Searching for Principle

Reconciling Tribal Membership and Liberal Values

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Many Indigenous groups, including iwi (Māori tribal groups), determine membership based solely on descent. Descent-based membership criteria are seen as illiberal, even within a liberal multicultural framework that accommodates minority cultural groups. Current attempts to justify descent-based membership rely more on pragmatic than theoretical justifications. In the context of iwi, an empirical study of tikanga Māori (Indigenous law) demonstrates that descent-based membership criteria enhance Māori autonomy. Liberalism should recognize descent-based membership requirements as inherently liberal when they promote autonomy.

I Introduction

Modern New Zealand law has an uneasy relationship with New Zealand's first law, tikanga Māori. This is partly because of the central role that principles of whanaungatanga (familial relationships) and whakapapa (lines of descent) play in tikanga Māori, as discussed in Part II of this article. Descent is one of the organising principles of tikanga Māori; not only familial, but also *legal* relationships are shaped by it. The emphasis placed on descent is demonstrated by the central role that descent-based groups, primarily iwi (tribes), play in tikanga Māori. In contrast with tikanga Māori, European law is underpinned by liberal principles based on an individualistic conception of autonomy and equality.[1]

New Zealand statutes increasingly accord rights to iwi which other New Zealanders are denied. Previously, these were primarily restricted to resolution of land-based grievances under the Treaty of Waitangi (the Treaty).[2] These include:

- The 1975 enactment of the *Treaty of Waitangi Act*, which established the Waitangi Tribunal to inquire into Crown breaches of the Treaty of Waitangi;
- The 1987 "*Lands Case*" which established the relevance of the principles of the Treaty of Waitangi;[3]
- Commencing in 1988, the policy of direct negotiation between the Crown and iwi to determine redress for past breaches of the Treaty of Waitangi; and
- The 1993 enactment of the *Te Ture Whenua Māori Act*, which protects Māori land from fragmentation and exploitation.

These special rights could be justified, even on liberal principles, on the basis of restitution for past grievances. However, as Part III of this article will demonstrate, as New Zealand moves beyond Treaty settlement, the question of special rights will arise in areas of law that go beyond direct Treaty redress.[4] This arti-

1 This paper uses the term "liberalism" throughout to refer to the principles of classical liberalism, further discussed in the section entitled "Classical Liberalism and Descent-Based Groups", below.

2 The Treaty of Waitangi, signed between Māori and the Crown in 1840, is considered New Zealand's founding document. It is commonly interpreted to have ceded Māori sovereignty in exchange for Crown protection of Māori possession and self-government over their property, but its legal status is disputed.

3 *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641 (CA).

4 "Settlement" is here used to describe the outcome of the Treaty of Waitangi claims process, whereby the Crown acknowledges its breach of the Treaty and makes redress to the iwi that has been wronged. For more information, see the explanation of the Waitangi Tribunal in "Claims Process" (16 May 2017), *Waitangi Tribunal*, online:

cle reconciles the granting of rights to tikanga Māori descent-based groups with multicultural liberal philosophy.

Part IV of this article examines three possible justificatory models. The first is the notion of iwi as corporate entities, parties to an ongoing contractual relationship, with restitution owing for past breaches (the "contract model"). However, this model fails to take into account the post-Treaty settlement phase, where the Crown–iwi relationship extends beyond past grievances. The second is to consider the Treaty of Waitangi as an enduring constitutional document which enshrines tikanga values as part of New Zealand's constitution (the "enduring contract model"). However, this model encounters the same difficulty that whanaungatanga itself encounters — it is incompatible with liberal principles of ongoing autonomy. The third model is the "function model," whereby the status of iwi can be justified depending on whether they are performing a "tribal" or "political" function. This is the model adopted by the Supreme Court of the United States. The contradictory nature of United States Supreme Court case law demonstrates the unworkability of this model.

In light of the failure of these models, scholars such as Kirsty Gover have fallen back on a "pragmatic" approach (analysed in Part V).[5] Gover conceives of group membership as a matter for democratic boundary theory, whereby the limits of justice are determined *before* its contents are examined.[6] She correctly points out that, when viewed through this lens, Indigenous descent-based organisation is no different from the liberal confinement of rights distribution to citizens of a particular polity.[7] This approach is helpful, yet it need not be exclusively pragmatic.

Instead, democratic boundary theory yields a *principled* way forward, anchored in the value of autonomy, a value promoted by both liberalism and iwi membership. Despite the prima facie illiberal nature of iwi membership, the values of whakapapa and whanaungatanga promote the autonomy of iwi members. The central thesis of this paper is that when descent-based groups are understood in this light — and Māori who lack defined whakapapa are adequately provided for — it can foster autonomy, and thus be reconciled with liberalism.

Before embarking on this argument, an important caveat is necessary. This article proceeds on the basis that liberal justice is a relevant metric of justice insofar as it forms the basis of the principles of New Zealand's constitution: democracy and individual rights. Ideally, New Zealand will one day review its constitutional arrangements to acknowledge Indigenous sources of government and authority. But for the present, insofar as it promotes acceptance of tikanga principles within a predominantly liberal system of government, there is value in locating tikanga Māori within the legitimising framework of liberal democracy.

<www.waitangitribunal.govt.nz/claims-process/>, particularly "After the Hearing" (29 March 2017), *Waitangi Tribunal*, online: <www.waitangitribunal.govt.nz/claims-process/after-hearing/>. (Continued on next page.)

See also "Settling Historical Treaty of Waitangi Claims", *New Zealand Government*, online: <www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/settling-historical-treaty-of-waitangi-claims/>.

5 Kirsty Gover, "When Tribalism Meets Liberalism: Human Rights and Indigenous Boundary Problems in Canada" (2014) 64 UTLJ 206 [Gover, "When Tribalism Meets Liberalism"].

6 *Ibid* at 219–227.

7 *Ibid* at 208.

II The Role of Descent and Iwi in Tikanga Māori

This section examines the fundamental importance of descent as an organising principle in tikanga Māori and sets out its fundamental conflict with liberal philosophy.

Iwi are the structural units of descent-based tikanga. They are constituted by whakapapa (descent), and they order legal obligations through whanaungatanga (obligations of kinship).[8] This contrasts with liberal principles, whereby it is choice, and not birth, which shapes obligations. Legal incorporation of groups constituted by descent, therefore, sits uncomfortably alongside Western law.

Whakapapa: Iwi as Descent-Based Groups

Iwi are among the most powerful of Māori organisations. While other structures — including Urban Māori Authorities (UMAs) and pan-tribal organisations — have gained prominence in recent years, the majority of governance devolution functions, special rights, and all Treaty of Waitangi settlements[9] remain the domain of iwi, hapū (subtribe), or pan-iwi collectives: all descent-based entities.[10]

The central constitutional principle of iwi is that they are descent-based. They draw on linear intergenerational modes of ancestry — both concrete and mythological — to determine their membership. Obligations within and between iwi are ordered by modes of ancestry. These may include interpersonal obligations, such as restitution for inappropriate actions (muru or utu), or relationships with bodies outside the iwi, such as the natural or Pākehā (settler) worlds. These principles date back to the earliest precedents of tikanga Māori. As the Waitangi Tribunal has surmised:

> Its [tikanga's] defining principle, and its life blood, was kinship … with the elements of the physical world, the spiritual world, and each other. The sea was not an impersonal thing, but an ancestor deity. … Kinship was the revolving door between the human, physical and spiritual realms. … They enabled human exploitation of the environment, but through the kinship value (known in te ao Māori as whanaungatanga) they also emphasised human responsibility to nurture and care for it (known in

8 As defined in Joseph Williams, "The Harkness Henry Lecture: Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato LR 1.

9 The Treaty of Waitangi was signed between the Crown and Māori in 1840. Since the 1990s, the New Zealand government has recognised an obligation to negotiate in good faith with iwi to provide compensation for breaches of the Treaty.

10 Over time, iwi have come to supplant hapū as the dominant delineated group within tikanga Māori. See the affidavit of John Winiata in the case of *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission,* [2000] 1 NZLR 285 (HC), cited in Paul Meredith, "Urban Maori as 'New Citizens': The Quest for Recognition and Resources", (2000) [unpublished, available online at <lianz.waikato.ac.nz/PAPERS/paul/URBAN%20MAORI.pdf >:

> I have been asked to talk on what is an iwi and how it is represented. That is a problem because traditionally iwi meant just 'the people'. It was regularly used as 'te iwi Maori me te iwi Pakeha', the Maori and the Pakeha people. 'Iwi' could be used for the people of a hapū, the people of a district or the people of a country. It could be used for rich people, the poor people, the people of Auckland or whatever. When we talked of tribe we spoke of hapū.

te ao Māori as kaitiakitanga).[11]

Thus, whakapapa and whanaungatanga are so central to tikanga Māori that they structure not only interpersonal, but also global relationships. All legal organisation flows from descent. Carwyn Jones cites whanaungatanga as the constitutional principle regulating relationships between individuals; communities; the individual and the collective; past, present and future generations; people and atua (gods); and people and the natural world.[12] As Williams J puts it:

> … whanaungatanga was, in traditional Māori society, not just about emotional and social ties between people and with the environment. It was just as importantly about economic rights and obligations. Thus rights depended on right holders remembering their own descent lines as well as the descent lines of other potential claimants to the right. Whakapapa was both sword and shield wielded by Māori custom lawyers. It remains so today.[13]

In tikanga, whakapapa is not an arbitrary principle or accident of birth. A person's birth into a particular whanau (family) generates legal consequences. It shapes the relationship between the individual and the community. It determines to whom an individual owes obligations, and which communal narrative — beginning with Ranginui and Papatūānuku, the first gods — a person is shaped by. Whakapapa is central to the worldview of Māori, collectively and individually. It bridges te ao wairua (the spiritual world) and te ao mārama (the material world) by providing genealogy and natural order.[14] Thus, legal and social organisation is regulated by descent: membership in iwi specifically and te ao Māori generally is determined on the basis of birth, not choice. It is a constitutional principle.

A principle of this sort is not unique to Māori iwi. Gover demonstrates that descent plays an integral role across a wide range of Indigenous polities. For example, of 245 United States Indigenous tribes surveyed by Gover, 44% use linear descent to determine membership, and 70% use blood quantum.[15] This qualification of tribal membership has also received recognition from the Pākehā domain and the common law: the Crown defines its primary partners as "large *natural* groups",[16] while the Privy Council has defined iwi as "tribes claiming descent from a common ancestor".[17]

While there are other relevant principles in determining iwi membership, they generally will not suffice independent of whakapapa and will not grant full

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11 NZ, Waitangi Tribunal*, Ko Aotearoa Tenei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Wai 262* (Wellington: Legislation Direct, 2011) at 5.

12 Carwyn Jones, "A Māori Constitutional Tradition" (2014) 12 NZJPIL 187 at 191.

13 Williams, *supra* note 8 at 4.

14 Māori Marsden, *The Woven Universe: Selected Writings of Rev. Māori Marsden* (Wellington: Marsden Estate, 2003) at 31–56.

15 Kirsty Gover, *Tribal Constitutionalism* (Oxford: Oxford University Press, 2010) at 132 [Gover, *Tribal Constitutionalism*].

16 NZ, Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Wellington: Office of Treaty Settlements, 2015) at 31, online: <www.govt.nz/assets/Documents/Red-Book-Healing-the-past-building-a-future.pdf> [emphasis added].

17 *Manukau Urban Māori Authority v Treaty of Waitangi Fisheries Commission*, [2002] 2 NZLR 17 (PC) at para 2 [*Manukau Urban Māori Authority*].

membership rights. For example, ahi kā — title to land through occupation; literally "the fires of occupation" — requires that, in order to maintain iwi membership, an individual must exercise some form of attachment to the iwi and its rohe (tribal area). Historically, some have suggested that migration between iwi and hapū on the basis of ahi kā was possible. The precise balance of the importance of ahi kā and whakapapa varies between various tribal entities, but ahi kā is generally a secondary requirement.

Furthermore, membership granted other than through whakapapa is generally less than full membership. While most iwi will grant some form of membership to spouses or whāngai (adopted or foster children) of members, this is likely to be differentiated from whakapapa membership to a greater or lesser extent.[18] The use of whakapapa as a constitutional principle means that iwi have significant entry barriers: it is difficult to attain iwi membership except through birth.

Classical Liberalism and Descent-Based Groups

Classical liberal thought has long been resistant to the idea of special rights and obligations based on descent. As Will Kymlicka explains, classical liberalism:

> … is characterised both by a certain kind of *individualism* — that is, individuals are viewed as the ultimate unit of moral worth, as having moral standing as ends in themselves, as "self-originating sources of value claims"; and by a certain kind of *egalitarianism* …[19]

Accordingly, the notion that rights may be afforded to a group rather than to members as individuals is an uncomfortable one for classical liberals. Similarly, the notion that people may be treated differently on the basis of their membership in a group is inimical to classical liberalism's notion of egalitarianism, particularly when differential treatment or rights derive from birth. To classical liberals, disparities in birth are nothing more than an accident.

The resistance to descent-based rights and obligations is evident in many features of Western law. Rather than being generated by kinship, duties are established by contracts agreed to on the basis of individual autonomy. Individual consent is a paramount value in both civil and criminal law. Human rights law generally rejects the idea that different treatment may be justified on the basis of group affiliation.[20] Elizabeth Rata succinctly expresses the popularly held rejection of group rights. She argues that Aotearoa/New Zealand must decide between tribalism and "democracy" (a term she uses interchangeably with liberalism), claiming that:

> The incompatibility goes deep into the very structure of politics. Tribalism is based on principles of inequality. Democracy is based in equality. Kin status is what matters in the tribe; citizenship is the democratic status. Tribalism is exclusive. To be-

18 Gover, *Tribal Constitutionalism*, *supra* note 15 at 43.

19 Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) at 140 [footnotes omitted].

20 See *New Zealand Bill of Rights Act 1990* (NZ), 1990/109, s 19(1). Note, however, that there is limited scope for affirmative action recognition of group rights within a liberal framework, as will be advanced later in this paper. See e.g. *New Zealand Bill of Rights Act 1990* (NZ), 1990/109, ss 19(2) and 20.

> long you must have ancestors who were themselves born into the system. Democracy by contrast includes people from all backgrounds.[21]

On this view, individual citizenship is privileged over kinship — or whakapapa — as a fairer determinant of rights and power.

Multicultural Liberalism

Multicultural liberal theorists have taken a more flexible approach to the accommodation of group interests. These liberals, proponents of "liberal multiculturalism," have adapted the central values of classical liberalism — freedom and autonomy — and examined how cultures can maximise these values. While these theorists are still concerned about enhancing individual freedom and autonomy, liberal multiculturalists argue that group rights achieve this goal.

Scholars such as Charles Taylor have demonstrated how groups may provide a "cultural context" for individuals in which they can locate their own sense of meaning.[22] Belonging to a particular culture, or possessing a sense of membership, can enable individuals to unlock structures of meaning through which they can live out their own conception of the good. Choice and consent operate through group membership. This provides a legitimate basis for governments to afford particular recognition and rights to cultural groups.

Yet, even liberal multiculturalists are careful to base group membership and rights on *culture*, whilst remaining opposed to rights based on *descent*. For Kymlicka, groups can justifiably be based on and aim to protect culture, but should have minimal barriers to entry. By contrast, descent-based groups — which retain ancestry as an extremely thick barrier to entry —cannot be accommodated. Kymlicka is concerned, in principle, that descent-based groups such as iwi have:

> … obviously racist overtones, and are manifestly unjust. It is indeed one of the tests of a liberal conception of minority rights that it defines national membership in terms of integration into a cultural community, rather than descent. National membership should be open in principle to anyone, regardless of race or colour, who is willing to learn the language and history of the society and participate in its social and political institutions.[23]

Prima facie, it appears that special rights for iwi are incompatible with liberal principles.

III The Status Quo: An Uneasy Accommodation

Despite the uncomfortable relationship between descent-based tikanga and autonomy-based liberalism, iwi are recognized in New Zealand law. This section surveys that recognition in New Zealand statutes and concludes that the recognition given to iwi stems primarily from their role in the Treaty of Wai-

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21 Elizabeth Rata, "Tribalism, democracy incompatible", *New Zealand Herald* (29 January 2013).

22 Charles Taylor, "The Politics of Recognition" in David Goldberg ed, *Multiculturalism: A Critical Reader* (Cambridge: Blackwell, 1994) at 102–110.

23 Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press, York, 1995) at 23.

tangi settlement process. However, as New Zealand enters a new phase in the relationship between government and Māori, a new justification is needed.

A Relationship since 1840: The Treaty of Waitangi

When the Treaty of Waitangi was signed in 1840, the Māori signatories were the rangatira (chiefs) of iwi. For this reason, it is unsurprising that Article Two of the English version of the Treaty provides guarantees for Māori through the formula of "the Chiefs and Tribes of New Zealand".[24] To this day, iwi remain the primary representatives of Māori and partners of government. Treaty settlements are concluded exclusively with iwi, hapū, or pan-iwi collectives. Upon the settling of a Treaty claim, iwi are often given recognition through a specific statute.[25]

Rights may be allocated to iwi as a form of recompense for Treaty breaches. These rights may be financial, or they may allow limited right of governance for iwi over their rohe. For example, the settlement concluded between the Crown and Tūhoe resulted in the *Tūhoe Claims Settlement Act 2014* and *Te Urewera Act 2014*, which grant the Tūhoe iwi certain rights over Te Urewera, a forested area of the North Island. Iwi also assume an important role in New Zealand's customary fisheries regime. This regime was established as a form of redress for breaches of the Treaty of Waitangi. Iwi are the primary beneficiary group of New Zealand's fishing quota allocation scheme: the purpose of the *Māori Fisheries Act 2004* is "the allocation and transfer of specified settlement assets to iwi".[26]

It is clear that the first and most enduring engagement between Pākehā law and iwi has been based on the Treaty of Waitangi. Thus, Treaty rights might be said to have a contract justification: a contract was formed, and breached, necessitating restitution to the aggrieved party. (This is more fully discussed at Part IV below.) However, as the Crown–iwi relationship develops, the backward-looking restitutionary aspects of this relationship are rendered less relevant.

Beyond the Terms of the Treaty

Recently, the legal relationship between iwi and the Crown has gone beyond the parameters of Treaty redress. This is now commonly heralded as the "post-settlement phase".[27] This has given rise to two new forms of interaction between government and iwi. First, there are ongoing quasi-governmental functions arising out of Treaty settlements: a "post-Treaty-settlement" role. Secondly, iwi have been given state-sanctioned responsibilities in a number of areas of law beyond the terms of the Treaty.

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24 *Treaty of Waitangi*, United Kingdom and Māori, 6 February 1840, Article II.

25 See e.g. *Ngāti Porou Claims Settlement Act 2012* (NZ), 2012/31.

26 *Māori Fisheries Act 2004* (NZ), 2004/78, s 3(1). It is acknowledged that it is possible that other entities, such as UMAs, may also benefit from this allocation — see *Thompson v Treaty of Waitangi Fisheries Commission,* [2005] 2 NZLR 9 (CA) [*Thompson*].

27 See e.g. the Law Commission's use of this term in New Zealand Law Commission, *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase, NZLC SP13* (Wellington: Law Commission, 2002).

Post-Treaty-Settlement Role for Iwi

As a result of Treaty settlements, a number of iwi now have rights and powers of a quasi-governmental nature. Examples include the stewardship of Tūhoe over Te Urewera and the Tainui co-management of the Waikato River.[28] These models frequently vest in iwi powers that would typically be held by central or local government, such as environmental management and limited planning control. The theoretical justification for such power is more complex than for "one-off" Treaty settlements, where past breaches of the Treaty are remedied by a financial or land transaction. Post-Treaty arrangements endure long after the breach has been addressed. Instead, they continue to grant legal rights on the basis of iwi membership into the future. An iwi member born after the Treaty breach has been settled will still derive special rights from the arrangement. From the standpoint of liberals who reject the validity of rights arising out of descent, these arrangements are clearly problematic.

Roles for Iwi Beyond the Treaty Settlement Paradigm

Post-Treaty iwi rights may be problematic for liberalism but, to an extent, they can be justified in line with a liberal contractual model. Increasingly, however, iwi are given recognition in New Zealand law even where there is no express link to the Treaty relationship.[29] Recognition of iwi occurs across a wide range of legal frameworks. A key example is the incorporation of the concept of kaitiakitanga (stewardship) in the *Resource Management Act 1991* (*RMA*).[30] This recognises the obligation of the Crown to consider Māori exercise of guardianship, giving iwi and hapū a right to consultation and consideration in their role as kaitiaki. Taking kaitiakitanga into account is an obligation *separate* from the obligation to consider the Treaty of Waitangi.[31] Indeed, the case law is most frequently concerned with the identification of the correct iwi as the relevant kaitiaki, and thus engages with principles of tikanga and whakapapa rather than the Treaty relationship explicitly.[32]

Furthermore, some iwi, such as Ngāti Whātua Ōrākeiand Ngāi Tahu, provide public services such as social housing and other social services for their members.[33] This is in line with a general trend of decentralisation of social services. Many iwi also have governance rights within their rohe.[34] Specific rights

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28 "Waikato River and Waipa River Co-Management", *Waikato Regional Council*, online: <www.waikatoregion.govt.nz/community/your-community/iwi/waikato-river-co-management/>.

29 The recognition of minority rights flowing through iwi is accompanied by Māori rights which derive from recognition of culture, rather than exclusively from Treaty redress. See e.g. the judgement of Elias CJ in *Takamore v Clarke,* [2012] NZSC 116 at 100, where the burial rights of Māori were taken into account. This consideration was justified on a number of cultural grounds beyond solely the Treaty of Waitangi.

30 *Resource Management Act 1991* (NZ), 1991/69, s 7(a).

31 It is instead included in the *Resource Management Act 1991* (NZ), 1991/69, s 8.

32 See for example *Friends and Community of Ngawha v Minister of Corrections,* [2002] NZRMA 401 (HC); *Auckland Regional Council v Arrigato Investments Ltd,* [2001] NZRMA 158 (HC).

33 Marta Steeman, "Privatised social housing to benefit tenants" *Stuff* (18 May 2013), online: <www.stuff.co.nz/business/budget-2013/8687996/Privatised-social-housing-to-benefit-tenants>.

34 It should be noted that these relationships are also often pragmatic, in that iwi are often best placed to provide these services. See e.g. Local Government New Zealand, "Iwi Leaders and Local Government New Zealand Memorandum of Understanding" (6 August 2015), online: <www.lgnz.co.nz/home/news-and-media/2015-media-releases/iwi-leaders-and-local-

for iwi may also be found in family law,[35] maritime law,[36] and biosecurity law.[37] None of these contexts make reference to iwi rights flowing from a Treaty settlement. These non-Treaty rights cannot be justified solely on the basis of the Treaty of Waitangi. The remainder of this article examines the possible foundation for a different theoretical justification.

IV Can the Systems be Reconciled?

Given the liberal underpinnings of dominant Western political theory, the recognition of iwi rights has the potential to create a difficult conflict of values. Can special rights for iwi be compatible with multicultural liberalism?

Reconciling Two Worlds

Liberal multiculturalists have gone some way in justifying accommodation of illiberal minorities.[38] Yet, there is surprisingly little literature addressing the question of how groups whose very *constitutive principles* are prima facie illiberal ought to be accommodated.

Scholarship and judicial dicta present a number of possible solutions, which are explored in this section. The first three are unsatisfactory. The fourth is also unsatisfactory, but it provides a useful starting point for the solution this paper proposes. The solutions are:

1. To place iwi rights within a framework of political group redress, whereby the question of iwi rights is therefore not a question of multiculturalism;
2. To consider that iwi rights arise from an enduring compact created by the Treaty of Waitangi, which extends indefinitely;
3. To classify iwi as "political", rather than "descent-based" groups, thus making them more palatable to liberals; or
4. To explain iwi through democratic boundary theory, and thus expose the hypocrisy of liberal systems in excluding them.

The solution proposed by this article builds on democratic boundary theory. Iwi membership, mediated by the principle of whakapapa, is empirically autonomy maximising. This allows it to be comfortably reconciled within a liberal multicultural framework.

Redress versus Multiculturalism

When a wrong is done to a particular group, it is relatively uncontroversial that the wrong be righted through a process of redress. Such a notion is inherent in English contract and tort law,[39] and in tikanga (embodied in the notion of utu).

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government-new-zealand-sign-memorandum-of-understanding/>. See also e.g. Local Government New Zealand, "Local Authorities and Maori: Case Studies of Local Arrangements" (28 February 2011), online: <www.lgnz.co.nz/assets/Uploads/Our-work/CME-000000507784.pdf>.

35 *Children, Young Persons, and Their Families Act 1989* (NZ), 1989/24, s 5; *Vulnerable Children Act 2014* (NZ), 2014/40, s 6.

36 *Maritime Transport Act 1994* (NZ), 1994/104, s 33B.

37 *Biosecurity Act 1993* (NZ), 1993/95, s 72(1)(c).

38 See e.g. Will Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd ed (New York: Oxford University Press, 2002) at 327–376; Chandran Kukathas, "Are There any Cultural Rights?" (1992) 20 Political Theory 105.

39 See e.g. the classic statement in *Ashby v White* (1703), 92 ER 126 at 137.

If the provision of certain rights to iwi is merely a form of redress, it has a principled justification within liberal theory. It is tempting to place iwi within this redress framework. The Treaty of Waitangi — through its language in Article Two — clearly guarantees iwi the right to undisturbed possession over their lands. The settlement process that has sought to remedy breaches of the Treaty has naturally made redress to those groups provided for by the Treaty: iwi. To that extent, the rights afforded to iwi by the Treaty process are not special rights, but instead are merely contractual. This explanation is further bolstered by the fact that, as noted above, many iwi rights have been won in the Treaty settlement process.

However, this contractual model is an inadequate explanation of the nature of iwi rights. While it is true that iwi receive rights as a direct form of redress for past grievances, the iwi–Crown relationship goes further than this. Many rights are granted to iwi out of future-looking obligations arising from the Treaty. Post-Treaty rights will continue long after settlement negotiations conclude. The justification for such provision may be rooted in the Treaty, but it does not directly arise out of a breach — instead, it arises out of recognition that the Treaty requires the Crown to actively protect the culture of individual iwi. Both Crown and iwi recognise that the protection of language (for example) is required, not simply out of historic obligation, but a continuing recognition of the value it holds. This is far more akin to a forward-looking cultural right than a backward-looking right of redress.

Furthermore, many rights exercised by iwi have little direct connection to the Treaty. This is true of the non-Treaty rights discussed above; rather than any explicit link to the past, they shape ongoing and forward-looking obligations. These functions are likely to continue into the future, as government functions are devolved to iwi in an age of decentralised public management.[40] The provision of housing and other social goods — either exclusively to iwi members, or in lieu of central government — and the rights afforded to iwi as statutorily-recognised kaitiaki or representatives in local government, are not specifically tied to past wrongs. Instead, it appears that government has embraced the multicultural rationale for iwi rights, and views them as a valid means of delegating public functions or protecting Māori culture.[41]

An Enduring Partnership

Iwi rights in New Zealand statutes — particularly "post-Treaty" rights — do not generally make reference to the Treaty of Waitangi as their legitimising source. However, the Treaty of Waitangi may be conceived of as a "positive and enduring" partnership,[42] extending beyond a land-based guarantee. The possibility of such a partnership is clearly contained in the text of the Treaty.[43] As noted above, the Treaty of Waitangi guaranteed iwi rights over their land. The Treaty was signed in two languages: English and te reo Māori. The English text of the Treaty promised:

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40 See Williams, *supra* note 8 at 31–32.

41 See e.g. Pita Sharples, "Start a new tradition in Māori Language Week", *New Zealand Government* (1 July 2013), online: <http://www.beehive.govt.nz/release/start-new-tradition-m%C4%81ori-language-week>.

42 See *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641 (HC) at 673.

43 The notion of the Treaty as a positive and enduring partnership is also clearly supported by Court of Appeal *dicta*. See e.g. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General,* [1993] 2 NZLR 301 (CA).

> … undisturbed possession of their [Tribes'] Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess …

In te reo Māori, the guarantee was phrased as:

> … tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. …

One significant variation between the texts is the phrase "other properties" in the English, contrasted against "taonga" in the te reo Māori version. While "other properties" would appear to restrict the Treaty to issues concerning land and tangible property, "taonga" is a much broader classification. It is usually translated as "treasure", but may include:

> Anything prized — applied to anything considered to be of value including socially or culturally valuable objects, resources, phenomenon, ideas and techniques.[44]

The ideology of whanaungatanga, or tikanga Māori more generally, may be such a taonga worthy of protection under the Treaty. [45] The Treaty of Waitangi can be seen as a foundational moment that still regulates constitutional arrangements in New Zealand. It is that constitutional framework, perhaps, that provides the basis of iwi recognition in New Zealand law.

There are two problems with this approach. First, while there is much to be said for the enduring partnership as a normative constitution for New Zealand, this "judicial archaeology" is not a descriptive one. Paul McHugh describes it as "impossibly starry-eyed".[46] As noted above, New Zealand's constitution — empirically — is explicitly liberal. It is based on the notion that the will of Parliament, the embodiment of democratic individualised liberalism, is supreme. Parliament "is omnicompetent and may legislate without restriction on any subject matter".[47] While certain property-based obligations toward iwi have been recognised by the courts in respect of state-owned land,[48] courts have also upheld the orthodoxy that the Crown owes no Treaty obligation unless it explicitly incorporates the Treaty in statute.[49]

The second problem with the "enduring partnership" approach is that, despite the moral — and perhaps even constitutional — appeal of an "enduring partnership", this historical approach sits uncomfortably with liberal perspectives. Liberalism, including multicultural liberalism, is focused on the rights of individuals in the present. At best, the past may explain why an individual re-

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44 Te Aka Māori Dictionary, *Taonga*, online: <maoridictionary.co.nz>.

45 "Taonga" includes intangible concepts such as the Māori language (Te Reo Māori). See Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Māori Claim, Wai 11* (Wellington: Brookers, 1993). Paul McHugh suggests that rangatiratanga, a fundamental principle of tikanga Māori, may be one such protected taonga.

46 PG McHugh, "Constitutional Theory and Māori Claims" in IH Kawharu, ed, *Waitangi: Māori & Pakeha Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) 25 at 45.

47 Philip Joseph, *Constitutional and Administrative Law,* 4th ed (Wellington: Thomson Reuters, 2014) at para 1.6.15.

48 *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641 (CA); *Tainui Māori Trust Board v Attorney-General,* [1989] 2 NZLR 513 (CA).

49 *New Zealand Māori Council v Attorney-General,* [1987] 1 NZLR 641 (CA) at 655 per Cooke P. For a recent example of the application of this orthodoxy, see *New Zealand Māori Council v Attorney-General,* [2013] NZSC 6.

quires a specific form of support to achieve autonomy in the present. It is unlikely ever to be justified as a means of denying rights to individuals. As such, it may justify granting Māori special rights, and it may even be appropriate for iwi to be vehicles for delivery of those rights. The historical rationale for the "enduring partnership", however, is unable to justify the high entry barriers, in the form of descent requirements, that exclude others from iwi membership.

Ethnicity versus Political Entity

The United States offers another possible reconciliation. In two seemingly contradictory cases, the United States Supreme Court considered the clash of descent-based groups and liberalism through the paradigm of alleged racial discrimination. The divergent results in two separate cases demonstrate the difficulty of the Court's approach.

In *Morton v Mancari*, the Court considered a complaint that a policy designed to advance the employment of American Indians in the Bureau of Indian Affairs amounted to illegal discrimination against non-Indian employees.[50] The policy favoured Indian applicants at both the hiring and promotion phases of employment. The Court found that the policy did not amount to racial discrimination. The Court reached this decision by finding that race (as determined by descent) was not the basis of the federal–tribal relationship. Indians should instead be conceived of as a sovereign political entity. The majority of the Court found that:

> The preference, as applied, is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.[51]

The Court thereby concluded that the problem of descent-based discrimination could be surmounted by recasting the group as a purely political actor. It should be noted that this was explicitly linked to the special rights that were being provided; in this case, the opportunity to take on leadership roles in an organisation that in turn governed Indian lives in "a unique fashion". The Court was able to find a way of reconciling discrimination laws — embedded in principles of liberalism — and descent-based indigeneity.

This conception of Indian tribes as "quasi-sovereign" entities, to an extent, incorporates aspects of the New Zealand "enduring partnership" model discussed above. The Supreme Court made several references to the historical relationship between Indian tribes and the United States government.[52] However, it can be distinguished in one important respect. The "enduring partnership" model in New Zealand involves a unitary polity, albeit with special rights for iwi within that polity. The "quasi-sovereign" model, as accepted in Morton v Mancari, recognises Indian tribes as political entities precisely because they are conceived as self-governing.[53]

However, a justificatory model that extends only to descent-based groups that are already self-governing will not protect all Indigenous descent-based groups. The distinction identified in *Morton v Mancari* could not be maintained

50 *Morton v Mancari,* 417 US 535 (1974).
51 *Ibid* at 554.
52 See e.g. *ibid* at 552.
53 See e.g. the discussion of sovereignty as exercised on Indian reservations, *ibid* at 552.

by the United States Supreme Court. A seemingly contradictory conclusion was reached by the same Court in *Rice v Cayetano*.[54] In that case, a petitioner brought a claim of discrimination against special rights for Indigenous Hawaiians to vote in elections for the Office of Hawaiian Affairs. This time, in a 7-2 decision, the Court found that those special rights were discriminatory. The Court explicitly found that discrimination on the ground of descent was no different from prohibited discrimination on the grounds of race; indeed, "ancestry can be a proxy for race".[55] The majority found that even if the Court were to accept that Hawaiians had tribal status similar to Indians, the voting scheme would have been illegal. In a classical articulation of liberal principles, Justice Kennedy endorsed the finding that: "… distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[56] Justices Stevens and Ginsburg, in the minority, instead adopted the *Morton* approach, finding that Hawaiians could be conceived of as a sovereign political entity, thereby entitling them to special rights without invoking the spectre of racial discrimination.[57]

The key distinction, therefore, appears to be whether a particular group or tribal entity has taken on the characteristics of a political sovereign institution. A group that has historically been able to assert rights of self-government is therefore naturally favoured by this justification. If it has, then the allocation of special rights will not be discriminatory, and will instead be seen to serve a valid purpose.

Yet, by the reasoning in *Rice*, where membership of a political institution is underpinned by requirements of ancestry (as was the case for the Indian tribes in *Morton v Mancari*), the special treatment would nevertheless be illiberal and discriminatory. The cases demonstrate a key difficulty faced by multicultural liberalism. When Indigenous groups are conceived of as sovereign or cultural groups, multicultural liberals will find grounds to grant special rights to them, as was the case in *Morton*. However, when the group is revealed to have descent-based (and therefore racial) qualifications for entry, multicultural liberals balk, as demonstrated by the reasoning in *Rice*.

The distinction created by these two cases is illusory. The precise function of tribal groups such as iwi is irrelevant if their constitutive principles themselves differentiate on the basis of descent — for Justice Kennedy, this would still make them "odious to a free people". The Court's approach in *Rice* indicates that the Court has disavowed *Morton*. As the decision in *Rice* illustrates, the protection of Indigenous rights on the basis of tribalism and political constitutionalism is tenuous. Translating Indigenous constitutive membership into a liberal lexicon may avoid the confrontation between two sets of values, but it only leaves that clash to be fought another day. A lasting reconciliation requires a more nuanced analysis.

V A Better Way Forward

These three models of explanation are inadequate. A new framework must be developed in order to provide a meaningful account of the compatibility be-

54 *Rice v Cayetano,* 528 US 495 (2000).
55 *Ibid* at 496.
56 *Ibid* at 517, citing *Hirabayashi v United States,* 320 US 81 at 100 (1943).
57 *Ibid* at 527.

tween liberalism and special recognition of iwi. In doing so, as Gover points out, a useful starting point is to examine what systems of membership are adopted, in practice, by liberal states.[58] This analysis provides the basis for a fourth model, advanced by this article in part V(0) below.

Liberal Hypocrisy

As noted above, a key tenet of liberal membership is its adherence to the value of individual autonomy. Liberal membership is based on consent and advocates minimal barriers to entry. One would expect, therefore, that liberal states *themselves* would have relatively low barriers to entry, and accept prospective members who consent to join. If not, liberal theory can hopefully account for the discrepancy.

In reality, liberal states — including New Zealand — impose strict restrictions on membership. These restrictions are regulated by extensive immigration controls. Immigration law does not embody equality as its central principle, but is instead based on a range of factors that are often beyond the sphere of individual autonomy, including income and wealth, the status of a spouse's membership and, unsurprisingly, descent. The overriding qualification for New Zealand citizenship is the "accident" of being born to a New Zealander.[59] Although it is legally possible to acquire citizenship through other means, migrants experience significant barriers to entry that native-born citizens do not: indeed, it is easier for a person born overseas to New Zealand parents to acquire citizenship than for a migrant living in New Zealand.[60] The barriers to entry may be surmountable, but they are significant nonetheless.

This reality makes a mockery of liberal accounts of legitimate criteria of belonging. The difference between iwi membership and New Zealand citizenship is the strength of entry barriers, not the underlying principle of exclusion. In liberal democracies, citizens are universally granted rights that non-citizens are not, purely on the basis of descent. Indeed, as Ronald Dworkin noted, political obligations in liberal states really arise out of "associative obligations" based on shared "genetic or geographical or other historical conditions".[61] In reality there is little difference between the constitutive principles of iwi and liberal nations.

Boundary Theory

So how do liberals account for this? Democratic boundary theory has been developed to justify the exclusionary nature of liberal polities. It is alarming that these justifications for exclusionary criteria have not been extended to non-Western systems of membership. Boundary theory is, in many respects, an admission that a principled approach to liberalism is not absolutely possible (or, perhaps more accurately, desirable). As Robert Dahl notes: "there is no theoretical solution to the puzzle, only pragmatic ones".[62]

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58 Gover, "When Tribalism Meets Liberalism", *supra* note 5 at 219–227.

59 Note that being born in New Zealand does not automatically qualify a person as a New Zealand citizen. See the *Citizenship Act 1977* (NZ), 1977/61, s 6.

60 *Ibid,* ss 7–8.

61 Ronald Dworkin, *Law's Empire* (Cambridge: Belknap, 1986) at 201.

62 Robert A Dahl, *After the Revolution: Authority in a Good Society* (New Haven: Yale University Press, 1970) at 59, cited in Gover, "When Tribalism Meets Liberalism," *supra* note 5 at 221.

When applied to iwi, boundary theory effectively places the entire question of membership beyond the realm of liberal justice; liberalism cannot provide a principled explanation of exclusionary membership, and therefore must limit itself to an account of justice within that membership. Accordingly, liberalism is vulnerable to the same charge of discrimination that its proponents level against descent-based national minorities. Membership is not an *embodiment* of justice: rather, it is a practical mechanism utilised to describe those who are afforded rights and are *subject* to justice. As Gover points out:

> If both states and tribes distribute birthright membership arbitrarily by measures of descent, race, or blood quantum, and no overarching normative principle can be found … we are invited to contemplate the unsettling conclusion that any grounds of exclusion may be equally as valid (or invalid) as another.[63]

Completely Arbitrary? Searching for Principle

The problem identified by Gover is worrying. Membership is important to conceptions of justice; it determines which individuals and groups in society are granted particular rights. An account of justice that leaves membership to be determined by solely pragmatic factors may be considered arbitrary. To reconcile iwi rights and liberalism, a useful starting point is to search for a principle that is common to both systems, such as the principle of autonomy. There is no question that autonomy forms the bedrock of liberal multiculturalism, as group rights are used as a mechanism to further individual autonomy. Crucially, autonomy, rangatiratanga (sovereignty), and self-determination are more easily accessed by Māori in a framework of iwi membership.

Multicultural liberals are prepared to accommodate illiberal practices where they foster autonomy.[64] This should be no different where membership *itself* may appear illiberal. This is true of iwi membership. Whakapapa is an anchoring principle of Māori identity. It connects individuals with their past, and with other individuals who share a common past. It is no less a part of cultural identity than ritual or language. As Ranginui Walker suggests:

> … the whakapapa of a tribe is a *comprehensible paradigm of reality*, capable of being stored in the human mind and transmitted orally from one generation to the next.[65]

Accordingly, by any ontological multicultural account, iwi are structures of meaning. They provide a "cultural context" that orientates individuals, allowing them to make truly autonomous decisions as to what choices are meaningful.[66] In the Dworkinian sense, iwi are *true* communities: they arise from meaningful bonds between people, regardless of whether they have met one another.[67] As noted above, whakapapa is deeply relevant to ontological choice and freedom. It provides a source of meaning that can only be accessed by a person who is born

63 Gover, "When Tribalism Meets Liberalism," *supra* note 5 at 208.

64 Kymlicka, *supra* note 38 at 327–376.

65 RJ Walker, "A Paradigm of the Māori View of Reality" (Paper delivered at the David Nichol Seminar IX, Voyages and Beaches Discovery and the Pacific 1700–1840, Auckland, 24 August 1993), [unpublished] [emphasis added].

66 Taylor, *supra* note 22 at 102–110.

67 Dworkin, *supra* note 61 at 196–201. Dworkin distinguishes these "true" communities and "bare" communities, noting that true communities with strong associative obligations have greater legitimacy.

into the lineage of descent. By situating a person within a framework of lineage, whakapapa operates to provide context and meaning. As Nin Tomas noted:

> Whakapapa … provides certainty, by anchoring individuals in time and place within a sea of otherwise disparate relationships to offer a sense of intergenerational "belonging". It also provides for long-term planning as the natural progression of unravelling "events," some of which have already occurred and are recorded in tribal ancestries, the rest of which are yet to happen.[68]

Similarly, Sir Hirini Moko Mead added that:

> Tikanga are tools of thought and understanding. They are packages of ideas which help to organise behaviour and provide some predictability in how certain activities are carried out. They provide templates and frameworks to guide our actions … tikanga help us survive.[69]

The New Zealand Law Commission has gone so far as to define whakapapa as "the glue that holds the Māori world together".[70] It structures an individual's place in the world: to other human beings through whanaungatanga and ties of kinship, and to the physical world through the ancestral deities that represent natural phenomena.[71]

Whakapapa is integral to the maintenance of tikanga, a set of cultural norms that guide a person's ontological self-determination. Whakapapa structures the collective entities through which obligations are owed and reciprocated. It places an individual within their iwi and hapū community, through which they exercise their legal personhood as a member of a collective. Without this descent-based context, it is not possible for someone embedded in traditional Māori ways to act through tikanga and thereby achieve a sense of autonomy. It is because of the aim to foster autonomy that multicultural liberalism has come to accommodate cultural practices. As long as a practice truly fosters autonomy — as is the case with whakapapa — it should continue to be accommodated.

In the same way that liberal multiculturalists are committed to allowing illiberal *practices* where they reinforce autonomy, they should also be willing to respect illiberal *membership* where it reinforces autonomy. Not to afford them the same recognition would be to disregard the intrinsic meaning of membership within tikanga. In this sense, iwi membership comports with liberal multiculturalism in a principled manner.

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68 Nin Tomas, "Māori Concepts of Rangatiratanga, Kaitiakitanga, the Environment, and Property Rights" in David Grinlinton & Prue Taylor, eds, *Property Rights and Sustainability* (Boston: Nijhoff, 2011) 219 at 228.

69 Hirini Moko Mead, "The Nature of Tikanga" (Paper delivered at the Mai i te Ata Hāpara Conference, Te Wānanga o Raukawa, 11 August 2000), [unpublished] at 3–4, as cited in New Zealand Law Commission, *Māori Custom and Values in New Zealand Law, NZLC SP9* (Wellington: Law Commission, 2001) at para 72.

70 *Ibid* at para 130.

71 *Ibid* at para 136.

Two Examples

Two examples within existing New Zealand law point to recognition of this principle.

Section 20 of the *New Zealand Bill of Rights Act* states that:

> A person who belongs to an ethnic, religious or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority.

While not explicitly giving rights to iwi, this provision recognizes that for an individual to realise their autonomy, they may need to do so in community with others.[72] The provision legally enshrines the right of such a person not to be frustrated in accessing this right.[73]

Secondly, section 5(b) of the *Children, Young Persons and their Families Act 1989* (*CYPFA*) requires decision-makers to consider the principle that "wherever possible, the relationship between a child and young person and his or her … iwi … should be maintained and strengthened". The Act recognises that a young person's overall autonomy and welfare may be strengthened by group membership, and accordingly the iwi has a special role in the young person's welfare. Section 5(d) of the *CYPFA* places weight on a child or young person's wishes, and section 5(e)(ii) encourages consultation before decisions are made concerning his or her welfare. Section 5 suggests statutory recognition that autonomy and iwi membership are mutually enhancing. The young person's welfare is best served when the frameworks of meaning and autonomy are taken into account. Whanau, hapū and iwi are part of this matrix.

In order to foster autonomy, trade-offs must be made. Liberal multiculturalists have already done so, by accommodating illiberal practices of many minority groups where they create an important cultural context. It is not unreasonable to extend this to ancestry-based membership. Indeed, despite his criticism of descent-based membership as "odious", Kymlicka advocates special rights for "cultural groups", notwithstanding illiberal practices. Yet, despite Kymlicka's comments to the contrary,[74] cultural groups (such as iwi) are almost always underpinned by descent-based membership criteria: indeed, it is the failure to recognise this empirical reality that leads to confusing dicta such as the contradiction between the decisions in *Morton* and *Rice*. The fact that Kymlicka is nevertheless willing to grant special rights to cultural groups indicates a pragmatic willingness to engage with descent-based groups.

When autonomy is placed at the centre of the apparent conflict, it becomes clear that the two systems of membership can be reconciled on a principled basis. Membership boundaries are important because they are the foundation for autonomous decision-making. They are therefore deserving of special state rec-

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72 Andrew and Petra Butler locate the purpose of this section as the "survival and continued development of the structural, religious and social identity." See Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: A Commentary,* 2nd ed (Wellington: LexisNexis NZ, 2015) at 17.22.1, citing UNHRC General Comment No 23, 8 April 1994 at 9.

73 It should be noted, however, that this provision has rarely been utilised in New Zealand. See Butler & Butler, *supra* note 72 at 17.22.10–17.22.11.

74 Kymlicka, *Multicultural Citizenship, supra* note 23 at 22–23.

ognition and rights. Such recognition is a "reasonable limit" on normal liberal principles.[75]

VI Ensuring Inclusion

Of course, granting special rights to groups constituted on principles of descent will inevitably have the effect of exclusion. Not all Māori benefit from affiliation to an iwi, and indeed many Māori — often as a result of past Treaty breaches — are unable to identify their whakapapa. In this sense, special rights *exclusively* for members of iwi who are aware and actively engaged with their iwi membership may have the effect of privileging such groups at the expense of others. Accordingly, it is vital that provision of special rights to descent-based groups are not made to the exclusion of those whose Māori membership is *culturally* constituted. Historically — and perhaps because of the aforementioned influence of redress and the mention of iwi in the text of the Treaty of Waitangi — the affording of rights has been restricted to iwi and hapū. This was made explicit in the allocation of fishing rights in the 1990s: the Privy Council determined that a statutory scheme "for the benefit of all Māori" included only those within the iwi framework.[76]

More recently, greater provision of rights has been made for urban Māori. For example — with regard to fisheries — the Court of Appeal in *Thompson* retreated in part from the Privy Council's decision, finding that:

> … a scheme prepared by the Commission must be designed so that it does not exclude from the possibility of benefit those who are both of Māori *descent* and who *identify* as Māori … An allocation model cannot be seen as being ultimately for the benefit of all Māori, or indeed fair, if there are a group of Māori who identify as Māori but who will not at any stage be able to access the settlement.[77]

Non-descent-based Māori may still derive important structures of meaning from their cultural identity, and accordingly there is an onus on government and iwi to ensure that their autonomy can be appropriately recognised. This is particularly true as Crown-Māori relations enter into a post-Treaty settlement phase. While, in the past, iwi could claim special rights as compensation as Treaty partners, provision of rights for Māori — as noted above — is increasingly likely independent of the Treaty of Waitangi. Kaitiaki rights, for example, are explicitly *separated* from the obligation to recognise the Treaty in the RMA.[78] Devolution of public services to Māori, too, are not predicated on Treaty rights, but rather on the need to provide for Māori or protect specific aspects of Māori culture.

Increasingly, special rights are provided to Māori through a diversity of means. As this paper has demonstrated, there is no intrinsic problem with engaging iwi as part of the rights allocation, but the net must be cast wider than that. The use of geography-based groups, such as UMAs and local trusts, is a

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75 Adopting the language of human rights law, as does Gover, "When Tribalism Meets Liberalism", *supra* note 5 at 208.

76 *Manukau Urban Māori Authority*, *supra* note 17.

77 *Thompson*, *supra* note 26 at paras 153, 157 [emphasis added].

78 Kaitiakitanga is provided for in the *Resource Management Act 1991* (NZ), 1991/69 s 7(a), while the Treaty of Waitangi is included as a discrete consideration at s 8.

valuable way of maximising Māori options for the exercise of autonomy, while still retaining the whakapapa basis of iwi that makes them so important. If the iwi model is to be maintained, it is equally important that Māori are afforded alternative options.

VII Conclusion

Iwi members have frequently been the primary recipient of special rights for Māori. Since they are descent-based groups principally constituted on the basis of whakapapa, there appears to be a prima facie conflict between allocating rights to them, and the principles underpinning the liberal state.

The conflict between these principles is under-theorised. Traditionally, even a multicultural conception of liberalism has been hostile to special rights for descent-based groups. Models that reconcile the competing values, such as the redress, "enduring partnership", and "political entity" models, are unsatisfactory. However, democratic boundary theory provides an important insight by demonstrating that there is little difference between entry barriers in liberal states and descent-based groups. In practice, the difference is one of degree rather than principle.

Furthermore, the impasse between liberalism and iwi membership is surmounted once autonomy is identified as a cardinal feature of both systems. The empirical experience of tikanga Māori in New Zealand demonstrates the central role played by descent itself in providing autonomy for members of iwi. Iwi rights and responsibilities should not be feared by liberals — rather, they should be embraced.