The Right of Indigenous Peoples to Collective Self-determination

by Margaret Moore*

The right of self-determination is usually understood as the right of a group of people to be collectively self-governing. This generally has two aspects, or can be disaggregated in the following way. First, collective self-determination appeals to the democratic doctrine of legitimacy, and involves the claim that members of the group should be able to choose their own government. This is sometimes termed internal self-determination. The second idea is that the community should be able to freely determine its own political status. This term is employed in international law discussions of collective self-determination,¹ and is usually at the heart of indigenous claims to collective self-determination. This collective self-determination can take a number of institutional forms, ranging from independence (from a colonial power), secession (from a larger state), confederation (of two states) and political autonomy within a state, either through delegated power (devolution) or constitutionally protected political autonomy (federation).

This essay explores the normative arguments for giving rights to political self-determination in the second sense, which are employed by, or on behalf of, indigenous peoples, and then considers how these rights might be institutionalized in the state. This paper treats indigenousness as important to the self-identity of members of the group, and as a component of two of the arguments examined here, but not the fundamental basis for a right to self-determination. Although the claim to indigenous status contains a truth-claim concerning first occupancy that, in principle, should be verifiable, this paper doesn’t attempt to assess the veracity of claims to being indigenous.² The rights which flow from indigenousness at the
international level involve all groups who claim to be indigenous in the sense of first occupants of the land and whose claim is generally accepted or not widely disputed.

I have argued elsewhere that the fact that a group in question is indigenous, in the sense of having first occupied the land, cannot straightforwardly be translated into an argument for a right to self-government or jurisdictional control over territory. The first problem with that assumption is related to the fact that human migration is and has been extremely common: many people are descended from people who came from somewhere else, and it would be very difficult and problematic to assign (general) rights to people based on where their ancestors originated. Where people originated may not bear any relation to where or who they are now. Non-indigenous people may feel a strong attachment to the place where they were born and not to the place where their ancestors came from. If we attempt to give some people rights based on where they originated (indigenous people) but diminished rights to those people whose ancestors at one time migrated, we encounter similar problems. If we take the view that any principle or policy should be capable of being justified to the person or group who does worst under it, it is not at all clear that it is straightforward to justify an inferior right to people born in a place but descended from one line of people, whereas others, who are descended from a different line of people and who are therefore indigenous, may have a superior right.

Considerations of equity pose a further complicating factor to claims to entitlement. Suppose that one group has a culture based on slash-and-burn agriculture or nomadic herding, which requires thousands of acres to support a small group of people. There are, it would seem, at least two kinds of arguments for this group's right to collective self-government and jurisdictional authority over the territory. The first is a straightforward argument from
indigenousness: This group has lived on this land for hundreds, perhaps thousands of years, and therefore are rightful owners of this land. Another, slightly more sophisticated argument would go like this: The group has a right to its distinctive culture and the culture requires access to and control over a large amount of territory. However, these arguments, which raise valid points, are subject to other considerations. Suppose, for example, that a non-indigenous group has been stripped of its territory, or its territory has become so degraded or is so resource-poor that it cannot support them, and the thousands of acres reserved for indigenous people is more than sufficient to feed and support all the people, especially if the land was used in a different way. This is not an argument from efficiency: the claim here is not a Lockean one that efficiency grants entitlement; it is merely suggesting that considerations of equity may override such land entitlement. This is particularly the case once the outsider-group has lived on the territory for many years, perhaps even many generations; in this case, it does not seem fair to grant some people superior rights and others inferior rights to the territory on the basis of the line of descent of the two groups.

These difficulties with the appeal to indigenousness do not mean, however, that indigenous status has no moral force whatsoever. Although the claim to indigenousness does not straightforwardly or unproblematically generate rights to self-determination, it is possible to reconstruct an argument that would indicate why collective self-government for indigenous people is justified. However, because this argument is reconstructed within an historical context of dispossession and marginalization by white colonialists, the arguments apply directly to indigenous peoples in the Americas, Australia and New Zealand. It may be the case that the pattern of dispossession and marginalization applies more widely, to Greenland Inuit, to the Sami
of northern Scandinavia, Malays in Malaysia, the Kannadigas of Karnataka state in India, the Bankonjo and Baamba of Western Uganda, the Kinshasa in Zaire, to name a few. That is an empirical question, beyond the scope of the paper. In reconstructing the arguments for indigenous self-determination, the central cases on which this paper is based are the indigenous peoples of the Americas and Australasia.

The bulk of this paper examines three justificatory arguments for indigenous self-determination, which are primarily addressed to the question: Why are indigenous peoples entitled to be self-determining? The first kind of argument attempts to link the right to self-determination to more fundamental values, such as the value of autonomy or equality, which are associated with liberal democracy. The second type of argument is historical: it appeals to a particular version of history, or past event, to construct an argument based on rectificatory justice. The resources and land which are justified on this argument are important elements in the capacity of indigenous peoples to be collectively self-governing. The third type of argument explores indigenous rights as a sub-set of the general right to political self-determination; specifically, it examines the particular history and context of indigenous people to question the jurisdictional authority of the states in which they are incorporated. This argument has two elements: one is rectificatory in so far as political self-government is justified in part as a measure to restore the self-governing status of indigenous peoples prior to colonization; and the second element questions the colonizing state=s legitimate rule over indigenous peoples in so far as the process itself was unjust and the rule involved massive violations of indigenous people=s rights and the attempted destruction of them as a people. The paper suggests that the second and third type of argument can be combined to provide a plausible case for rights to indigenous self-
government. After examining the merit of these arguments, the paper turns to the question of the form that self-determination should take. This raises issues connected to the context in which indigenous people find themselves, the challenges unique to this, and the kinds of institutional forms that are appropriate for indigenous peoples.

1. Why are Indigenous Peoples Entitled to be Self-determining?

1.1 Equality/Culture/Autonomy Arguments: Nations and First Nations

The inherent right [to self-government] is being advocated for a purpose: to protect our identities, languages, cultures and traditions, and to ensure our integrity as peoples... We want to preserve a distinct way of life that has suffered dramatically under Canadian policies of assimilation.

- Ovide Mercredi, National Chief of the (Canadian) Assembly of First Nations.

One of the most popular arguments for indigenous self-determination, at least amongst political theorists, attempts to derive the right of political self-determination from more basic rights, which are generally accepted and relatively uncontroversial in liberal democratic societies. This type of argument typically begins by stressing that groups that do not share in the dominant culture suffer various kinds of disadvantage from their minority status. Will Kymlicka argues that it is harder and more expensive for members of these groups to maintain their culture and so live a life they consider worthwhile. Therefore, some protection B and for national minorities and indigenous peoples this includes a measure of self-government B is necessary to offset the vulnerabilities that attach to being a member of a minority group.

This argument (for equal respect) is not sufficient in itself, since people may be differently (unequally) situated on a variety of fronts, but these might not be considered
important enough to merit protection. Therefore, most exponents of the equality argument also emphasize the importance of culture. Liberal political theorists B the most prominent contemporary exponent of this type of argument B do this by claiming that there is an important, indeed constitutive, link between culture and individual autonomy. The important move in this argument is the claim that culture provides the context from which individual choices about how to live one=s life can be made. According to Miller, AA common culture.. gives its bearers...a background against which meaningful choices can be made.@^9 Kymlicka makes the same point: A[I]ndividual choice is dependent on the presence of a societal culture, defined by language and history.@^10 Not only does culture provide the options from which the individual chooses but it infuses them with meaning.

Since, on this argument, a rich and flourishing societal culture is an essential condition of the exercise of individual autonomy, which liberals value, liberals have a good reason to adopt measures that would protect culture. Although this argument has only demonstrated that the existence of (some) flourishing cultural structure is necessary to the exercise of individual autonomy, but not a particular culture, proponents of this argument offer empirical evidence attesting to the Adeep bond@ that most people have to their own culture. In this way, they suggest that people have a Alegitimate interest@ in not having their inherited culture damaged against their will and to suggest that one way, indeed sometimes the only way, to Aprevent this is to use the power of the state to protect aspects that are judged to be important.@^12

This argument is useful in highlighting the problematic nature of the claimed neutrality of the liberal state, the threat posed when minority groups are forcibly included as equal, undifferentiated individuals in a state with a different majority (dominant) culture, and people=s
legitimate interest in protecting their inherited culture. Further, this argument goes some way
towards meeting indigenous peoples’ aspirations to be collectively self-governing: the rights
envisioned by Kymlicka and other proponents of this argument would enable national minorities
and indigenous peoples to enact policies that protect their language, give them a measure of
control over education, and other aspects of their cultural and political life.

However, as an argument for indigenous rights, especially if is put forward as the sole
argument for indigenous self-determination, it suffers from a number of drawbacks. First,
according to this argument, culture is valuable insofar as it contributes to the exercise of
individual autonomy. This means that rights to the protection of culture and specifically, rights
to be self-governing over cultural matters are justified only in the cases of those groups, or
those cultures, that value individual autonomy. It seems unfair and counter-intuitive to limit
cultural protection only to groups that protect autonomy. It seems counter-intuitive because,
while the argument ostensibly is designed to give recognition to a particular culture by the state,
or to suggest why a group should be given political autonomy in defence of its culture, what this
argument in fact ends up showing is that this is unjustified in many cases. It justifies political
recognition only when the culture is a liberal one. This seems unfair, because the proponents of
this argument have also pointed out, in the course of making this argument, the extent to which
many people care about their culture, and how people need their culture for making sense of their
life, and giving it structure and meaning.

Further, and relatedly, this argument goes only part way in conferring on indigenous
people the freedom to pursue their own preferred cultural and political life. To the extent that
this argument is grounded on a culturally-transmitted (and not specifically indigenous) value,
which serves as a criteria for testing claims to self-government, it seems to run counter to the
whole point of indigenous self-determination, namely, that indigenous peoples should be the
ones to determine for themselves their central interests and the shape of the institutional
structures that satisfies them.\textsuperscript{13}

Moreover, while this is not a decisive philosophical objection, it is worth noting that this
type of argument is not structured in a way that reflects indigenous peoples’ own understanding
of their claims. This argument subsumes indigenous peoples under the broader category of
national minorities, and argues that they are entitled to the same kind of rights. This is
manifestly not how most indigenous peoples see themselves or their claims. Every term that they
use to describe themselves B indigenous, aboriginal, native, First Nations B emphasizes the fact
that they were the land’s original occupants, that they were once self-governing people who have
a special attachment to the land, and that their rights are inextricably connected to their memory
of being displaced from land to which they are attached. A leading expert on American native
mobilization has claimed that natives= Asense of history is rooted here, in this land, in the
geography of their present. Most forms of Indian political action are explicitly grounded in a
consciousness of that history and... are articulated in explicitly historical terms.@\textsuperscript{14} The equality-
culture-autonomy argument canvassed here does not broach on these questions, or, when it does,
it views these facts as purely causal, to explain indigenous disadvantage or minority status, but
not as a morally relevant basis for self-determination.

By ignoring the historical and territorial nature of most indigenous peoples= claims to be
self-determining, this argument fails to connect indigenous memory with the institutions of
political autonomy justified under this argument. This is not a purely symbolic issue: on the
contrary, the way that indigenous peoples are described as a sub-set of national minorities has a strong bearing on the structure of the argument. Indeed, the argument seems to apply better to the claims of national minorities than indigenous peoples. To see this, consider Kymlicka’s description of a >societal culture<, which is his term for the kind of cultural structure that is closely linked with the exercise of autonomy. A societal culture is defined as a culture whose practices and institutions cover the full range of human activities, encompassing both public and private lives. He elaborates that a societal culture provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational and economic life, encompassing both public and private space. These cultures tend to be territorially concentrated and based on a shared language...[and are] institutional[ly] embodied in schools, media, economy, government, etc. To create, and maintain, a societal culture is, Kymlicka correctly says, an immensely ambitious and arduous project. National minorities like the Québécois, the Scots, Basques, Catalans and others can plausibly be said to have a >societal culture<, but many indigenous peoples do not have, and cannot reasonably aspire to, a full societal culture, which encompasses all aspects of life. This is because their original culture has been persecuted and degraded, mainly through the policies of the white settler societies among whom they live. It would require a major transformation in the conditions of their existence to be able to reasonably aspire to such an encompassing culture. To be fair, Kymlicka does not deploy the concept of societal culture to rule indigenous people from his argument for self-government. In fact, he suggests that claims of equality dictate that self-government should be extended to them but it is not clear, first, that the linkage between autonomy and societal culture, which is crucial to the argument, applies in their case; and,
second, why the equality argument is not deployed to grant self-governing rights to other small cultural groups. For this reason, many proponents of indigenous rights think that it is necessary to consider, as the equality-culture-autonomy argument does not, the historical nature of indigenous marginalization and the injustice attached to their continuing inequality and deprivation.

*Historical Arguments*

The history of the relationship between indigenous and non-indigenous peoples is contested terrain, which is nowhere illustrated better than the controversy surrounding the quincentenary celebration of Columbus’s *Adiscovery* of the Americas in 1492. While there is, undoubtedly, a political element surrounding historical interpretation, the basic facts of indigenous dispossession, marginalization, conquest and colonization in the Americas and Australasia are undisputed.\(^{18}\)

It is not necessary to paint a Golden Age picture of pre-Columbian indigenous societies in order to appreciate the multitude and variety of cultures of the first peoples of the Americas, whose communities ranged from the frigid Arctic barrens to the tropical Amazonian rainforests. Their cultures were extremely varied, from the ceremonial and hierarchical political systems in the Coastal rainforests of contemporary British Columbia and Washington state to the egalitarian societies of the Iroquois, the Cree and many indigenous peoples of the southwest United States. There were sophisticated political empires in the Andean highlands and highly developed cities, such as Tenochtitlán in the Aztec empire\(^ {19}\), as well as Inuit hunters who followed the caribou and erected shelters for themselves as they moved. The story of dispossession varies B in some
cases, indigenous peoples were enslaved;\textsuperscript{20} decimated from disease; and deliberately exterminated. There are many documented cases of deliberate destruction perpetrated on them by non-aboriginal people: the killing of hundreds of Lakota men, women and children at Wounded Knee is perhaps the best known in American history,\textsuperscript{21} but there are numerous instances where indigenous people were deliberately destroyed as obstacles to white settlement.\textsuperscript{22}

In many parts of the Americas, there were forced transfers of indigenous populations to "make room" for non-indigenous peoples, as with the Cherokees,\textsuperscript{23} but also the confining of indigenous peoples, especially in Canada, the United States and Australia, to small reservations.\textsuperscript{24} In all cases their colonization within political systems marked indigenous peoples as inferior: they were classified as wards, incapable of agency, and found themselves in a tutelary relationship, where they were subject peoples, whose very identity and world (landscape) was defined by non-aboriginal peoples, who attempted to assimilate them.

These historical facts are relevant to the indigenous case for political self-determination in two ways. First, the historical story of theft and dispossession underwrites the reparative claim for additional resources and authority over territory that is implicit in most claims for indigenous self-government. Second, the fact that indigenous peoples constituted self-governing communities who were subjugated and marginalized is an important factor in assessing the legitimacy of the state to make rules over them.

1.2: (Historical Arguments): Prior Dispossession and the Claims of Rectificatory Justice

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and
informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

- Article 27 of the Draft Declaration on the Rights of Indigenous Peoples

One prominent argument deployed in the context of claims for indigenous self-determination begins by establishing a link between the historical treatment, and especially dispossession, of indigenous peoples and their on-going disadvantaged status.

Many indigenous peoples, particularly in Australia and the Americas, are economically and socially marginalized, with lower literacy rates, lower socio-economic status, and higher mortality rates than the population as a whole. This in itself suggests that they should, as a matter of justice, be entitled to additional resources and help from the larger society. However, concentrating on the marginalized position of indigenous peoples from a strictly distributive justice perspective misrepresents their claims and arguments. Like most victims of injustice, indigenous peoples tend to stress the importance of remembering what occurred, in part because the past injustice continues into the present (they are still without their land) but also because their own individual self-identity as a member of the group is bound up with the kinds of things that happened to the group, and this is partly constitutive of the kind of group it is. A crucial element of this argument is the point that their current poverty and marginalization is the direct result of the past injustice that they suffered at the hands of the white colonialists. The fact that indigenous peoples were defrauded and expropriated brings with it some responsibility on the part of the non-indigenous population to take steps to rectify this injustice.

The dispossession of native peoples weaves itself into native claims for additional rights and especially rights over territory in both arguments based on treaty rights and arguments based
on rectificatory justice. The first kind of argument focuses on treaty rights and, specifically, on the fact that in many cases treaties were made but not honoured, or were eroded by later judicial action. There is a long history of broken promises in the relationship between indigenous and non-indigenous peoples: the American government has unilaterally abrogated certain treaties with Indian tribes;\textsuperscript{25} the New Zealand treaty of Waitangi signed by Maori chiefs and British colonists was declared a \textit{simple nullity} in 1877 (although its status has very recently been reinterpreted);\textsuperscript{26} the language and land rights guaranteed to the Métis under the Manitoba Act of 1870 were rescinded by white anglophone settlers, once they became a majority. Other treaty rights, of small communities, have never been honoured.\textsuperscript{27} Obviously, any society that is based on the principle of the rule of law has to take seriously the evidence that indigenous people have legal claims to land or resources that are currently not being honoured.

In many cases, however, indigenous peoples did not sign treaties with the white settlers, or the treaties that they signed were clearly unfair. In many cases, indigenous peoples were reluctant to sign the treaties that the European colonists offered them, because they did not think that these treaties adequately provided for their people. Some treaties were signed only when many members of the indigenous communities were sick or starving or otherwise reduced partners. Although implicit in the treaty-making process is recognition of the need for mutual respect and mutual consent, many of the treaties signed do not represent a fair or just basis for inter-communal relations. Because the historical treaties may not apply, or may not represent a just basis for agreement, it may be necessary to move beyond the issue of a purely legal entitlement to additional land or resources and consider claims based on a conception of rectificatory justice.
This brings us to the second way in which historical arguments intersect with the claims of justice. In many cases, the disadvantaged status of indigenous peoples is a direct result of the actions of non-indigenous societies and of the state in which indigenous peoples are incorporated. Where the link between contemporary inequality and past oppression is causal in this way, dominant groups have a collective responsibility not only to dismantle the institutions and processes that marginalize native peoples but also to address the inequality that they experience. Of course, the memory of oppression may be more vivid for its victims than for members of the dominant society, and the meaning of the oppression may also be different. This is because the experience of oppression helps to mobilize the victimized group, but is not a defining experience for the dominant group, and is often not conceptualized as a group-based action at all. Nevertheless, in the case of indigenous peoples, there are objective sources of evidence—law, documents, as well as narratives that can be corroborated—that the group had been oppressed, stolen from, discriminated against, and this can be causally related to the group’s current experience of poverty and marginalization.

In some ways, the structure of this argument for reparative claims on behalf of the community is similar to the claims for reparation made on behalf of individuals who have been dispossessed or are victims of injustice. The basic moral and legal idea is that people should be recompensed for the injustices that they suffer. However, there is a question of whether it is legitimate for collective bodies or communities (tribes, nations, corporations, inter-generational associations) to make claims of this kind. The individual members of the community who actually suffered such wrongs may be quite different from the ones now seeking recompense, and of course the compensators may also be different people.
The two basic criteria for identifying when a group has a strong moral claim for group-differentiated rights, especially rights to additional resources, help to address this concern. The criteria are: (a) the group must be disadvantaged in comparison to other social groups; and (b) there must be an objective history of discrimination and oppression, which can be connected to their present disadvantaged status. These criteria avoid two different kinds of problems. First, it avoids problems attached to tracing actual or biological descent of peoples. Even where it is possible to establish prior possession and wrongful taking of land, for example, there are serious difficulties attached to actually tracing lines of descent. This is clearly problematic: the idea that people may be entitled to differential rights because of their ancestry or line of descent sits uneasily with the idea that people can only be responsible for their own actions. The argument advanced here, however, avoids this difficulty because it does not require that we trace actual biological descent, but only that we are able to identify the group that suffered the injustice. The justification for this strategy is that, in many cases, the oppression or discrimination occurred on a group basis: these were not random acts committed by one individual agent against other individuals, but involved actions aimed at members of a group precisely because they were members of the targeted group. Second, this argument does not suggest that people should be held responsible for the decisions or actions of their ancestors. The key issue is that the non-indigenous population of the Americas and Australasia have gained advantages from the historic injustice done to indigenous peoples, and this explains the obligation to try to make up for it in some way, and to rectify this injustice.

Moreover, the requirement that there is a demonstrated causal relationship between current disadvantage and prior discrimination and dispossession tends to rule out the most
counter-intuitive cases for additional resources based on prior injustice. Irish-Americans who came to the United States during the 19th Century potato famine suffered from group-based discrimination but it would be counter-intuitive and wrong to compensate their descendants for the sufferings of their Irish great-grandparents, because the recipients did not actually suffer the discrimination nor did they suffer from the effects of that past discrimination. In fact, Irish Americans as a group have done extremely well in the United States, and there is no evidence of a lasting adverse effect of that period of discrimination on the fortunes of descendants of Irish-Americans. This is clearly different from the situation of indigenous peoples, whose current disadvantage is directly related (caused) by their prior dispossession. Indeed, in their case, the current unequal state of affairs can be explained in historical terms; and the continuing failure to address the inequality or the disadvantage represents a continuing source of injustice. There is no suggestion here of actual responsibility for the actions of ancestors but only recognition of the complex relationship between past events and unfair starting points, and the way in which institutional structures can continue to marginalize certain groups.

This argument feeds into arguments for self-determination by justifying indigenous peoples' entitlement to additional resources; and economic resources, including land, control over natural resources, and straightforward transfers of money, are an important element in meaningful self-government. Moreover, as Allen Buchanan has pointed out, with respect to treaty rights, it is difficult to uphold the land claims typically specified in treaties that indigenous people signed without also envisioning some form of collective self-government.32

In so far as this rectificatory justice argument is framed in terms of economic marginalization and inequality, it seems able to justify additional economic resources fairly
straightforwardly. However, it is not the knockdown argument that some of its proponents assume. One problem is that many attempts to rectify historic injustice or move to the *status quo ante* will involve committing even more injustices. This is because people build a pattern of expectations and attachment to land and goods that they are in possession of. Restoring this land or these goods to the original owners may create new, equally serious kinds of injustices. Waldron has contended that this is one of the main arguments underlying the view that injustice can be superceded with the passage of time.\(^{33}\) This is not an argument to do nothing: there are things that can be done to make amends for past injustices and ensure that the poverty and disadvantages facing indigenous peoples are addressed. The non-indigenous majority should agree to institutional structures that recognise indigenous peoples’ attachment to land, and need for additional resources. But it means that there can be no return to the original state of affairs, prior to the unjust dispossession of indigenous peoples. There can only be some 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 dispensation to other peoples who now also live in these lands.\(^{34}\)

One problem with the idea of reparations for historical injustices committed against a particular group, especially when the reparations must be of a limited nature, as in this case, is that it fails to address the on-going marginalization of indigenous peoples. Reparations are insufficient because they are similar to small affirmative action programmes meant to *restore* to a group some element of what is taken from them. To the extent that they are temporary and distributive, they fail to address the overall context of injustice that may continue to operate even after reparations are made. As the sole means to address injustice, they are conservative in the
sense that they do not challenge the overall structure of the society, which may be paternalistic or racist in profound ways. It is important therefore that the redistribution of resources, conceived of as a form of reparations or justified on the grounds of rectificatory justice, much be combined with institutional reform of the political and social systems of contemporary societies. Some element of rectificatory justice is necessary, because indigenous people were unfairly dispossessed. It is also an important element in an argument for indigenous self-determination because access to resources and redistribution is an important background condition for the meaningful exercise of collective self-determination.

1.3 Colonization, Dispossession and Jurisdictional Authority

In 1864, the descendants of the people who arrived here five hundred years ago took it upon themselves to forge a constitution without us. It became the British North America Act of 1867. In this Act, the federal government gave itself the power over AIndians and lands reserved for the Indians@. It did not ask us if we agreed; it just assumed power over our peoples. We were not even there when the decision was made. We must ask ourselves, ABy what right did they get that power and how have they used it?@ These questions are critical to our future relationships with this nation. - Ovide Mercredi, National (Canadian) Chief for the Assembly of First Nations

This brings us to the third argument for self-determination rights, which questions the current state@s claims to jurisdictional authority. The two arguments canvassed above need to be supplemented by an argument concerning the jurisdictional authority of the state. Both the culture argument, and, even more, the injustice argument, could suggest a number of different remedies, not only collective self-government. Other rights, which are typically argued for on some kind of culture or equity grounds, are rights of access to sacred sites, ancestral bones,
cultural artefacts or burial grounds; rights to education in their own language and schooling about
the ways of life of their own culture; the right to hunt or fish in their traditional territory; or the
right to employ their own standards of evidence or acceptable argument or punishment practices
in the legal system; or a right to full participation at all levels of political decision-making which
might affect their interests. This paper is not concerned with all these claims to group-
differentiated rights, but only those arguments that bear on the issue of political self-
determination. Ideally, the argument should also show why collective self-determination is
necessary, not only in the sense that it is a means to address the cultural and economic
disadvantage that native peoples suffer (the other rights are also conceived of as remedies), but
also show directly why jurisdictional authority for indigenous peoples is morally necessary.

One argument for collective self-determination invokes considerations of the kind put
forward by Mill in relation to the liberty principle. Mill argued in *On Liberty* that each
individual is most interested in his or her own well-being and so should be entrusted with rights
to protect him or her from interference in making decisions over his or her own life. Margalit
and Raz, in their argument justifying political self-government for groups within the state, have
extended this argument to groups: just as the individual person is in the best position to decide
how to arrange his or her life, so Amembers of a group are best placed to judge@ the interests of
the group. This may not be a conclusive argument but it does offer good reasons for a
presumption in favour of collective autonomy or self-government as a means to address group
disadvantage.

Of course, whether a group is able to make decisions in its best interests will depend upon
the nature of group decision-making. In fact, unless the decision-makers represent, and are
accountable to, the whole group, it is a mistake to say that self-government is really government by the group. In order for the Millian argument to work, we must assume that the decision-makers are representative of the group and that there are institutional mechanisms to ensure their representative and accountable nature.

The basic point implicit in this argument B that groups are in the best position to judge their own interests and so should be given the requisite resources and jurisdictional authority to resolve their own problems and overcome the disadvantages that they face B presses on a very closely related argument for collective self-government for indigenous peoples. The idea is not simply that the groups themselves are in a good position to make decisions over their own life, but that the state in which they are incorporated has manifestly failed to work in the best interests of indigenous peoples. This fact raises serious questions connected to the assumption that the state is entitled to make decisions over the lives of indigenous peoples.

This issue (of jurisdictional authority) lurked behind the previous argument concerning dispossession and injustice, because, in many cases, indigenous peoples lack legal entitlement because their claims and their holdings were not recognized by the conquering regime, which forcibly incorporated them. This suggests, first, that indigenous peoples were once self-governing communities, who governed themselves according to their own practices, and, second, that the conquering and colonizing regime often did not treat their claims fairly.38

From a liberal-democratic perspective, the process by which indigenous peoples were colonized and dispossessed was morally wrong. It is relevant to their claim to collective self-government that this process involved silencing and excluding indigenous peoples and stripping them of the institutions of self-government that they enjoyed prior to colonization. Just as the
history of imperial powers= relations with the non-white societies that they ruled was done without the involvement of the colonized peoples, so, in the Americas and Australia and New Zealand, the process of settlement and state-creation proceeded without the consent of the indigenous peoples who lived there. From a legitimacy point of view, this is important, first, because, it involves a violation of fundamental principles of democratic governance, but also because it involved the further wrong that it destroyed the self-governing regimes enjoyed by indigenous peoples.  

Democratic governance rejects the view that any particular individual (or sovereign) has a proprietorial right to political authority. The proprietary view was common in the early modern period, when the sovereign was related to the jurisdictional unit that s/he reigned over in a way roughly analogous to the relationship between a property-owner and his/her land: it was something s/he (largely) controlled and was transferred by inheritance, just as individual property-holdings were. By contrast, democratic governance presupposes a distinction between political legitimacy, which resides in the people, conceived of as a collective body, who are the ultimate source of political authority, and the government, which exercises power delegated to it from the people.

An understanding of the bases of state legitimacy is important to the claims of indigenous peoples who implicitly question the authority of the state to govern them. In many cases, indigenous peoples were entirely marginalized from the processes of state-creation, which raises the question of the basis for the state=s authority over indigenous peoples. If the exercise of legitimate authority is based on the principles of democratic will and the sovereignty of the people, then, the current state does not exercise legitimate authority over them.
peoples were entitled, through the same normative principle, to exercise collective self-government in the past, then how, normatively, has this right been extinguished? It is counter-intuitive to suppose that the continued subordination and unfair treatment of indigenous peoples has left them also with fewer (moral) rights, and no longer entitled to collective self-government.

This argument regarding the jurisdictional authority of the state over indigenous peoples typically proceeds through an analogy with imperial forms of authority over societies in Africa and Asia, and the relations between indigenous peoples and white elites in the Americas, Australia and New Zealand. The tutelary relationship implicit in the relations between indigenous and non-indigenous peoples can properly be seen as a localized version of a global phenomenon in which European powers such as Britain, France, Portugal, the Netherlands (and, before 1918, Germany) controlled non-white peoples everywhere. These European empires extended throughout Asia and Africa, and operated on the premise that European civilization was superior to other cultural forms and practices; that power was merited in some way as a result of the Darwinian competition in which the fittest tend to rule; and skin colour was highly correlated with power, and, by extension, civilization and progress.

The European imperial relationship with their subject peoples was mirrored in the relationship between white settlers B extensions of the empire, fragments of European civilization B and indigenous peoples in the Americas and Australia and New Zealand. The assumption that indigenous peoples were culturally backward and their assimilation into the white society was both in their interests, and an inevitable result of the Darwinian competition among cultures, permeated almost all the policies made by white settler majorities over
indigenous peoples. It is fundamental to the colonial nature of the relationship between the white social majority and indigenous people because it meant that indigenous peoples were not included in the discussions that led to the founding of the state in which they were incorporated. Indeed, in almost every respect, and every policy decision, indigenous peoples were described as wards and treated like children. As John A. Macdonald, Founding Father of Canada, and its first prime minister, claimed in 1887: AThe great aim of our civilization has been to do away with the tribal system and assimilate the Indian people in all respects with the inhabitants of the Dominion, as speedily as they are fit for the change.@ The consequences of the policies based on the related assumptions of the cultural inferiority of indigenous peoples and the merits of assimilationist policies have been disastrous. Inuit communities in Northern Canada were forcibly removed from their homes and relocated thousands of miles at the recommendation of distant bureaucrats who claimed to want to more efficiently direct services to scattered indigenous communities, but also as a method to establish sovereignty over the High Arctic by populating parts of it. Indigenous children in Canada and Australia were forcibly removed from their families and sent to live with non-indigenous families or in non-indigenous residential schools, where they were sometimes physically and sexually abused and, even when they were not, they were stripped of their indigenous culture, forbidden to speak their language. The old culture was forgotten because not taught and the new white culture was perceived as foreign or alien and inconsistent with native identity. This was not surprising: it is hard to adopt the culture and identity of the group that engaged in large-scale theft and sometimes murder of your forefathers and foremothers. The result, of course, was that indigenous children were left with very few cultural resources, having been deprived of one culture and unable to
adopt another. In short, white monopoly on policy over indigenous peoples, based on the assumption of white superiority and indigenous inferiority, has led to a legacy of failed programmes. For indigenous peoples, it has meant social and economic depression and marginalization, high rates of alcoholism, suicide and of incarceration, as well as cultural anomie and despair on the part of a whole generation. This record provides empirical support for the point made in the previous section that groups themselves are usually in the best position to define policies and make decisions over their own lives.

There is, however, another normative argument implicit in the analogy between indigenous peoples and other colonized peoples in Africa and Asia. The colonization and subordination of indigenous peoples in Australia, New Zealand and the Americas involved the same assumptions of cultural inferiority, strongly correlated with race, that underlay European imperialism, and the related view of European entitlement to mastery over the world. The process differed, mainly because, in Africa and Asia, the European population was frequently very tiny, and political control could be returned to the people who had been deprived of it simply through a process of making these territories independent. In Australia, New Zealand and the Americas, the settlement of Europeans was more complete, and the decimation of the original population, more serious. These historical differences suggest two related points. The first is that, if decolonization was right if the process of stripping Europeans of their imperial control over non-white societies was morally right then indigenous self-government must also be morally right. Indigenous peoples should control the conditions of their existence through the exercise of political self-government, just as the peoples of Africa and Asia have had their capacity for political agency restored to them through the process of decolonization. However
B and this is the second point B because of the numerical strength of the non-indigenous population, and the interdependent nature of the indigenous and non-indigenous communities in Australasia and the Americas B self-government cannot take the same form as with decolonization. The argument for self-government in both cases still has normative force, but the remedy must be different, because the context is different.

2. The Remedy: The Practice of Indigenous Self-Government

While the moral arguments in favour of indigenous self-government are very strong, the situation or context in which indigenous people find themselves means that the exercise of self-government for indigenous peoples will have to be within existing states. The analogy between imperial rule in Africa and Asia and the conquest and colonization of indigenous peoples in the New World breaks down once we consider the context in which indigenous people operate. It is clear that a different remedy than independence is appropriate.

The specific challenge for indigenous peoples, then, is to develop models of the kind of self-determination that it makes sense for them to pursue. In almost all cases, indigenous peoples have been concerned to argue for limited forms of self-government within the state, which typically involves maximal jurisdictional authority, consistent with numbers, especially over areas relating to language, culture and resources, but also with some increased representation at the centre. In Mexico, this basic formula is embodied in the San Andres Accords of 1996, which outlines a structure aimed at creating a multi-ethnic nation in Mexico that encompasses differences, permits decisions in the decentralized tradition of the Mayas, and ensures both broader political representation of indigenous people and fair representation within the justice
system.\textsuperscript{49} In Canada, the 1996 Royal Commission on Aboriginal Peoples, which interviewed hundreds of aboriginal peoples in many different communities, endorses a model of treaty federalism, which is similar to the San Andres Accords in that it recognizes the interdependence of non-indigenous and indigenous communities through endorsing both shared rule and self-rule. It recognizes the previously self-governing nature of indigenous communities through emphasizing the voluntary nature of the federal project.\textsuperscript{50} This section of the paper discusses the implications of the argument presented thus far, for the democratic accountability of indigenous communities, and for the nation-building and representation policies of the central state, both of which must be modified in accordance with the basic principles of self-rule and shared rule.

Many indigenous groups are dispersed into small communities of only a few hundred people and so have limited governing capacities. The size of such communities raises the question of the extent to which they can be expected to deliver services to their communities. Indeed, in many cases it is not clear that they have the capacity to exercise the jurisdictional authority equivalent to American states or Canadian provinces. The size of the territory, natural resources and population base limits their governing capacities. States or provinces are much better equipped than small indigenous communities to take on the tasks normally associated with internal self-government: they have far greater resources, greater access to expertise, not only in the administration of these services but also in public policy design, fiscal accounting, and so on. However, local indigenous governments are in a much better position to identify the needs and concerns of their communities. For this reason, in many spheres, there will have to be institutional forms of cooperation between indigenous and non-indigenous communities so that indigenous communities can co-ordinate with and draw on the expertise of larger governing
bodies in such areas as health care delivery, health care reform, education, or providing the
services usually associated with local municipalities (clean water, garbage removal). At the same
time, indigenous governments should have the ability to make decisions over their priorities to
meet the needs of their local community.\textsuperscript{51} There is no theoretical reason why there cannot be a
third level or tier of government within federal states, in which indigenous people are collectively
self-governing, and which could encompass a number of very small, isolated communities. This
would be similar to the model suggested by the European Union federalists, of having a
federation within a federation (Spain in the European Union).\textsuperscript{52}

The democratic thrust of the argument developed here, with its emphasis on the need for
indigenous self-rule, has a number of implications for the kind of self-governing institutions that
are appropriate. In so far as the basis of the self-government argument rests, not on a static
traditional cultural argument, but on an argument for collective self-rule, it follows that, while
indigenous communities should have the jurisdictional authority to ensure by democratic means
the extension of their culture in the public sphere (through teaching their own language, history
and culture), they are not \textit{defined} by their distinct culture or tradition. Indeed, the problem with
traditional culture-based conceptions of indigenous peoples is that they tend to define indigenous
people in purely traditional terms and indeed suggest that self-government should be conferred
on indigenous people to the extent that they adhere to traditional ways and maintain their old
culture. This fails to recognise the dynamic and adaptable nature of both culture and identity. As
Will Kymlicka has argued, it means cultural and political isolation, not cultural and political self-
determination.\textsuperscript{53} Further, it is consistent with attempts to deny self-government to indigenous
communities. In Brazil, for example, the government indicated its preparedness to recognise and
support indigenous communities as long as they were traditional. As soon as acculturation and adaptation to modern ways occurred, the people were no longer defined as indigenous and so lost their rights.\textsuperscript{54} The arguments canvassed and supported in this paper do not imply anything about the type of culture adopted in communities that have an indigenous identity. Presumably, some communities will seek to preserve some indigenous ways, to teach their language and history. However, the precise kind of accommodation that they may seek with the larger state and majority culture will be up to them to decide. These arguments put forward here explain only why indigenous people are justified in exercising self-rule in accordance with their aspirations and their historic status as self-governing peoples.

It follows from the emphasis on the interrelationship between indigenous self-determination and democratic governance that such rule should be consistent with the fundamental principles of democracy.\textsuperscript{55} This has implications for any attempt to restrict membership within territorial jurisdictions to members, defined in ancestral or personalized terms. Most contemporary forms of self-government, including indigenous self-government B with the exception of voluntary self-governing organizations such as ones for urban natives, discussed below B are territorial in the sense that jurisdictional authority is divided into geographical areas or regions, and everyone within the geographical area is subject to the authority of the rules of that legal/political regime, and the rules do not apply outside the geographical area.

Territorial self-government is inconsistent with political structures based on membership in a particular group or a particular ethnic identity.\textsuperscript{56} It presupposes that all people resident within a particular jurisdiction, and so subject to its rules, have input or >democratic voice= in
the making of these decisions. It is entirely legitimate to draw boundaries around areas of indigenous majorities, and ensure that the community has the jurisdictional authority to effectively control entry into the area (by regulating such things as housing permits) to prevent their local majority from being >swamped= by a non-indigenous majority, if that is what they desire. However, it does not mean that they are entitled to effectively disenfranchise non-indigenous people resident in their area, or indeed to set rigid rules for membership that exclude or marginalize some people in the self-governing community.

It is a fundamental premise of this discussion that the self-rule of indigenous peoples can be jeopardized not only by the imposition of alien cultures and rules, but also by local self-interested elites, who use their authority to preserve and maintain their power base. Mobutu Sese Seko=s Congo, which was completely subordinated to its ruler, and treated as his own personal fiefdom, is an extreme case of government which had become completely personalized. Problems of corruption and the exclusion and marginalization of elements of the community can also arise in smaller communities. This problem is particularly pertinent in the case of indigenous self-government because indigenous communities are typically economically disadvantaged and meaningful self-government must be accompanied by redistribution from the non-indigenous population. This raises the problem of accountability in so far as the people who provide the economic resources do not receive the services, which can lead to a dynamic where the leadership of the indigenous community has an incentive to maximize the extraction of resources, but not necessarily to pursue policies aimed at more efficiently providing services to their community. It also obfuscates the lines of responsibility and so makes unfair, nepotistic policies and allocation of resources more likely. The financial structure on Canadian reserves,
for example, whereby wealth is distributed to chiefs and the band council, reproduces the authority and structure of the paternalist Department of Indian Affairs, which controlled indigenous people and treated them as children. Following from the idea that indigenous peoples are entitled to be self-governing and make decisions over their own lives, this system needs to be reformed. What is needed is direct redistribution to indigenous people, while, at the same time, conferring on indigenous governments the jurisdictional capacity to tax back what is needed to provide needed services to their communities.

The principles of shared rule and self-rule implicit in the self-government arrangements typically pursued by indigenous peoples challenges both the unitary discourse of equal and undifferentiated citizens and the binary discourse of indigenous vs. non-indigenous people, which seems to suggest that the over-arching state does not also include indigenous people. The first type of discourse is problematic because indigenous peoples have a different historic relation to the state: they precede it, and were forcibly incorporated into it. The second type of discourse is problematic because the goal of establishing self-governing communities within the state is to create a truly inclusive and legitimate state, not a state for non-indigenous peoples. In order to recognize the interdependence of indigenous societies within the larger societies, it is important not only to confer political autonomy on indigenous people who are territorially concentrated and have a land base, such that they can be collectively self-governing, but also address the exclusion of indigenous people in the central institutions and public culture of the state.

This issue is inseparable from the question of the division of powers in any kind of federal or quasi-federal state that is organised to permit various forms of internal self-government. The terms of jurisdictional authority cannot be subject to unilateral (white)
government interpretation and interference. The history of legal interpretation of indigenous rights has been very biased: indigenous peoples’ interpretation of the treaties they agreed to have been ignored, and the white-dominated legal systems did not admit their oral understanding of these treaties as legitimate evidence. This suggests that there should be mechanisms at the centre to ensure neutrality, at least in the sense of reflecting a bi-communal understanding of the meaning of the constitutional documents that affect indigenous peoples.

The idea of shared rule also suggests the need for mechanisms to ensure that indigenous voice is heard at the centre. There are a number of ways to represent distinct interests in central institutions, but the most common, found in virtually all federations, is through the second chamber, which, historically, is designed to represent regional interests and is well suited to the expression of territorially concentrated indigenous interests.61 As well, there are some examples (Belgium) of the expression of non-territorial identities in the central legislative chamber.62

The principle of shared rule in an inclusive state also suggests the need to make the public culture of the state more permeable in the sense that the institutions of the public sphere are designed so that they reflect the character of indigenous identity in the state. The creation of internally self-governing units in which indigenous peoples obtain public services and run their own schools and communities goes some way towards accommodating indigenous identities, but it must be combined with the sense that the central institutions are cognisant of indigenous concerns and the school curricula and symbols of the state are sensitive to indigenous culture and meaning. In countries like New Zealand where the Maoris speak one language and have a single recognizable culture, it is possible to approach equality of recognition, for this type of diversity is amenable to state-wide policies of bilingualism and biculturalism (and indeed Maori is a
recognised, official language of New Zealand).

Making the state maximally inclusive also requires policies that meet the needs of indigenous people who do not live in areas that can be readily transformed into areas of collective territorial self-government. This is not merely a theoretical issue, but an urgent practical one: in Canada, Australia and New Zealand, for example, there has been a steady flow of indigenous people from depressed resource-less rural areas to urban centres. Half of Canada=s indigenous people live in cities. Unfortunately, the main proposals advocated by indigenous organizations that are tribally or reserve-based (such as, in Canada, the Assembly of First Nations) focus on the need for increased jurisdictional authority (self-government) for territorially-based indigenous groups, despite the fact that there are many indigenous peoples who live in urban areas and would be outside the scope of such reforms. The concerns of urban indigenous people would not be addressed by instituting policies of indigenous self-government for reserves. For this reason, it is important to develop programmes that permit indigenous people in urban areas to organise their own collectively self-governing organizations to run their own schools and their own community organizations, in addition to reforms of the justice system so that it more adequately meets their needs and reflects their problems and culture.

Conclusion

This paper has examined three arguments for indigenous self-government, concentrating on the experience of indigenous peoples in the Americas and Australasia: the culture/autonomy argument, an argument for rectificatory justice based on prior dispossession and continued inequality, and an argument questioning the legitimacy of the state=s jurisdictional authority over
indigenous people. It found merit in all three arguments, although it suggested that the last two, when combined together, provided the strongest case for indigenous self-government.

The shorter second section discussed some of the implications behind the paper’s focus on self-rule, rather than cultural, justifications, and the need to create institutional structures that reflect indigenous people’s legitimate aspirations to be collectively self-determining. To the extent that some of the policies and practices suggested here seem to require sweeping constitutional changes, they are difficult to realize. Constitutional change is often quite difficult to affect, especially given the amending formulae of many contemporary constitutions. For this reason, some of the policies might be more effectively pursued through gradual or incremental change. This should not, however, blind us to the moral imperatives behind indigenous self-determination and the need for governmental forms that are not only fully inclusive of diversity but have come to terms with the historic grievances and injustices committed in the course of settlement, conquest and state-formation.
End-Notes

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1. The term >political status= is frequently used in connection with self-determination. The United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) states in Article 2 that all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. As is typical of such documents, these rights are then limited by article 6, which refers to the imperatives of the national unity and territorial integrity of states.

2. It is important to note, however, that, in many cases, the actual history of migrations is more complicated than the assertion of indigenousness might suggest. For example, in Sri Lanka, the Sinhalese claim to be indigenous, but in fact the Vedda people are aboriginal people whose time of arrival in Sri Lanka long preceded that of the Sinhalese. Similarly, in Malaysia, the Malays regard themselves as indigenous people their name for themselves is Bumiputra (sons of the soil), but in fact the Orang Asli people were in Malaysia long before the Malays. Indeed, many Chinese families have been in Malaysia longer than some >Malaysian= families, who in fact arrived relatively recently from Indonesia and assimilated to the Malay identity. Many Sri Lankan Tamils have been in Sri Lanka a thousand years and so are hardly recent immigrants, and sometimes claim to be indigenous to the north and eastern parts of Sri Lanka, whereas the Sinhalese take as their relevant political context the whole of the island. Differing conceptions of the relevant geographical context are important in many cases of claimed indigenousness. In Durban, South Africa, many Africans settled on Indian-owned land after World War II. Although the Africans arrived later than the Indians, they regard themselves as indigenous and the Indians as outsiders, because they took the whole continent of Africa as the relevant geographical context. This is from Donald L. Horowitz, Ethnic Groups in Conflict (Berkeley, Ca: University of California Press, 1985), 203.


4. This is different from the evidentiary problem discussed in endnote 2.
5. The view that principles should be defended to those who do worst under them is associated with John Rawls's argument in *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).


12. Miller, *On Nationality*, 86-7. Although this argument is primarily directed at defending the state’s policies aimed at cultural protection, it clearly applies to cultural minorities who are vulnerable because they lack political autonomy.


18. One of the most hotly contested issues is the size of the pre-Columbian Aboriginal population, with aboriginal sympathizer generally reporting high estimates of the size of the population, for large populations generally assume more complex societies, while pro-Europeans tend to give
low estimates of the size of the aboriginal populations (for this tends to correspond to more simple societies). As well, the higher population estimates tend to suggest the devastating effects of the conquest and subsequent settlement of the Europeans, while the lower figures suggest a much less dark picture of the European arrival for aboriginal people.


22. Some of this was perpetrated by the settlers themselves, acting without political direction, but there are also many instances of political direction. One example is that of George Washington, who instructed Major-General John Sullivan in 1779 to attack the Iroquois and lay waste all the settlements around @ Stannard, American Holocaust, 126.


24. From 1834 to 1920s, under the Bureau of Indian Affairs, Indian peoples in the United States were gradually disposessed of their territory and confined to reserves of land. See Francis Paul Prucha, Indian Policy in the United States: An Historical Essay (Lincoln, Ne: University of Nebraska Press, 1981), 27-34. Under the Dawes Act (or General Allotment Act), passed by the United States Congress in 1887, tribal lands were broken up, and allotted to individual Indians, while surplus land was sold to white settlers. By 1934, some 2.75 million hectares, more than 60% of the remaining Indian land base, had been taken from indigenous peoples. Stephen Cornell, The Return of the Native: American Indian Political Resurgence (New York: Oxford University Press, 1998), 42.

25. See C. E.S. Franks, Indian Policy: Canada and the United States Compared @ in Curtis Cook and Juan Lindau, eds., Aboriginal Rights and Self-government, 221-263, at 227.


27. Mercredi and Turpel, In the Rapids, 59-79. See especially the moving discussion of Cree
leader Big Bear=s signing of Treaty 6 in 1882, and the subsequent imprisonment of Big Bear and abrogation of the treaty only six years later.


30. Williams, Voice, Trust, and Memory, 177.

31. Ibid. Iris Young, Justice and the Politics of Difference also provides a compelling argument for these types of group-based strategies for remedying injustice.


33. See here Jeremy Waldron, ASuperseding Historic Injustice®, Ethics, 103 (October 1992), 4-28.

34. This is also recognised by indigenous peoples. See James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (Cambridge: Cambridge University Press, 1995) and the theme that runs throughout of two-row wampum.

35. Mercredi and Turpel, In the Rapids, 23


37. Of course, this line of argument does not address the difficult questions relating to the extent of jurisdictional authority, or territory, that such groups should have. To see this problem, consider the disanalogies between J.S. Mill=s argument for individual liberty and the justification for group autonomy. If Mill=s distinction between self- and other-regarding behaviour in individuals is problematic, this is doubly so for groups which aspire to self-government over (diverse) territory. In the latter case, the Aself® that is self-governing is comprised of two elements: (1) attachment to a group or membership in the group; and (2) attachment to territory or land. To the extent that government is over a territorial jurisdiction, it is inclusive of all peoples resident in that territory and so may not necessarily correspond to group membership. This is not a decisive criticism of this line of argument, but it does suggest that there are crucial ambiguities at the heart of the extension of the Millian insight to groups.

38. Allen Buchanan identifies a number of different grounds for recognizing indigenous self-
government. The remedial rights argument that he identifies corresponds to the rights that arise as a result of the injustice suffered by indigenous peoples, and rectificatory justice considerations justify the resurrection of some form of political self-rule which indigenous peoples were denied. This corresponds roughly to my discussion of jurisdictional authority. Buchanan, *Philosophy of International Law*, ch. 9.

39. Of course, the notion of popular sovereignty typically carries with it the idea that it is *all* the people who are the source of the government’s legitimacy. However, this is problematic in societies that are deeply divided in the sense that the laws, policies and institutions typically reflect the culture and understanding of only one group (the non-indigenous community) on the territory, and where the subordinated group (indigenous people) has been marginalized from the process of state-creation, and whose minority status renders them vulnerable if they are included simply as equal undifferentiated individuals.

40. As Bernie Yack writes: Alongside an image of the people who actually participate in political institutions, it constructs another image of the people as a prepolitical community that establishes those institutions, and has a final say in their legitimacy. B. Yack, *Popular Sovereignty and Nationalism*, *Political Theory*, 29/4 (August 2001), 517-536, at 519.

41. In his book, *Politics in the Vernacular* (Oxford: Oxford University Press, 2001), 122, W ill Kymlicka identifies the historic differences in the relationship to early state-formation as one of the key differences between indigenous peoples and minority nationalists. He argues that national minorities were losers, but players, in the process of European state-formation, while indigenous people were entirely outside that process. This paper develops that argument to highlight the parallel between the process of colonization and indigenous settlement.

42. This is related to, though distinct from, the international law account of historic sovereignty. On that account, the loss of sovereignty of the three Baltic republics and their forcible incorporation into the U.S.S.R. in 1940-41 meant that the sovereignty of these areas could be revived in international law and their place in the world community of states could be restored to them. There are some parallels with the situation of indigenous peoples, but it is not necessary to engage in such retrospective invalidation (with its enormous implications) or to suppose that the self-governing indigenous communities were *sovereign* in the sense that we use the word today. It is only necessary to note that most indigenous peoples have an account or a memory of an earlier era of political independence and the basis on which this independence was lost was often illegal, and also morally suspect. For a discussion of the relationship between the international law account and the normative account, see Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples= Claims in International and Comparative Law*, 100.

44. The point is made in Cairns, *Citizens Plus*, 14-56. However, curiously, he does not connect that historical story at all with the solutions that he proposes in the bulk of the book.


48. The formulation does not clarify whether self-determination of particular groups within areas of decolonization could be morally justified. For an argument concerning the limited contexts in which this might be the best (optimal) overall result, see Margaret Moore, *The Ethics of Nationalism* (Oxford: Oxford University Press, 2001), chapter seven.


50. The San Andres Accord in Mexico was not implemented by the government. The proposals of the Royal Commission in Canada were not acted upon by the federal government.

51. This is especially important in areas such as policing where white majority interventions are frequently seen as attempts to control indigenous peoples by incarcerating them rather than dealing with the social and economic problems that lead to anti-social behaviour. Local indigenous police services are in the best position to draw up solutions and develop trust in the community.


55. On the face of it, this discussion may seem to fall victim to the same criticism that I made of the first argument for indigenous self-determination, namely, that it effectively hampers indigenous people in the exercise of self-determination by requiring them to meet externally-imposed standards in that case, to be full liberal, in this case, to be fully democratic. There is, however, a difference between the externally-imposed requirements of liberal justice and that of democracy, which simply requires that the elites are responsive to, and accountable to, their own
people. The principles are designed to ensure that indigenous people are able to effectively exercise self-rule, and have the capacity to make decisions over their own life.

56. This tension between restrictive and territorial membership forms is experienced by many indigenous communities, particularly since intermarriage rates are quite high in some countries. In the U.S., for example, nearly 60% if Native Americans are married to non-natives. (Figures from Cairns, Citizens Plus, ). For a discussion of the problems that restrictive membership poses for communities, see Audra Simpson, APaths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake@ in Ivison, Patton and Sanders, Political Theory and the Rights of Indigenous Peoples, 113-136. Restrictive membership is consistent with a traditionalist, cultural type of argument, but not with the dynamic conception of indigenous self-determination and territorial self-government argued for in this chapter.

57. I do not show that this is justifiable here, and in fact there are arguments based on global justice which question this move. However, it is certainly unjustifiable to deny this capacity to indigenous peoples and yet have an international state system premised on the equal rights of citizens combined with restrictive entry.

58. This is a flaw in the Nisga=a Treaty, negotiated by the Nisga=a Band of British Columbia, which gives some input (of an advisory nature) to the small non-indigenous population living in the Nisga=a territory, but denies them equal political rights. See the section dealing with the constitution of the Nisga=a government in the Nisga=a Final Agreement. The full text of the Agreement is available at www.inac.gc.nrs/m_a1999/991065k/html. Accessed January, 2002.

59. This diagnosis is found in Menno Boldt, Surviving as Indians; The Challenge of Self-Government (Toronto: University of Toronto Press, 1993), 140. It is repeated in Tom Flanagan, First Nations? Second Thoughts (Montreal & Kingston: McGill-Queen=s University Press, 2000), 94-111, but in Flanagan=s book, it is put forward, not as an argument for needed reform, but as an argument against indigenous self-government.

60. Implicit in this argument is the importance of creating institutional structures that reflect the culture of indigenous peoples. The argument of this paper is that cultural integrity is preserved best, and in a non-static way, through creating institutions of self-government. However, it is important to supplement this by considering ways in which the state can reflect the distinctive practices and cultures of its indigenous peoples.

61. In Canada, the failed Charlottetown Accord addressed the issue of indigenous representation at the centre through provisions for representation in the Senate (sect. 7), the Supreme Court (sect. 20), and the House of Commons (sect. 22). Obviously, in countries like Mexico where indigenous people constitute a majority in 3 states, representation in central institutions is potentially easier, and more could be done through favourable weighting of indigenous interests. It is also consistent with democratic inclusion to combine territorial self-government with
reserved seats, along the lines of India, which reserves 15% of seats for scheduled castes and 6% of seats of scheduled indigenous tribes.


63. Statistics re: percentage of urban indigenous population is from Cairns, Citizens Plus, 8.

64. This problem is admirably discussed in Cairns, Citizens Plus, 126-132.

65. In Canada, comprehensive constitutional change has been depressingly unsuccessful, with the last three efforts (the Aboriginal round, from 1984-87, the Meech Lake round of 1987-90, and the Charlottetown round of 1991-92) resulting in failure. In Australia, comprehensive constitutional review of 15 years resulted in four constitutional proposals being put to referendum, but all were rejected. See Ronald Watts, A Federal Systems and Accommodation of Distinct Groups, p. 28.