6.

180. *Ibid.* at 315.

181. For New Zealand, see Sharp, *supra* note 67 at 194-204; Alan Ward, *A Show of Justice* (Auckland: Auckland University Press/Oxford University Press, 1973). For Australia, see Henry Reynolds, “New Frontiers: Australia” in Paul Havemann, ed., *Indigenous Peoples’ Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999). For the US and Canada, see Roger L. Nichols, *Indians in the United States and Canada: A Comparative History* (Lincoln & London: University of Nebraska Press, 1998); and C.E.S. Franks, “Indian Policy: Canada and the United States Compared” in Cook & Lindau, *supra* note 8.

### Prior Sovereignty

The first step in the HSD approach is the recognition of the prior sovereignty, self-government or self-determination of Indigenous peoples.<sup>182</sup> Connecting these three terms by “or” indicates that, from a normative point of view, it is immaterial whether Indigenous peoples were recognized as having sovereignty by any domestic or international point-of-view at any particular time in history. HSD does not ask whether Indigenous peoples have ever been granted sovereignty—jurisdiction or control—under imposed domestic or international systems. Instead, HSD asks whether Indigenous peoples have exercised that power in fact *before* they came into contact with other legal systems.

Something like this principle—that historic denial of international recognition of a people does not prevent such recognition in the present—drove the decolonization movement. Many of the states that have been allowed to decolonize, and that are now recognized as self-determining, would not have had international legal personality at the time of colonization.<sup>183</sup> These states have acquired international legal personality because of the moral importance of self-determination.<sup>184</sup> Further, as Michael Asch has forcefully argued, there is no question that all peoples of the New World, no matter how “civilized” or “primitive,” were self-governing and self-determining before colonization.<sup>185</sup>

Other commentators have affirmed the significance of prior sovereignty. Moore states that historically, “Indigenous peoples constituted self-governing communities.”<sup>186</sup> Tully phrases the point as “they have the status of independent, self-governing nations, in virtue of prior sovereignty, grounded in the practice of governing themselves by their own laws.”<sup>187</sup> We can see this recognition of the historical fact of sovereign power in the Marshall trilogy,<sup>188</sup> and continuing to some degree in the US today.<sup>189</sup> From the perspective of domestic and international law, this recognition is often hard fought.<sup>190</sup> Legal theorists<sup>191</sup> and judges<sup>192</sup> are notorious for denying the

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182. See Turner, “Liberalism’s Last Stand”, *supra* note 12 at 135; Tully, “A Just Relationship”, *supra* note 8 at 39 and 47; Macklem, *Indigenous Difference*, *supra* note 13 at 4.

183. For example, most of the African, American and Asian countries would not have been regarded as states in international law.

184. Cassese, *supra* note 20 at 189.

185. Michael Asch, “From *Terra Nullius* to Affirmation: Reconciling Aboriginal Rights with the Canadian Constitution” (2002) 2 C.J.L.S. 23.

186. Moore, “An Historical Argument”, *supra* note 11 at 91.

187. Tully, “A Just Relationship”, *supra* note 8 at 47.

188. See Clinton, *supra* note 24 at 137-143.

189. Rebecca Tsosie, “Tribalism, Constitutionalism and Cultural Pluralism: Where do Indigenous Peoples Fit within Civil Society” (2003) 5 U. Pa. J. Const. L. 357.

190. See Paul McHugh, “A History of Crown Sovereignty in New Zealand” in Andrew Sharp & Paul McHugh, eds., *Histories, Power and Loss* (Wellington: Bridget Williams Books, 2001) at 193-197 [McHugh, “A History of Crown Sovereignty”].



sovereignty of Indigenous and other colonized peoples because they lack the requisite degree of civilization. Some commentators, like Buchanan, deny recognition of Indigenous peoples’ prior sovereignty because their situation was not “statehood in the sense defined by international law.”<sup>193</sup> This contrasts with the position of Julie Cassidy, who interprets international law as recognizing Indigenous sovereignty.<sup>194</sup>

By this approach, history elucidates justice in a different way than an ahistorical approach would. For example, Rawls’ theory of justice and Waldron’s liberal property principles reject a “backward-looking” historical approach to justice. In contrast, Indigenous peoples examine justice by tracing their histories of self-determination. A historical self-determination approach looks at both the exercise of self-determination and the “memory” that Indigenous peoples have of having exercised that self-determination, which is key to their conceptions of justice.<sup>195</sup>

The references to Rawls’ and Waldron’s arguments point to an important aspect of the historical self-determination approach. In each of the three key steps, there is an emphasis on the “equality of nations,” which sees Indigenous peoples as “peoples,” rather than just a category of individual citizens of a state. Further, the “equality of nations” takes us out of the “equality of citizens” domestic justice arguments, as provided by Rawls and Waldron, to those of international justice. This distinction is an important point that runs throughout the historical self-determination approach, and it is one of the reasons for popular rejection of the approach by most non-Indigenous citizens—most recognize the “equality of citizens,” and not the “equality of nations” argument, as relevant. This will be discussed further below.

In the same way that law and history have been intertwined,<sup>196</sup> historical self-determination arguments intertwine “equality of nations” justice arguments with inquiry into the history of Indigenous–colonial relations. However, this historical inquiry is complicated in that there is no one definitive constitutional history in settler states; there are competing Indigenous and non-Indigenous histories of contact, sovereignty and property.<sup>197</sup> For example, in New Zealand, the internal narrative of the common law has constructed a myth of immemorial and unitary Crown

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191. For a discussion of this tendency, see Green & Dickason, *supra* note 169.

192. See the view of *Wi Parata v. Bishop of Wellington*, [1877] 3 N.Z. Jurist (NS) 72 in McHugh, “A History of Crown Sovereignty”, *supra* note 190 at 193-200; *Coe v. Australia* (1979), 53 A.L.J.R. 403 [*Coe*].

193. Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10 at 416.

194. Julie Cassidy, “Sovereignty of Aboriginal Peoples” (1998) 9 *Ind. Int’l & Comp. L. Rev.* 65.

195. See Pocock, “The Treaty between Histories”, *supra* note 9 at 79-81, 86-91 and 93-95.

196. Paul McHugh, “The Common-Law Status of Colonies and Aboriginal ‘Rights’: How Lawyers and Historians Treat the Past” (1998) 61 *Sask. L. Rev.* 393 at 395.

197. Pocock, “Waitangi as a Mystery”, *supra* note 9 at 26; Pocock, “Law, Sovereignty and History”, *supra* note 9.

sovereignty disengaged from historical explanation.<sup>198</sup> Only lately has this narrative been challenged and reconsidered in light of Māori histories of self-determination and sovereignty.<sup>199</sup> The problem for such a challenge is that self-determination is a historical concept that must challenge the legal myth of immemorial and unitary Crown sovereignty as historical fact. Elaborating on a historical self-determination approach within a common law system denies both legal fictions: that the Crown is both an *immemorial* and an *exclusive* sovereign. Historical self-determination is therefore bound to fail in the courts, legally bound, as they are, to those fictions.

In contrast, the normative principle can survive if we take the view that we should take Indigenous histories of sovereignty and self-determination seriously, regardless of how they hold up under state and international legal doctrine.<sup>200</sup> Pocock suggests that Indigenous peoples and non-Indigenous peoples in New Zealand might engage with one another's histories in discussing prior sovereignty and the legitimacy of state governments' rule over Indigenous peoples.<sup>201</sup> Furthermore, he has pointed out the importance of the historical recognition of federative capacity—the capacity to make treaties as a sovereign—in this prior recognition of sovereignty.<sup>202</sup> As a result, we should take account of both Indigenous and non-Indigenous conceptions of sovereignty when making the historical inquiry into sovereignty; this will likely yield more favourable results for Indigenous peoples.

However, the usual caveats for using the word “sovereignty” in the modern world apply.<sup>203</sup> The nature of statehood and sovereignty is rapidly changing.<sup>204</sup> We are not necessarily recognizing sovereignty in the British

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198. See Pocock, “The Treaty between Histories”, *supra* note 9 at 81-83; McHugh, “A History of Crown Sovereignty”, *supra* note 190.

199. McHugh, “A History of Crown Sovereignty”, *ibid.* at 200-211. See also Benedict Kingsbury, “Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law” 52 U.T.L.J. 101 at 124: “[I]n decolonization, ‘resistance’ can be understood as groups asserting their own history rather than reacting in others.”

200. Pocock suggests a Habermasian ideal of an open society in which actors can write and re-write their own and others' histories: Pocock, “The Treaty between Histories”, *supra* note 9 at 89-91.

201. Pocock, “Waitangi as a Mystery”, *supra* note 9 at 33.

202. Pocock, “Law, Sovereignty and History”, *supra* note 9 at 487: “It is crucial to the Indigenous group that it should be able to define itself as a ‘nation,’ possessed of both history and legal or rights-bearing personality both before and since the making of the treaty; and in so doing it lays claim to sovereign capacity.”

203. See Waldron, “Indigeneity”, *supra* note 5 at 67.

204. Michael Keating, “So Many Nations, so Few States: Territory and Nationalism in the Global Era” in Alain-G. Gagnon & James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001) at 55-61.

constitutional or international sense.<sup>205</sup> Indigenous sovereignty cannot mean a reversion to pre-contact patterns of sovereignty. This notion of sovereignty has to be complementary and relational. Indigenous sovereignty refers to, at least in applying this notion to present Indigenous–state relationships, “a non-absolute, pragmatic conception of sovereignty that contemplates a plurality of entities wielding sovereign authority.”<sup>206</sup> The problems of “sovereignty-talk”—the problem of discussing absolute and competing sovereignties, and the non-Indigenous hostility this engenders—clearly make any use of the term dangerous,<sup>207</sup> especially in states dominated by an all-powerful and unitary sovereign.<sup>208</sup> So it may be more politically expedient to talk of prior sovereignty in terms of prior self-determination or prior nationhood; it is easier for most to accept that peoples can live together as self-determining nations or polities.<sup>209</sup>

Though Indigenous prior sovereignty is a clear social fact, it is often dismissed in the present because of lingering notions of a lack of civilization on the part of Indigenous peoples. Even when the fact of prior sovereignty is acknowledged, it is often hard to get politicians and citizens steeped in Western constitutionalism to recognize the political significance of prior sovereignty. Such recognition of prior sovereignty is essential if Indigenous peoples and the state are to form an adequate relationship based on mutual recognition, consent and continuity.<sup>210</sup> One useful tool for explaining this significance is the next key step in the historical self-determination approach, which makes clear the normative analogy between Indigenous self-determination and the decolonization movements of the last century.

205. Australasian judiciaries do not react favourably to the claims of continuing Indigenous sovereignty. See *Coe*, *supra* note 192, where the plaintiff asserted a wrongful proclamation of sovereignty over Australia, and the continuing existence of a sovereign Aboriginal nation. See also *Berkett v. Tauranga District Court*, [1992] 3 N.Z.L.R. 206 (H.C.); and *R v. Knowles*, [1998] B.C.L. 369, CA 146/98, 12 October 1998 (N.Z.C.A.).

206. Macklem, *Indigenous Difference*, *supra* note 13 at 7. Waldron in “Indigeneity”, *supra* note 5 at 67, cites a different example of the same perspective: “Obsolete versions of absolute sovereignty are being discarded for Indigenous equivalents that emphasise an autonomy both relative and relational” (citing Maaka & Fleras, *supra* note 22).

207. McHugh, “Aboriginal Identity and Relations”, *supra* note 175 at 120; P.G. McHugh, “From Sovereignty Talk to Settlement Time: The Constitutional Setting of Maori Claims in the 1990s” in Havemann, *supra* note 181, 452; Maaka & Fleras, *supra* note 22 at 92.

208. Sharp, *supra* note 67 at 266-268.

209. But note even the international concern about the application of the norm of self-determination to Indigenous peoples (albeit related to conceptions of unitary sovereignty and territorial integrity): Iorns, *supra* note 19 at 226-228; Douglas Graham, “The New Zealand Government’s Policy” in Quentin-Baxter, *supra* note 166, 3 at 7-11. Anaya sees this concern as turning a corner to acknowledging intrastate self-determination, Anaya, *Indigenous Peoples*, *supra* note 20 at 86-88.

210. However, Russel L. Barsh argues that whether Indigenous groups were sovereign or self-governing is irrelevant to international law, because the issue is whether groups have “a right to become independent today ... [t]he international issue is not historical status” in “Indigenous Peoples and the Right to Self-Determination in International Law” in Hocking, *supra* note 165, 68 at 71-72.

### Indigeneity and Decolonization

Indigenous self-determination and African and Asian decolonization are both based on the same normative arguments that underlie the moral and international law norm of self-determination. As seen above, we may apply the relatively sophisticated moral self-determination arguments to the situation of Indigenous peoples.<sup>211</sup> Instead of this abstract moral theorizing, we could proceed with a more practical and intuitive analogy with the decolonization norm that was followed by the international community in the 1960s and 1970s.<sup>212</sup> The decolonization process corrected the “*sui generis* deviation represented by twentieth-century colonialism” and, therefore, “[t]he contemporary international concern for Indigenous peoples ... is based effectively on the identification of a long-standing *sui generis* deviation from the self-determination standard.”<sup>213</sup> Or, as Moore puts it, “if decolonization was right ... then Indigenous self-government must also be morally right.”<sup>214</sup> She continues to make the analogy between Indigenous peoples in settler-majority states and classic imperial colonization.<sup>215</sup> The New Zealand constitutional scholar F.M. Brookfield notes that this concern for colonized peoples is related to their relative proximity to the present era of self-determination: “[T]he ending of the traditional right of conquest in international law brought into question the legitimacy of at least more recent imperial conquests.”<sup>216</sup>

Indigenous peoples concern the international community because they lack the rights of self-determination that other peoples enjoy, and are

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211. See section III, “‘Choice,’ ‘Remedial Right’ or ‘National’ Self-Determination,” above on pp. 98-101; Buchanan, *Justice, Legitimacy and Self-Determination*, *supra* note 10; Moore, “An Historical Argument”, *supra* note 11.

212. Kingsbury argues that “[t]he legal instantiation of self-determination upon which the claims of Indigenous peoples have drawn most in the formative period of the international Indigenous movement is the law established for decolonization of extra-European colonies of European states” in “Reconciling Competing Structures”, *supra* note 2 at 219. For general historical analysis of decolonization, see John Springhall, *Decolonisation Since 1945: The Collapse of European Overseas Empires* (Palgrave: Basingstoke, 2001).

213. Anaya, *Indigenous Peoples*, *supra* note 20 at 85. He states further (at 86):

Indigenous peoples of today typically share much the same history of colonialism suffered by those still living in this century under formal colonial structures and targeted for decolonization procedures. But despite the contemporary absence of colonial structures in the classical form, Indigenous peoples have continued to suffer impediments or threats to their ability to live and develop freely as distinct groups in their original homelands. The historical violations of Indigenous peoples’ self-determination, together with contemporary inequities against Indigenous peoples, still cast a dark shadow on the legitimacy of state authority, regardless of effective control or the law contemporaneous with historical events.

214. Moore, “An Historical Argument”, *supra* note 11 at 103-104.

215. *Ibid.* at 101-102.

216. F.M. Brookfield, *Waitangi and Indigenous Rights: Revolution, Law & Legitimation* (Auckland: Auckland University Press, 1999) at 79.

guaranteed by international law.<sup>217</sup> It causes more concern that Indigenous peoples have only been deprived of these rights relatively recently. Decolonization, through self-determination, circumvented international law precepts of effectiveness and intertemporality to achieve self-determination for colonized peoples.<sup>218</sup> Analogizing this to the situation of Indigenous peoples is compelling. Both Indigenous and recently decolonized peoples were deprived of their self-determination by a colonizing power. The distinguishing factor is the existence of “internal colonization”: the fact that the colonizing power built a society on the Indigenous peoples’ territory, rather than merely carrying out economic exploitation from afar.<sup>219</sup> As this article discloses, internal colonization is a thorny question in political philosophy and it is ambiguous how self-determination may be applied to internally colonized peoples. Presumptions that internal colonization is not only effective, but also that it is (1) legitimate, and that (2) there is no viable alternative<sup>220</sup> have precluded the recognition of Indigenous self-determination and have kept internally colonized states quite stable. However, appealing to an HSD analysis challenges these presumptions of legitimacy and lack of an alternative.

### ***Legitimation of Colonization Inadequate***

Despite a consensus amongst most states to the contrary, legitimations of colonization are inadequate.<sup>221</sup> The standard legitimating arguments are that the colonization has resulted in democratic government and that Indigenous peoples are free and equal within the democracy. This argument seems to accord with the orthodox international legal position: For example, Hannum notes that international practice is inconsistent in its treatment of the impact that the existence of majority settler populations has on the norm of decolonization.<sup>222</sup> The idea of decolonization for Indigenous peoples was (perhaps cynically) raised in the 1950s by Belgium,<sup>223</sup> but this was rejected by the United Nations.<sup>224</sup> Another legitimating argument is that stability and human rights were brought by the colonial power.<sup>225</sup> The underlying problem with these arguments is that they suppose that Indigenous populations are

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217. See Anaya, *Indigenous Peoples*, *supra* note 20 at 85; Macklem, *Indigenous Difference*, *supra* note 13 at 34-35; Keal, *supra* note 14 at 134.

218. Anaya, *Indigenous Peoples*, *supra* note 20 at 83.

219. Tully, “Struggles of Indigenous Peoples”, *supra* note 39 at 37-42.

220. *Ibid.* at 51.

221. *Ibid.* at 52; Brookfield argues that the denial of Indigenous self-governance has been partially legitimated: see *supra* note 216 at 136-162.

222. Hannum, *supra* note 73 at 38-39.

223. Macklem, *Indigenous Difference*, *supra* note 13 at 36.

224. UN GA 1514(XV) (14 December 1960).

225. Brookfield, *supra* note 216 at 145-148.

not peoples; they presuppose that Indigenous individuals can be integrated with the colonizing population so that the only question is of democratic justice between citizens, rather than the self-determination of peoples.<sup>226</sup>

There seems little intuitive moral appeal in these arguments apart from the argument that anything that is democratic is just. Territorial democracy, with full enfranchisement, is the touchstone of self-determination and precludes decolonization. This is the international law status quo. This seems both morally fair (if democracy constitutes justice) and realistic (the colonists cannot now go “home”). But the situation can be put another way. This democratic difference is what separates the African and Asian colonies from the Indigenous core, and which denies Indigenous peoples their self-determination.<sup>227</sup> Essentially, this democratic legitimation principle disadvantages peoples who have felt the greatest impact of colonization, who have been reduced to minorities, and who are left to abide by a different normative order and assimilate to a dominant societal culture if they wish to prosper. Compare this with the decolonization of Africa and Asia, where peoples have been allowed to live by their often very different normative orders, to better and worse effect.<sup>228</sup> Therefore, to use Eides’ terms, the denial of decolonization to Indigenous peoples emphasizes *demos* over *ethnos*;<sup>229</sup> the whole population (*demos*) of a state enjoys self-determination through democracy, not separate ethnic groups (*ethnos*). The simplest way to refute the morality of this arrangement is to consider our moral intuitions about a hypothetical. For example, if East Timor was subjected to a majority influx of Indonesians after its annexation, would that deny the East Timorese people their right of self-determination? My intuition is that self-determination here should not inhere in the *demos* of either the whole Indonesian state, or of the whole population (including the unjust recent immigrants) of East Timor’s territory.<sup>230</sup> The violation of East Timorese self-determination by this unwanted annexation and settlement does not transfer their self-determination—it remains with the *ethnos* group. Significantly, this idea was affirmed by the United Nations in a GA Resolution of

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226. Tully, “Struggles of Indigenous Peoples”, *supra* note 39 at 52.

227. Moore, “An Historical Argument”, *supra* note 11 at 103-104.

228. The “better” side of the equation seems to be represented by the countries in Asia (Singapore, Korea, Taiwan, Japan) that have prospered economically and retain a culture quite distinct to the cultures they were decolonized from. The “worse” side is represented by the African states that were doomed from the start by the imposed boundaries and colonially constructed states that these tribally organized peoples had to work with.

229. Asbjorn Eide, “Peaceful Group Accommodation as an Alternative to Secession in Sovereign States” in Clark & Williamson, *supra* note 108, 94.

230. For a similar argument, see Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001) at 73-75.

December 1966 that condemned the systematic influx of colonial immigrants into colonized territories.<sup>231</sup>

This hypothetical does not shift the self-determination emphasis solely to *ethnos* considerations—and argue that all ethnic groups are “peoples”—but remains within the framework of a historical approach. The East Timorese (like Indigenous peoples) are peoples with the right of self-determination because they historically enjoyed self-determination in the “*demos*” sense, and have only lost it relatively recently in an unjust manner. Naturally, in the case of integrated and interdependent Indigenous peoples, the restoration of self-determination cannot take the same form as classic decolonization,<sup>232</sup> but it should occur nonetheless.

### Mutual Recognition, Consent and Continuity

The previous two steps in the historical self-determination argument rest on recognizing the injustice of the continued denial of a return to prior Indigenous self-determination in the present. James Tully has shown that Indigenous self-determination could have been recognized in the Indigenous–state relationship. This relationship between Indigenous peoples and the state could have been based, and still may be based, on what he sees as the conventions of common law constitutionalism: mutual recognition, consent and continuity.<sup>233</sup> In this way, Tully enumerates a checklist for identifying whether a constitutional union between Indigenous peoples and colonial peoples was and is just. It requires mutual recognition of sovereignty, the consent of Indigenous peoples to the constitutional relationship with the colonizers, and the continuity of Indigenous difference and governance. When these principles of relationship are fulfilled, Indigenous self-determination is upheld. Pocock’s analysis of Indigenous sovereignty gives similar results.<sup>234</sup>

Mutual recognition requires the parties to the relationship to recognize each other as equal, coexisting and self-governing peoples.<sup>235</sup> If states do not recognize Indigenous peoples’ prior nationhood, they violate the principle of self-government.<sup>236</sup> Consequently, it is likely that the process whereby

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231. *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN GA Res. 2189(XXI) (13 December 1966).

232. Moore, “An Historical Argument”, *supra* note 11 at 104.

233. Tully, *Strange Multiplicity*, *supra* note 8 at 116-129. In many ways these conventions mirror the relational model of Indigenous–state relations proposed by Paul McHugh—mutual recognition of “coexisting political communities,” brought together in a relationship founded on consent and the understanding of the continuity of the political communities: McHugh, “Aboriginal Identity and Relations”, *supra* note 175 at 120-121.

234. Pocock, “Law, Sovereignty and History”, *supra* note 9.

235. Tully, “A Just Relationship”, *supra* note 8 at 44.

236. *Ibid.* at 49.

(previously self-governing) Indigenous peoples were incorporated into the state was illegitimate—without consent.<sup>237</sup> Treaties that entailed mutual recognition of sovereignty<sup>238</sup> are instances where consent is more likely to have been given to some kind of relationship, and Pocock has examined how we might discuss the history and interpretation of these treaties.<sup>239</sup> He shows that the terms of consent contained in these treaties can become fundamental in establishing and legitimating the sovereignty of the state.<sup>240</sup> For Dale Turner, the key question for Indigenous peoples is “how governments can come to recognize the legitimacy of Aboriginal sovereignty in order to renew the political relationship on more just foundations,” which implicitly affirms Tully’s requirement of continuity.<sup>241</sup>

The three key steps in the historical self-determination approach—recognizing prior sovereignty, recognizing the analogy with decolonization, and renewing the Indigenous–state relationship on principles of mutual recognition, consent and continuity—provide the core of an argument that can hold its own in the Western political tradition. Indigenous peoples do not need to claim that their rights are *sui generis*, flowing from a mystical pattern of thought that Western political thought cannot comprehend. Of course, some Indigenous peoples do make the claim that their rights are given by the world or the creator.<sup>242</sup> My point in this article is not, in any way, that these claims are false, but that they will not convince judges, politicians and citizens that understand better the Western political tradition. This section has articulated an argument, based on liberal principles that the Western political tradition can understand, and that goes some way to allowing forms of Indigenous self-determination in which Indigenous peoples’ traditions are allowed to flourish.

Before I conclude, I will address some of the problems inherent in the historical self-determination approach. The first problem is posed by the popularity within Western liberal thought of two key paradigms of equality; the other problems are those that I can foresee being made against the historical self-determination approach in general.

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237. Moore, “An Historical Argument”, *supra* note 11 at 95-96, 101.

238. Pocock shows that the very act of entering into treaties with Indigenous peoples entailed sovereign recognition on the part of the imperial power in “Law, Sovereignty and History”, *supra* note 9 at 487-488.

239. *Ibid.* at 486-488, 491-495.

240. Pocock, “Waitangi as a Mystery”, *supra* note 9 at 26.

241. Turner, “Liberalism’s Last Stand”, *supra* note 12 at 146.

242. Lyons, *supra* note 74.



### Historical Sovereignty and the Two Liberal Paradigms

Tully points out that Indigenous sovereignty, nationhood and constitutionalism are invariably skipped over by dominant political philosophy,<sup>243</sup> and we must ask, “Why?” Two dominant liberal paradigms that first arose in the 17<sup>th</sup> and 18<sup>th</sup> centuries refer to the equality of individuals within a state, and to the equality of nations in international society.<sup>244</sup> The fundamental difference between the property morality and the self-determination justifications for Indigeneity is the liberal paradigm they refer to. To begin a discussion of Indigeneity by assuming we are dealing with justice between individuals within a state misses the point and constitutes discrimination on the basis of the second paradigm, in that it presupposes the supremacy of the normative order of the colonial state and, as a corollary, relegates the Indigenous normative order to a weaker position.<sup>245</sup> Steps toward self-determination in the United States as diminished sovereignty, and in Canada as self-government, proceed on this basis because the colonial normative order is presumptively supreme and any negotiation between normative orders occurs under threat of state veto, but not under the threat of Indigenous veto.

Historical self-determination arguments frame the argument in the equality of nations paradigm. A discourse of self-determination, decolonization and nationhood makes little sense if we are rooted in the domestic justice arguments of the first paradigm. Recourse to the second paradigm is implicit in this historical self-determination approach, and would require the recognition of prior Indigenous sovereignty, nationhood and competence to negotiate the form of relationship with the colonial nation. Where some negotiation had taken place, most commonly culminating in a treaty, and where the negotiation proceeded on the basis of the equality of nations, then the result would either have to be respected, or a new agreement negotiated under conditions of equality.<sup>246</sup> Where the prior negotiations were somehow flawed, a fresh negotiation should take place.<sup>247</sup>

This position is radical to the extent that it takes recognition of Indigenous polities to recognition of international nationhood and, thus, to its furthest extreme. This position is clearly expressed in some discussions that argue for the sovereignty of Native American tribes in the United

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243. Tully, “Struggles of Indigenous Peoples”, *supra* note 39 at 53-54.

244. For a full discussion of this point, see Macklem, “Distributing Sovereignty”, *supra* note 13 at 1349-1367. See also Brownlie, *supra* note 63 at 287-288; Hannum, *supra* note 73 at 14-15.

245. Dale Turner argues that liberalism characteristically ignores Indigenous sovereignty, whereas “most Aboriginal communities claim that their so-called special rights flow from their legitimate political sovereignty”: Turner, “Liberalism’s Last Stand”, *supra* note 12 at 135.

246. For an argument about interpreting treaties in a contractual matter, see Claire E. Hunter, “New Justification for an Old Approach; In Defence of Characterizing First Nations Treaties as Contracts” (2004) 62 U. T. Fac. L. Rev. 61.

247. Again, note how Tully’s requirements apply.

States.<sup>248</sup> The same arguments have been made in relation to other states.<sup>249</sup> Nevertheless, while consistent with the equality of nations doctrine, it is politically inexpedient to discuss nationhood, sovereignty and the possibility of secession. I noted above that sovereignty talk brings many pitfalls to negotiation. So we have a sort of paradox: The liberal theory of Indigenous self-determination rests on recognizing the equality of nations, but to argue on this basis is inexpedient because of the political dominance of equal citizenship.

Perhaps the key to getting any movement towards the recognition of national equality is to forego secession, while somehow keeping an equal negotiating position (which implicitly includes the right of veto).<sup>250</sup> However, even conceding that Indigenous people constitute a negotiating polity still seems too much of an infringement of equal citizenship for some governments and many non-Indigenous citizens to bear. Ultimately, although the equality of nations (as expressed in the theory of historical self-determination) may be the best moral theory of Indigeneity, there are significant problems in convincing non-Indigenous citizens to accept this vision of justice.

### Addressing Waldron's Criticisms and Other Problems

Though it is defensible from within the Western political tradition, the historical approach to self-determination may seem to fall foul of Waldron's criticisms of remedying historic injustice.<sup>251</sup> Waldron argues that prior occupancy is a conservative principle that "prohibits overturning existing arrangements."<sup>252</sup> It is ahistorical and refrains from legitimate inquiry into the past; irrespective of the justice of an order's origins, it should be *prima facie* respected.<sup>253</sup> Although there may be circumstances in our modern situation that require change, they cannot be historic circumstances alone.<sup>254</sup> Prior occupancy notions of Indigeneity, perhaps even ones that point to prior self-determination,<sup>255</sup> are "really incapable of adding anything distinctive to

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248. See Clinton, *supra* note 24.

249. For NZ, see Sharp, *supra* note 67; for Australia, see Rosalie Balkin, "International Law and the Sovereign Rights of Indigenous Peoples" in Hocking, *supra* note 165. Generally see Cassidy, *supra* note 194.

250. Exactly how a veto can be achieved without the threat of secession remains to be seen, but the possibility of ongoing Indigenous anger and (to varying degrees) militancy may be as close as Indigenous peoples can get.

251. See Waldron, "Indigeneity", *supra* note 5 at 73-75; Waldron, "Redressing Historic Injustice", *supra* note 67.

252. Waldron, "Indigeneity", *ibid.* at 73.

253. *Ibid.*

254. *Ibid.*

255. We might make this inference based on Waldron's discussion that addresses the idea of prior "systems of polity, law, and economy": *Ibid.* at 66.

independent justice-based lines of argument for reform and change in the present.”<sup>256</sup>

A proponent of an HSD approach might respond to this argument in two ways. One is to argue that, according to the theories discussed above, the liberal concern for self-determination is one such “circumstance of our modern situation” that requires, in the interests of justice, us to alter our patterns of resource-distribution, governance and jurisdiction. An historical self-determination argument is a forward-looking argument in that it does not argue for reversion. It argues that the denial of self-determination continues in the present, and that it is a “circumstance of our modern situation” that requires altering current arrangements.<sup>257</sup> This approach rejects the idea that there is only an agonistic choice to be made between the current arrangements and the status quo ante prior arrangements, especially where they are associated with self-determination. Waldron’s arguments were originally aimed at superseding historical injustices relating to land and resource ownership.<sup>258</sup> His arguments against unsettling an existing order to restore the status quo—the radical Indigenous demands for some or all their sovereignty and property<sup>259</sup>—ignore the possibility of a just reconciliation. Of course, as Moore herself acknowledges, a return to the status quo ante will usually result in committing further injustices.<sup>260</sup> But this is not an argument to do nothing.<sup>261</sup> The threat of new injustices, caused by unsettling current patterns of jurisdiction and land ownership, does not preclude us from reconciling the present arrangements with Indigenous self-government. It merely requires us to take these possible further injustices into account when we are negotiating Indigenous self-determination. Indigenous prior sovereignty or occupancy *then* arguments need not be trumped by non-Indigenous prior sovereignty or occupancy *now* arguments because we can work towards a constitution that recognizes and reconciles both Indigenous and non-Indigenous orders.<sup>262</sup> Indeed, there are no model structures for Indigenous self-determination, and the manifestation of the principle will depend on each particular circumstance.<sup>263</sup>

Lastly, as noted above, a historical self-determination argument may still be rejected on the grounds that it clashes with different forms of liberal

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256. *Ibid.* at 73.

257. See section II, “Prior Occupancy,” above on pp. 87-88.

258. Waldron, “Redressing Historic Injustice,” *supra* note 67.

259. Waldron, “Indigeneity,” *supra* note 5 at 61.

260. Moore, “An Historical Argument,” *supra* note 11 at 98.

261. *Ibid.*

262. I note the ahistorical nature of making the argument that the prior occupancy principle applies to shield colonizers from a return to the previous Indigenous patterns of sovereignty and resource distribution, in that the previous Indigenous order would be, conceptually, a “new” order displacing the order of the colonizers. But this uneasiness does not refute Waldron’s point.

263. Iorns, *supra* note 19 at 225-226. See also Moore, “An Historical Argument,” *supra* note 11.

justice and equality, such as civic republicanism<sup>264</sup> or liberal cosmopolitanism.<sup>265</sup> We are relatively comfortable with thinking about territorial self-determination because there is no question of differentiated rights based on ethnicity. When we start talking about Indigenous peoples exercising self-determination within a state, either on a territorial base or extra-territorially, we are departing from both the paradigms of equality that were mentioned before—the equality of nations and the equality of citizens.

Nevertheless, this is the territory we are in. Normative orders have met, and one has subjugated the others so that it is no longer applied by the officials that administer the state. For various reasons, we deem that subjugation illegitimate, and the question arises as to how we might somehow reinstate the subjugated normative order, in which Indigenous self-determination subsists. Here the analogy of two rivers running side-by-side collapses, for there will always be an intermingling of waters, and fish tend to dart between both streams. But the solutions, contrary to some reports, might not violate our basic principles of equality.<sup>266</sup>

## V CONCLUSION

This article has argued that the explanation of the normative significance of Indigeneity is not necessarily liberal property principles. Self-determination, as understood by Western liberal thought and by many Indigenous conceptions, is the best liberal justification for the significance of Indigeneity. It reflects the way that Indigenous claims are phrased in Western political terms and it is in some ways reflected in current movements in state–Indigenous relations. Furthermore, the outline of a theory of a historical approach to self-determination, aimed at affirming self-determination’s usefulness for grounding the political significance of Indigeneity, is widely supported by Indigeneity supporters. The same broad ideas and arguments about Indigenous self-determination’s historical basis arise in a wide variety of sources, a number of which I have cited and been influenced by.

The historical approach to self-determination provides a viable argument from within the Western political tradition for using self-determination as a justification for Indigeneity’s significance. It survives the monological, internal challenge from Western political tradition and I would speculate that its relatively generous vision of what Indigenous rights are justified means that it would be close to the result of the intercultural

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264. See Tsosie, *supra* note 189.

265. See Jeremy Waldron, “Minority Cultures and the Cosmopolitan Alternative” in Kymlicka, *Minority Cultures*, *supra* note 108, 110.

266. Tully, “A Just Relationship”, *supra* note 8 at 66-69; Tsosie, *supra* note 189.

dialogue on constitutional justice that I envision in section III. It also makes Indigeneity a more coherent political concept, closely aligning its definition, claims and justifications. While there are significant controversies within this approach, what is clear is that the political significance of Indigeneity is contested, and the debate will continue in the next stage of Indigenous–state relations worldwide. A historical self-determination approach like the one described in this article will undoubtedly assume a central position in that debate.